



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

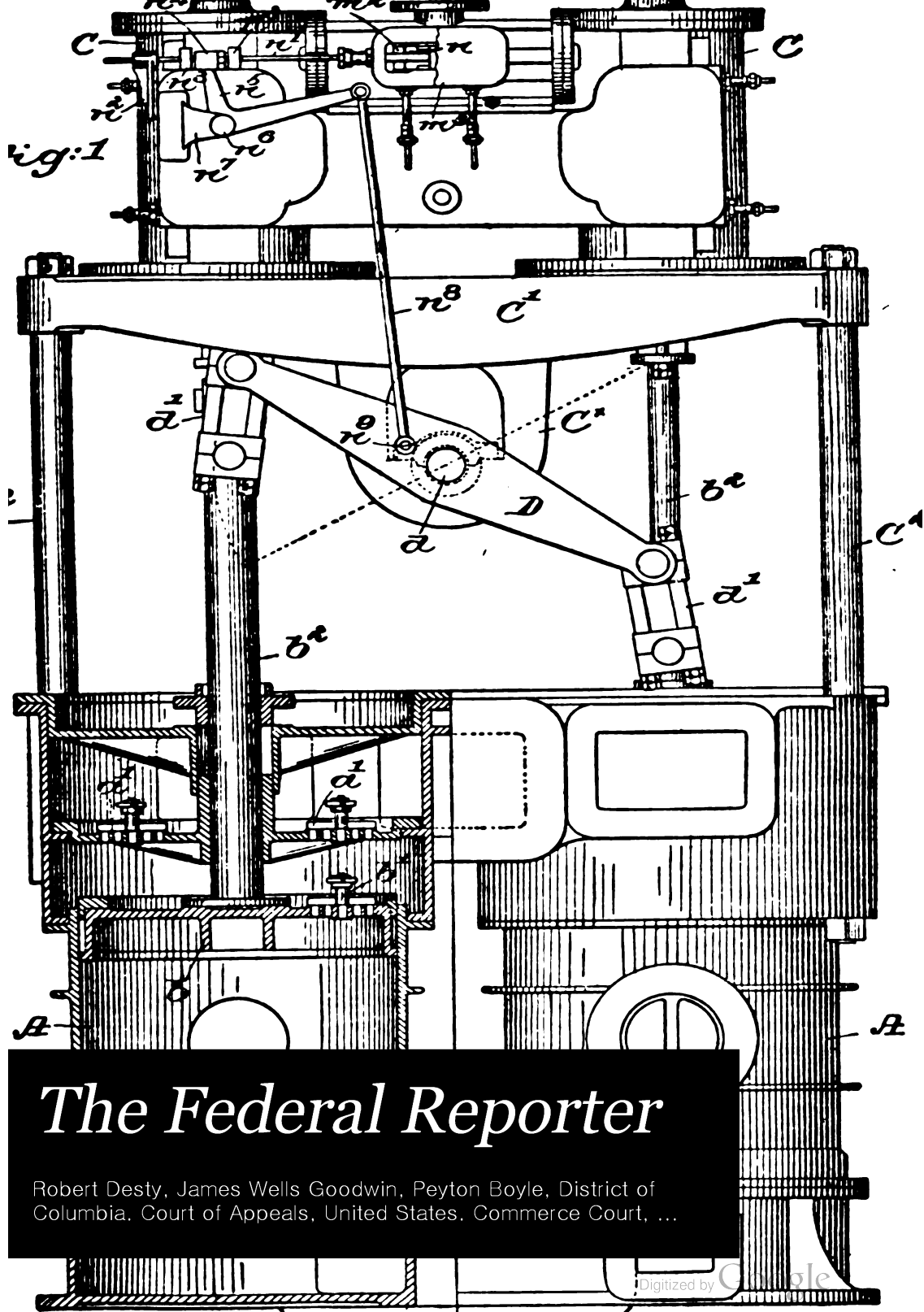
Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



The Federal Reporter

Robert Desty, James Wells Goodwin, Peyton Boyle, District of
Columbia, Court of Appeals, United States, Commerce Court, ...

ALL MATERIAL NONCIRCULATING

CALL NUMBER	VOLUME	COPY
	163	COPY 2 XXXXXX

AUTHOR

TITLE

FEDERAL REPORTER

NAME AND ADDRESS	

COPY 2



THE
FEDERAL REPORTER.

VOLUME 163.

CASES ARGUED AND DETERMINED
IN THE
CIRCUIT COURTS OF APPEALS AND CIRCUIT
AND DISTRICT COURTS OF THE
UNITED STATES.

PERMANENT EDITION.

OCTOBER—NOVEMBER, 1908.

ST. PAUL:
WEST PUBLISHING CO.
1908.

70 VMD
ANSON 140

**COPYRIGHT, 1908,
BY
WEST PUBLISHING COMPANY.**

**(163 FED.)
JURISPRUDENCE**

JUDGES

OF THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

FIRST CIRCUIT.

Hon. OLIVER WENDELL HOLMES, Circuit Justice.....Washington, D. C.
Hon. LE BARON B. COLT, Circuit Judge.....Providence, R. I.
Hon. WILLIAM L. PUTNAM, Circuit Judge.....Portland, Me.
Hon. FRANCIS C. LOWELL, Circuit Judge.....Boston, Mass.
Hon. CLARENCE HALE, District Judge, Maine.....Portland, Me.
Hon. FREDERIC DODGE, District Judge, Massachusetts.....Boston, Mass.
Hon. EDGAR ALDRICH, District Judge, New Hampshire.....Littleton, N. H.
Hon. ARTHUR L. BROWN, District Judge, Rhode Island.....Providence, R. I.

SECOND CIRCUIT.

Hon. RUFUS W. PECKHAM, Circuit Justice.....Washington, D. C.
Hon. E. HENRY LACOMBE, Circuit Judge.....New York, N. Y.
Hon. ALFRED C. COXE, Circuit Judge.....Utica, N. Y.
Hon. HENRY G. WARD, Circuit Judge.....New York, N. Y.
Hon. WALTER C. NOYES, Circuit Judge.....New London, Conn.
Hon. JAMES P. PLATT, District Judge, Connecticut.....Hartford, Conn.
Hon. THOMAS I. CHATFIELD, District Judge, E. D. New York.....Brooklyn, N. Y.
Hon. GEORGE W. RAY, District Judge, N. D. New York.....Norwich, N. Y.
Hon. GEORGE B. ADAMS, District Judge, S. D. New York.....New York, N. Y.
Hon. GEORGE C. HOLT, District Judge, S. D. New York.....New York, N. Y.
Hon. CHARLES M. HOUGH, District Judge, S. D. New York.....New York, N. Y.
Hon. JOHN R. HAZEL, District Judge, W. D. New York.....Buffalo, N. Y.
Hon. JAMES L. MARTIN, District Judge, Vermont.....Brattleboro, Vt.

THIRD CIRCUIT.

Hon. WILLIAM H. MOODY, Circuit Justice.....Washington, D. C.
Hon. GEORGE M. DALLAS, Circuit Judge.....Philadelphia, Pa.
Hon. GEORGE GRAY, Circuit Judge.....Wilmington, Del.
Hon. JOSEPH BUFFINGTON, Circuit Judge.....Pittsburgh, Pa.
Hon. EDWARD G. BRADFORD, District Judge, Delaware.....Wilmington, Del.
Hon. WILLIAM M. LANNING, District Judge, New Jersey.....Trenton, N. J.
Hon. JOSEPH CROSS, District Judge, New Jersey.....Elizabeth, N. J.
Hon. JOHN B. McPHERSON, District Judge, E. D. Pennsylvania.....Philadelphia, Pa.

Hon. JAMES B. HOLLAND, District Judge, E. D. Pennsylvania.....Philadelphia, Pa.
 Hon. ROBERT WODROW ARCHBALD, District Judge, M. D. Pennsylvania..Scranton, Pa.
 Hon. JAMES S. YOUNG, District Judge, W. D. PennsylvaniaPittsburgh, Pa.

FOURTH CIRCUIT.

Hon. MELVILLE W. FULLER, Circuit Justice.....Washington, D. C.
 Hon. NATHAN GOFF, Circuit Judge.....Clarksburg, W. Va.
 Hon. JETER C. PRITCHARD, Circuit Judge.....Asheville, N. C.
 Hon. THOMAS J. MORRIS, District Judge, Maryland.....Baltimore, Md.
 Hon. THOMAS R. PURNELL, District Judge, E. D. North Carolina.....Raleigh, N. C.
 Hon. JAMES E. BOYD, District Judge, W. D. North Carolina.....Greensboro, N. C.
 Hon. WILLIAM H. BRAWLEY, District Judge, E. and W. D. South Car..Charleston, S. C.
 Hon. EDMUND WADDILL, Jr., District Judge, E. D. Virginia.....Richmond, Va.
 Hon. HENRY CLAY McDOWELL, District Judge, W. D. Virginia.....Lynchburg, Va.
 Hon. ALSTON G. DAYTON, District Judge, N. D. West Virginia.....Phillippi, W. Va.
 Hon. BENJAMIN F. KELLER, District Judge, S. D. West Virginia.....Bramwell, W. Va.

FIFTH CIRCUIT.

Hon. EDWARD D. WHITE, Circuit Justice.....Washington, D. C.
 Hon. DON A. PARDEE, Circuit Judge.....Atlanta, Ga.
 Hon. A. P. McCORMICK, Circuit Judge.....Dallas, Tex.
 Hon. DAVID D. SHELBY, Circuit Judge.....Huntsville, Ala.
 Hon. THOMAS G. JONES, District Judge, N. and M. D. Alabama....Montgomery, Ala.
 Hon. OSCAR R. HUNDLEY, District Judge, N. D. Alabama.....Birmingham, Ala.
 Hon. HARRY T. TOULMIN, District Judge, S. D. Alabama.....Mobile, Ala.
 Hon. WM. B. SHEPPARD, District Judge, N. D. FloridaPensacola, Fla.
 Hon. JAMES W. LOCKE, District Judge, S. D. Florida.....Jacksonville, Fla.
 Hon. WILLIAM T. NEWMAN, District Judge, N. D. Georgia.....Atlanta, Ga.
 Hon. EMORY SPEER, District Judge, S. D. Georgia.....Macon, Ga.
 Hon. EUGENE D. SAUNDERS, District Judge, E. D. Louisiana.....New Orleans, La.
 Hon. ALECK BOARMAN, District Judge, W. D. Louisiana.....Shreveport, La.
 Hon. HENRY C. NILES, District Judge, N. and S. D. Mississippi.....Kosciusko, Miss.
 Hon. DAVID E. BRYANT, District Judge, E. D. Texas.....Sherman, Tex.
 Hon. EDWARD R. MEEK, District Judge, N. D. Texas.....Dallas, Tex.
 Hon. WALLER T. BURNS, District Judge, S. D. Texas.....Houston, Tex.
 Hon. THOMAS S. MAXEY, District Judge, W. D. Texas.....Austin, Tex.

SIXTH CIRCUIT

Hon. JOHN M. HARLAN, Circuit Justice.....Washington, D. C.
 Hon. HORACE H. LURTON, Circuit Judge.....Nashville, Tenn.
 Hon. HENRY F. SEVERENS, Circuit Judge.....Kalamazoo, Mich.
 Hon. JOHN K. RICHARDS, Circuit Judge.....Cincinnati, Ohio.
 Hon. ANDREW M. J. COCHRAN, District Judge, E. D. Kentucky.....Maysville, Ky.
 Hon. WALTER EVANS, District Judge, W. D. Kentucky.....Louisville, Ky.
 Hon. HENRY H. SWAN, District Judge, E. D. Michigan.....Detroit, Mich.
 Hon. LOYAL E. KNAPPEN, District Judge, W. D. Michigan.....Grand Rapids, Mich.
 Hon. ROBERT W. TAYLER, District Judge, N. D. Ohio.....Cleveland, Ohio.
 Hon. ALBERT C. THOMPSON, District Judge, S. D. Ohio.....Cincinnati, Ohio.
 Hon. JOHN E. SATER, District Judge, S. D. Ohio.....Columbus, Ohio.
 Hon. EDWARD T. SANFORD, District Judge, E. and M. D. Tennessee ..Knoxville, Tenn.
 Hon. JOHN E. McCALL, District Judge, W. D. Tennessee.....Memphis, Tenn.

SEVENTH CIRCUIT.

Hon. WILLIAM R. DAY, Circuit Justice.....	Washington, D. C.
Hon. PETER S. GROSSCUP, Circuit Judge.....	Chicago, Ill.
Hon. FRANCIS E. BAKER, Circuit Judge.....	Indianapolis, Ind.
Hon. WILLIAM H. SEAMAN, Circuit Judge.....	Sheboygan, Wis.
Hon. CHRISTIAN C. KOHLSAAT, Circuit Judge.....	Chicago, Ill.
Hon. KENESAW M. LANDIS, District Judge, N. D. Illinois.....	Chicago, Ill.
Hon. SOLOMON H. BETHEA, District Judge, N. D. Illinois.....	Chicago, Ill.
Hon. FRANCIS M. WRIGHT, District Judge, E. D. Illinois.....	Urbana, Ill.
Hon. J. OTIS HUMPHREY, District Judge, S. D. Illinois.....	Springfield, Ill.
Hon. ALBERT B. ANDERSON, District Judge, Indiana.....	Indianapolis, Ind.
Hon. JOSEPH V. QUARLES, District Judge, E. D. Wisconsin.....	Milwaukee, Wis.
Hon. ARTHUR L. SANBORN, District Judge, W. D. Wisconsin.....	Madison, Wis.

EIGHTH CIRCUIT.

Hon. DAVID J. BREWER, Circuit Justice.....	Washington, D. C.
Hon. WALTER H. SANBORN, Circuit Judge.....	St. Paul, Minn.
Hon. WILLIS VAN DEVANTER, Circuit Judge.....	Cheyenne, Wyo.
Hon. WILLIAM C. HOOK, Circuit Judge.....	Leavenworth, Kan.
Hon. ELMER B. ADAMS, Circuit Judge.....	St. Louis, Mo.
Hon. JACOB TRIEBER, District Judge, E. D. Arkansas.....	Little Rock, Ark.
Hon. JOHN H. ROGERS, District Judge, W. D. Arkansas.....	Ft. Smith, Ark.
Hon. ROBERT E. LEWIS, District Judge, Colorado.....	Denver, Colo.
Hon. HENRY THOMAS REED, District Judge, N. D. Iowa.....	Cresco, Iowa.
Hon. SMITH McPHERSON, District Judge, S. D. Iowa.....	Red Oak, Iowa.
Hon. JOHN C. POLLOCK, District Judge, Kansas.....	Topeka, Kan.
Hon. MILTON D. PURDY, District Judge, Minnesota.....	Minneapolis, Minn.
Hon. PAGE MORRIS, District Judge, Minnesota.....	Duluth, Minn.
Hon. DAVID P. DYER, District Judge, E. D. Missouri.....	St. Louis, Mo.
Hon. JOHN F. PHILIPS, District Judge, W. D. Missouri.....	Kansas City, Mo.
Hon. W. H. MUNGER, District Judge, Nebraska.....	Omaha, Neb.
Hon. THOMAS C. MUNGER, District Judge, Nebraska.....	Lincoln, Neb.
Hon. CHARLES F. AMIDON, District Judge, North Dakota.....	Fargo, N. D.
Hon. RALPH E. CAMPBELL, District Judge, E. Oklahoma.....	Muskogee, Okl.
Hon. JOHN H. COTTERAL, District Judge, W. Oklahoma.....	Guthrie, Okl.
Hon. JOHN E. CARLAND, District Judge, South Dakota.....	Sioux Falls, S. D.
Hon. JOHN A. MARSHALL, District Judge, Utah.....	Salt Lake City, Utah.
Hon. JOHN A. RINER, District Judge, Wyoming.....	Cheyenne, Wyo.

NINTH CIRCUIT.

Hon. JOSEPH McKENNA, Circuit Justice.....	Washington, D. C.
Hon. WILLIAM B. GILBERT, Circuit Judge.....	Portland, Or.
Hon. WM. W. MORROW, Circuit Judge.....	San Francisco, Cal.
Hon. ERSKINE M. ROSS, Circuit Judge.....	Los Angeles, Cal.
Hon. WM. C. VAN FLEET, District Judge, N. D. California.....	San Francisco, Cal.
Hon. JOHN J. DE HAVEN, District Judge, N. D. California.....	San Francisco, Cal.
Hon. OLIN WELLBORN, District Judge, S. D. California.....	Los Angeles, Cal.
Hon. FRANK S. DIETRICH, District Judge, Idaho.....	Boise, Idaho.
Hon. WILLIAM H. HUNT, District Judge, Montana.....	Helena, Mont.
Hon. EDWARD S. FARRINGTON, District Judge, Nevada.....	Carson City, Nev.
Hon. CHARLES E. WOLVERTON, District Judge, Oregon.....	Portland, Or.
Hon. EDWARD WHITSON, District Judge, E. D. Washington.....	Spokane, Wash.
Hon. CORNELIUS H. HANFORD, District Judge, W. D. Washington.....	Seattle, Wash.

CASES REPORTED.

	Page		Page
Adams, Atkinson v. (C. C.).....	671	Blake & Knowles Steam Pump Works,	
Ahrens, Miller v. (C. C.).....	870	Warren Steam Pump Co. v. (C. C. A.)..	263
Aiken, National Tube Co. v. (C. C. A.)....	254	Blomfelt, Mahoning Ore & Steel Co. v. (C.	
Alder v. Edenborn (C. C.).....	655	C. A.).....	827
Aldrich, Standard Savings & Loan Ass'n v.		Booker, Dillingham v. (C. C. A.).....	696
(C. C. A.).....	216	Breese, Taylor v. (C. C. A.).....	678
Alkon v. United States (C. C. A.).....	810	Brown, Coweta Fertilizer Co. v. (C. C. A.)	162
Allen v. Luke (C. C.).....	1018	Brown v. Morgan (C. C.)	395
American Law Book Co., Chamberlayne v.		Bryan, Ker v. (C. C. A.).....	233
(C. C.).....	858	Buntaro Kumagai, In re (D. C.).....	922
American Mfg. Co., Zuikowski v. (C. C.)..	550	California Pastoral & Agricultural Co.,	
American Motor Co., Suddard v. (C. C.)..	552	Miller & Lux v. (C. C. A.).....	462
American Sulphite Pulp Co. v. Bayless		Camors-McConnell Co. v. McConnell (C. C.)	638
Pulp & Paper Co. (C. C.).....	843	Camp v. Lake Drummond Canal & Water	
American Surety Co. of New York, United		Co. (C. C. A.).....	238
States v. (C. C. A.).....	223	Caracas, The (D. C.).....	662
American Tobacco Co., Larus & Bro. Co. v.		Caraway & Sons v. Kentucky Refining Co.	
(C. C.).....	712	(C. C. A.).....	189
American Tobacco Co., United States To-		Cargo of Lumber, Hagan v. (D. C.).....	657
bacco Co. v. (C. C.).....	701	Carriere & Son v. United States (C. C.)..	1009
American Tobacco Co., Weisert Bros. To-		Carroll, The (D. C.).....	425
bacco Co. v. (C. C.).....	712	Case Plow Works, B. F. Avery & Son v.	
American Tube & Stamping Co., Hefner v.		(C. C.).....	842
(D. C.).....	866	Chamberlayne v. American Law Book Co.	
Appel, In re (C. C. A.).....	1002	(C. C.).....	858
Arkansas R. Rates, In re (C. C.).....	141	Chance, Gulden v. (C. C.).....	447
Armored Concrete Const. Co. of Baltimore,		Charles G. Endicott, The (D. C.).....	797
Hennebique Const. Co. v. (C. C.).....	300	Chess v. Grant (C. C. A.).....	500
Astle, Percy Sumer Club v. (C. C. A.).....	1	Chester Forging & Engineering Co., Tindel-	
Atkinson v. Adams (C. C.).....	671	Morris Co. v. (C. C.).....	304
Atchison, T. & S. F. R. Co., United States		Chestertown Bank of Maryland v. Walker	
v. (D. C.).....	111	(C. C. A.).....	510
Atchison, T. & S. F. R. Co., United States		Chicago Great Western R. Co., Egan v. (C.	
v. (C. C. A.).....	517	C.).....	344
Atlantic C. L. R. Co., Macon Grocery Co.		Chicago, I. & L. R. Co., United States v.	
v. (C. C.).....	736	(C. C.).....	114
Atlantic C. L. R. Co., Macon Grocery Co.		Chicago Pneumatic Tool Co., Cleveland	
v. (C. C.).....	738	Pneumatic Tool Co. v. (C. C.).....	846
Atlantic Mach. Works, Knapp v. (C. C.)	531	Chicago & N. W. R. Co., Welles v. (C. C.)	330
Atlantic Stevedoring Co., Clarke v. (C. C.)	423	Chow Chok v. United States (C. C. A.)..	1021
Atlantic Trust & Deposit Co. v. Laurin-		Church Cooperage Co. v. Pinkney (D. C.)..	653
burg (C. C. A.).....	690	Citizens' Trust Co. of Utica, N. Y., Irish	
Auburn, International Text Book Co. v. (C.		v. (D. C.).....	880
C.).....	543	Clan Graham, The (D. C.).....	961
Augusta Pottery Co., In re (D. C.).....	1011	Clarke v. Atlantic Stevedoring Co. (C. C.)	423
Aurora, The (D. C.).....	633	Cleveland Pneumatic Tool Co. v. Chicago	
Avery & Son v. J. I. Case Plow Works		Pneumatic Tool Co. (C. C.).....	846
(C. C.).....	842	Cobb, United States v. (D. C.).....	791
		Cohen, In re (D. C.).....	444
Bache, Schaubel v. (C. C. A.).....	1022	Cole, First Nat. Bank v. (C. C. A.).....	180
Ball, United States v. (C. C. A.).....	504	Columbia Dredging Co. v. Sanford & Brooks	
Baltimore & O. R. Co., Winters v. (C. C.)	106	Co. (D. C.).....	862
Baughman, In re (D. C.).....	660	Confectioners' Machinery & Manufacturing	
Bayless Pulp & Paper Co., American Sul-		Co. v. Racine Engine & Machinery Co.	
phite Pulp Co. v. (C. C.).....	843	(C. C.).....	914
Beckett, Norfolk & W. R. Co. v. (C. C. A.)	479	Consolidated Ice Co., Meyer v. (C. C.)....	400
B. F. Avery & Son v. J. I. Case Plow		Coopersville Co-Operative Creamery Co. v.	
Works (C. C.).....	842	Lemon (C. C. A.).....	145

	Page		Page
Corner, Sprague v. (C. C. A.).....	486	F. W. Myers & Co. v. United States (C. C. A.).....	53
Coweta Fertilizer Co. v. Brown (C. C. A.).....	162	Garrigan v. United States (C. C. A.).....	16
Cramer & Haak v. 1900 Washer Co. (C. C.).....	296	General Electric Co. v. Duncan Electric Mfg. Co. (C. C. A.).....	839
Cretan, The (D. C.).....	546	George W. Shiebler & Co., In re (D. C.).....	545
Cucciarre v. New York Cent. & H. R. R. Co. (C. C. A.).....	38	Getts v. Janesville Wholesale Grocery Co. (D. C.).....	417
Cullom v. Traders' Ins. Co. (C. C. A.).....	45	Ghazal, In re (D. C.).....	602
Darlington Co., In re (D. C.).....	385	Gilbane v. Fidelity & Casualty Co. of New York (C. C. A.).....	673
Darlington Co., In re (D. C.).....	389	Gillespie v. Pocahontas Coal & Coke Co. (C. C. A.).....	992
Dauntless, The (D. C.).....	431	Giordani, United States v. (C. C.).....	772
David E. Fouts Co. v. S. A. Fouts Stock Food Co. (C. C.).....	408	Grant, Chess v. (C. C. A.).....	500
David Kaufman's Sons Co., McGovern v. (D. C.).....	76	Graves, In re (D. C.).....	358
Dazole Mfg. Co. v. Ollard (C. C.).....	1023	Greene, Kuchler v. (C. C.).....	91
Denver & R. G. R. Co., United States v. (C. C. A.).....	519	Greene, United States v. (C. C.).....	442
Dillingham v. Booker (C. C. A.).....	696	Guaranty Trust Co. v. Metropolitan St. R. Co. (C. C. A.).....	242
Dorchester, The (D. C.).....	779	Gulden v. Oance (C. C.).....	447
Dowagiac Mfg. Co., McSherry Mfg. Co. v. (C. C. A.).....	84	Haas, United States v. (C. C.).....	904
Dumois, The Simon (C. C. A.).....	490	Haas, United States v. (C. C.).....	908
Dunbar, Morris v. (C. C. A.).....	1022	Hagan v. Cargo of Lumber (D. C.).....	657
Duncan Electric Mfg. Co., General Electric Co. v. (C. C. A.).....	839	Haggart, United States Fidelity & Guaranty Co. v. (C. C. A.).....	801
Dunlap Carpet Co., In re (D. C.).....	541	Halsey Electric Generator Co. In re (D. C.).....	118
Dunlop, In re (C. C. A.).....	1021	Hammond, In re (D. C.).....	548
Dunn Mfg. Co. v. Standard Computing Scale Co. (C. C. A.).....	521	Hanson & Van Winkle Co., Potthoff v. (C. C. A.).....	56
Dupree v. Leggette (C. C. A.).....	1021	Harmon v. Sprague (C. C. A.).....	486
Eagle Horseshoe Co., In re (C. C. A.).....	699	Hartford v. Hollander (C. C. A.).....	948
Earn Line S. S. Co., Elder Dempster S. S. Co. v. (D. C.).....	868	Haywood Co. v. Pittsburgh Industrial Iron Works (D. C.).....	799
Edenborn, Alder v. (C. C.).....	655	Healy, Sun Co. v. (C. C. A.).....	48
Edenborn, Sim v. (C. C.).....	655	Hedges, The Ira M. (D. C.).....	587
Egan v. Chicago Great Western R. Co. (C. C.).....	344	Hefner v. American Tube & Stamping Co. (D. C.).....	866
E. I. Fidler & Son, In re (D. C.).....	973	Helvetia Swiss Fire Ins. Co., Tierney v. (C. C.).....	82
Elder Dempster S. S. Co. v. Earn Line S. S. Co. (D. C.).....	868	Helvetia Swiss Fire Ins. Co., Western Sugar Refining Co. v. (C. C.).....	644
Elkins Electric R. Co. v. Western Maryland R. Co. (C. C.).....	724	Helvetia-Swiss Fire Ins. Co. of St. Gall, Switzerland, Holton v. (C. C.).....	659
Ellis v. Southern R. Co. (C. C. A.).....	686	Hendrick Hudson, The (D. C.).....	862
E. Matthews & Sons, In re (D. C.).....	127	Hendricks, In re (C. C. A.).....	1021
Endicott, The Charles G. (D. C.).....	797	Henkel v. Seider (D. C.).....	553
Erandio, The (D. C.).....	435	Hennebique Const. Co. v. Armored Concrete Const. Co. of Baltimore (C. C.).....	300
Esherick, The Frank K. (C. C. A.).....	224	Herold v. Kahn (C. C. A.).....	947
Evans v. New York & P. S. S. Co. (D. C.).....	405	Highfield, In re (D. C.).....	924
Exmoor, The (D. C.).....	642	Hillard v. Remington Typewriter Co. (C. C.).....	281
Fairmont Coal Co., Merchants' Coal Co. v. (C. C. A.).....	1021	Hillarius, The (D. C.).....	421
Fidelity Trust Co., Milwaukee Trust Co. v. (C. C. A.).....	699	Hill v. R. D. Wood & Co. (C. C. A.).....	51
Fidelity & Casualty Co. of New York, Gilbane v. (C. C. A.).....	673	Hinds, Warden v. (C. C. A.).....	201
Fidler & Son, In re (D. C.).....	973	Hirner, Kilbourn v. (C. C.).....	539
Fink, In re (D. C.).....	135	Hogan v. Westmoreland Specialty Co. (C. C.).....	289
First Nat. Bank v. Cole (C. C. A.).....	180	Hollander, Hartford v. (C. C. A.).....	948
First Nat. Bank, Towle v. (C. C. A.).....	815	Holton v. Helvetia-Swiss Fire Ins. Co. of St. Gall, Switzerland (C. C.).....	659
Foo Duck, United States v. (D. C.).....	440	Houghton v. Whitin Machine Works (C. C.).....	311
Fouts Co. v. S. A. Fouts Stock Food Co. (C. C.).....	408	Hudson, The Hendrick (D. C.).....	862
Fouts Stock Food Co., David E. Fouts Co. v. (C. C.).....	408	Hutchinson, Pierce & Co. v. Loewy (C. C. A.).....	42
Frank K. Esherick The (C. C. A.).....	224	Industrial Cold Storage & Ice Co., In re (D. C.).....	390
Fulco v. Schuylkill Stone Co. (C. C.).....	124		

	Page		Page
International Text Book Co. v. Auburn (C. C.)	543	McConnell, Camors-McConnell Co. v. (C. C.)	638
Ira M. Hedges, The (D. C.)	587	McGovern v. David Kaufman's Sons Co. (D. C.)	76
Irish v. Citizens' Trust Co. of Utica, N. Y. (D. C.)	880	Mack, Ohio Valley Bank Co. v. (C. C. A.)	155
Isebnurger v. Roxbury Distilling Co. (C. C.)	133	McNaught, Waskey v. (C. C. A.)	929
James Dunlap Carpet Co., In re (D. C.)	541	McPeck, In re (C. C. A.)	1002
Janesville Wholesale Grocery Co., Getts v. (D. C.)	417	McSherry Mfg. Co. v. Dowagiac Mfg. Co. (C. C. A.)	34
J. I. Case Plow Works, B. F. Avery & Son v. (C. C.)	842	Mahoning Ore & Steel Co. v. Blomfelt (C. C. A.)	827
John G. Miller & Co., Romine v. (C. C. A.)	1022	Manhattan Screw & Stamping Works, Rushmore v. (C. C. A.)	939
Johnson v. United States (C. C. A.)	80	Marquet, Odbert v. (C. C.)	892
Johnson v. Virginia-Carolina Lumber Co. (C. C. A.)	249	Mars, The (C. C. A.)	224
J. R. Langdon, The (C. C. A.)	472	Mason v. National Herkimer County Bank of Little Falls (D. C.)	920
Kahn, Herold v. (C. C. A.)	947	Matthews & Sons, In re (D. C.)	127
Kaufman's Sons Co., McGovern v. (D. C.)	76	Mauzy, In re (D. C.)	900
Kaw Valley Drainage Dist. of Wyandotte County v. Union Pac. R. Co. (C. C. A.)	836	Meissner, Richards v. (C. C.)	957
Kempner, Leyner Engineering Works v. (C. C.)	605	M. E. Luckenbach, The, two cases (D. C.)	755
Kentucky Refining Co., Wm. Caraway & Sons v. (C. C. A.)	189	Mercer, Monitor Drill Co. v. (C. C. A.)	943
Ker v. Bryan (C. C. A.)	233	Merchants' Coal Co. v. Fairmont Coal Co. (C. C. A.)	1021
Kilbourn v. Hirner (C. C.)	539	Metropolitan St. R. Co., Guaranty Trust Co. v. (C. C. A.)	242
Kirby, The William S. (D. C.)	783	Metropolitan St. R. Co., Morton Trust Co. v. (C. C. A.)	242
Knapp v. Atlantic Mach. Works (C. C.)	531	Meyer v. Consolidated Ice Co. (C. C.)	400
Kuchler v. Greene (C. C.)	91	Miller v. Ahrens (C. C.)	870
Kuykendall v. Union Pac. R. Co. (C. C. A.)	819	Miller v. Zeigler (C. C. A.)	1022
Lake Drummond Canal & Water Co., Camp v. (C. C. A.)	238	Miller & Co., Romine v. (C. C. A.)	1022
Lanasa & Goffe S. S. & Importing Co. of Baltimore City, Lombard S. S. Co. v. (D. C.)	433	Miller & Lux v. California Pastoral & Agricultural Co. (C. C. A.)	462
Langdon, The J. R. (C. C. A.)	472	Milwaukee Trust Co. v. Fidelity Trust Co. (C. C. A.)	699
Larus & Bro. Co. v. American Tobacco Co. (C. C.)	712	Mitchell, United States v. (C. C.)	1014
Laskey, In re (D. C.)	99	Monitor Drill Co. v. Mercer (C. C. A.)	943
Laurinburg, Atlantic Trust & Deposit Co. v. (C. C. A.)	690	Montello Brick Works, In re (D. C.)	621
Lawrence, In re (D. C.)	131	Montello Brick Works, In re (D. C.)	624
Leggette, Dupree v. (C. C. A.)	1021	Montserrat, The (D. C.)	797
Legg v. United States (C. C. A.)	1006	Moran Towing & Transportation Co., Morris & Cummings Dredging Co. v. (D. C.)	610
Lemon, Coopersville Co-operative Creamery Co. v. (C. C. A.)	145	Morgan, Brown v. (C. C.)	395
Lesaius, In re (D. C.)	614	Morris v. Dunbar (C. C. A.)	1022
Lewis, In re (D. C.)	137	Morris & Cummings Dredging Co. v. Moran Towing & Transportation Co. (D. C.)	610
Lewis Blind Stitch Mach. Co. v. Premium Mfg. Co. (C. C. A.)	950	Morton Trust Co. v. Metropolitan St. R. Co. (C. C. A.)	242
Lewkowitz, Ex parte (C. C.)	646	Mulrooney v. Royal Ins. Co. of Liverpool, England (C. C. A.)	833
Leyner Engineering Works v. Kempner (C. C.)	605	Murhard Estate Co. v. Portland & Seattle Ry. Co. (C. C. A.)	194
Loeser v. Savings Deposit Bank & Trust Co. of Elyria, Ohio (C. C. A.)	212	Murray, Orr & Lockett Hardware Co. v. (C. C. A.)	54
Loewy, Hutchinson, Pierce & Co. v. (C. C. A.)	42	Myers & Co. v. United States (C. C. A.)	53
Lombard S. S. Co. v. Lanasa & Goffe S. S. & Importing Co. of Baltimore City (D. C.)	433	Nansemond, The (D. C.)	425
Luckenbach, The M. E., two cases (D. C.)	755	Natural Food Co. v. Williams (C. C. A.)	252
Luke, Allen v. (C. C.)	1018	National Herkimer County Bank of Little Falls, Mason v. (D. C.)	920
Macon Grocery Co. v. Atlantic C. L. R. Co. (C. C.)	736	National Phonograph Co., New York Phonograph Co. v. (C. C.)	534
Macon Grocery Co. v. Atlantic C. L. R. Co. (C. C.)	738	National Tube Co. v. Aiken (C. C. A.)	254
		New York Cent. & H. R. R. Co., Cucciarre v. (C. C. A.)	38
		New York City R. Co., Pennsylvania Steel Co. v. (C. C. A.)	242
		New York Phonograph Co. v. National Phonograph Co. (C. C.)	534
		New York & P. S. S. Co., Evans v. (D. C.)	405

	Page		Page
1900 Washer Co., Cramer & Haak v. (C. C.)	296	Reiss & Brady v. United States (C. C.)	65
Norfolk & Washington, D. C., Steamboat Co., Ragland v. (D. C.)	378	Remington Typewriter Co., Hillard v. (C. C.)	281
Norfolk & W. R. Co. v. Beckett (C. C. A.)	479	Reyburn, Queen City Sav. Bank & Trust Co. v. (C. C.)	597
O'Brien, United States v. (C. C. A.)	1022	Richards v. Meissner (C. C.)	957
Odbert v. Marquet (C. C.)	892	Rich v. Victoria Copper Min. Co. (C. C. A.)	207
Ohio Valley Bank Co. v. Mack (C. C. A.)	155	Rich Hill Bank, Vandagriff v. (C. C. A.)	823
Olansky, In re (D. C.)	423	Ridgway Dynamo & Engine Co. v. Phoenix Iron Works (C. C.)	527
Ollard, Dazzle Mfg. Co. v. (C. C.)	1023	Roanoke, The (D. C.)	425
Oregon R. & Nav. Co., United States v. (C. C.)	640	Rogoff, United States v. (C. C.)	311
Oregon R. & Nav. Co., United States v. (C. C.)	642	Romine v. John G. Miller & Co. (C. C. A.)	1022
Oregon & C. R. Co., Pacific Postal Telegraph-Cable Co. v. (C. C.)	967	Rose, In re (D. C.)	636
Orr & Lockett Hardware Co. v. Murray (C. C. A.)	54	Roxbury Distilling Co., Isenburger v. (C. C.)	133
Pacific Postal Telegraph-Cable Co. v. Oregon & C. R. Co. (C. C.)	967	Royal Ins. Co. of Liverpool, England, Mulrooney v. (C. C. A.)	833
Paulhamus v. Security Life & Annuity Co. (C. C.)	554	Rushmore v. Manhattan Screw & Stamping Works (C. C. A.)	939
Pennsylvania Consol. Coal Co., In re (D. C.)	579	Sacharoff & Kleiner, In re (D. C.)	664
Pennsylvania Paper Mills, Pusey & Jones v. (C. C.)	672	S. A. Foutz Stock Food Co., David E. Foutz Co. v. (C. C.)	408
Pennsylvania Steel Co. v. New York City R. Co. (C. C. A.)	242	Sanford & Brooks Co., Columbia Dredging Co. v. (D. C.)	362
Percy Summer Club v. Astle (C. C. A.)	1	San Joaquin & Kings River Canal & Irrigation Co. v. Stanislaus County (C. C.)	567
Philadelphia, The (D. C.)	438	Savings Deposit Bank & Trust Co. of Elyria, Ohio, Loesser v. (C. C. A.)	212
Philippi Collieries Co. v. Thompson (C. C. A.)	23	Schaubel v. Bache (C. C. A.)	1022
Phoenix Iron Works, Ridgway Dynamo & Engine Co. v. (C. C.)	527	Schering & Glatz, United States v., two cases (C. C. A.)	246
Pinkney, Church Cooperage Co. v. (D. C.)	653	Schomacker Piano Forte Mfg. Co., In re (D. C.)	413
Pittsburgh Industrial Iron Works, Haywood Co. v. (D. C.)	799	Schurr, United States v. (D. C.)	648
Planter, The (D. C.)	667	Schuyllkill Stone Co., Fulco v. (C. C.)	124
Pocahontas Coal & Coke Co., Gillespie v. (C. C. A.)	992	Security Life & Annuity Co., Paulhamus v. (C. C.)	554
Portland & Seattle R. Co., Murhard Estate Co. v. (C. C. A.)	194	Seider, In re (D. C.)	138
Post & Lester Co., Prest-O-Lite Co. v. (C. C.)	63	Seider, Henkel v. (D. C.)	553
Potthoff v. Hanson & Van Winkle Co. (C. C.)	56	Seligman, In re (D. C.)	549
Premium Mfg. Co., Lewis Blind Stitch Mach. Co. v. (C. C. A.)	950	Seneca, The (D. C.)	591
Prest-O-Lite Co. v. Post & Lester Co. (C. C.)	63	Seventy-Nine Bags of Cheese, United States v. (D. C.)	367
Price, United States v. (C. C.)	904	Shiebler & Co., In re (D. C.)	545
Fridmore v. Puffer Mfg. Co. (C. C. A.)	496	Sim v. Edenborn (C. C.)	655
Provident Savings & Trust Co., Sprague v. (C. C. A.)	449	Simon Dumois, The (C. C. A.)	490
Puffer Mfg. Co., Fridmore v. (C. C. A.)	496	Sixty-Six Cases of Cheese, United States v. (D. C.)	367
Puget Sound Engine Works, Title Guaranty & Trust Co. v. (C. C. A.)	168	Smith, United States v. (D. C.)	926
Pusey & Jones v. Pennsylvania Paper Mills (C. C.)	672	Smith v. Virginia-Carolina Lumber Co. (C. C. A.)	249
Queen City Sav. Bank & Trust Co. v. Reyburn (C. C.)	597	Solomon & Carvel, In re (D. C.)	140
Racine Engine & Machinery Co., Confectioners' Machinery & Manufacturing Co. v. (C. C.)	914	Southern R. Co., Ellis v. (C. C. A.)	686
Ragland v. Norfolk & Washington, D. C., Steamboat Co. (D. C.)	376	Sprague v. Corner (C. C. A.)	486
Raish, United States v. (D. C.)	911	Sprague, Harmon v. (C. C. A.)	486
R. D. Wood & Co., Hill v. (C. C. A.)	51	Sprague v. Provident Savings & Trust Co. (C. C. A.)	449
		Standard Computing Scale Co., Dunn Mfg. Co. v. (C. C. A.)	521
		Standard Paint Co., Trinidad Asphalt Mfg. Co. v. (C. C. A.)	977
		Standard Savings & Loan Ass'n v. Aldrich (C. C. A.)	216
		Stanislaus County, San Joaquin & Kings River Canal & Irrigation Co. v. (C. C.)	567
		Strobel, In re (D. C.)	380

	Page		Page
Strobel, In re (D. C.).....	787	United States v. Sixty-Six Cases of Cheese (D. C.).....	367
Suddard v. American Motor Co. (C. C.)...	852	United States v. Smith (D. C.).....	928
Sun Co. v. Healy (C. C. A.).....	48	United States, Tom Wah v. (C. C. A.).....	1008
Swedish-American Tel. Co., Western Tel. Mfg. Co. v. (C. C.).....	308	United States v. Tsokas (C. C.).....	129
Taylor v. Breese (C. C. A.).....	678	United States v. Twenty Boxes of Cheese (D. C.).....	369
Thompson, Phillipi Collieries Co. v. (C. C. A.).....	23	United States v. Two Hundred and Ten Half-Cases of Figs (D. C.).....	369
Tierney v. Helvetia Swiss Fire Ins. Co. (C. C.).....	82	United States v. Van Der Molen (D. C.).....	650
Tindel-Morris Co. v. Chester Forging & Engineering Co. (C. C.).....	304	United States v. Virginia-Carolina Chemical Co. (C. C.).....	68
Title Guaranty & Trust Co. v. Puget Sound Engine Works (C. C. A.).....	168	United States v. Wayer (D. C.).....	650
Tom Wah v. United States (C. C. A.).....	1008	United States v. Wells (D. C.).....	313
Towle v. First Nat. Bank (C. C. A.).....	815	United States v. Wilson (C. C.).....	338
Traders' Ins. Co., Cullom v. (C. C. A.).....	45	United States Fidelity & Guaranty Co. v. Haggart (C. C. A.).....	801
Trinidad Asphalt Mfg. Co. v. Standard Paint Co. (C. C. A.).....	977	United States Tobacco Co. v. American Tobacco Co. (C. C.).....	701
Tsokas, United States v. (C. C.).....	129	Vandagriff v. Rich Hill Bank (C. C. A.)...	823
Tupper, In re (D. C.).....	766	Van Der Molen, United States v. (D. C.)	650
Twenty Boxes of Cheese, United States v. (D. C.).....	369	Victoria Copper Min. Co. v. Rich (C. C. A.)	207
Two Hundred and Ten Half-Cases of Figs, United States v. (D. C.).....	369	Virginia-Carolina Chemical Co., United States v. (C. C.).....	68
Union Pac. R. Co., Kaw Valley Drainage Dist. of Wyandotte County v. (C. C. A.)	836	Virginia-Carolina Lumber Co., Johnson v. (C. C. A.).....	249
Union Pac. R. Co., Kuykendall v. (C. C. A.).....	819	Virginia-Carolina Lumber Co., Smith v. (C. C. A.).....	249
United States, Alkon v. (C. C. A.).....	810	Vogt, In re (D. C.).....	551
United States v. American Surety Co. of New York (C. C. A.).....	228	Vueltabajo, The (D. C.).....	584
United States v. Atchison, T. & S. F. R. Co. (D. C.).....	111	Walker, Chestertown Bank of Maryland v. (C. C. A.).....	510
United States v. Atchison T. & S. F. R. Co. (C. C. A.).....	517	Walsh Bros., In re (D. C.).....	352
United States v. Ball (C. C. A.).....	504	Warden v. Hinds (C. C. A.).....	201
United States, Carriere & Son v. (C. C.).....	1009	Warren Steam Pump Co. v. Blake & Knowles Steam Pump Works (C. C. A.)	263
United States v. Chicago, I. & L. R. Co. (C. C.).....	114	Washtenaw, The (D. C.).....	372
United States, Chow Chok v. (C. C. A.).....	1021	Waskey v. McNaught (C. C. A.).....	929
United States v. Cobb (D. C.).....	791	Wayer, United States v. (D. C.).....	650
United States v. Denver & R. G. R. Co. (C. C. A.).....	519	Weisert Bros. Tobacco Co. v. American Tobacco Co. (C. C.).....	712
United States v. Foo Duck (D. C.).....	440	Welles v. Chicago & N. W. R. Co. (C. C.)	330
United States, F. W. Myers & Co. v. (C. C. A.).....	53	Wells, United States v. (D. C.).....	313
United States, Garrigan v. (C. C. A.).....	16	Western Bank & Trust Co., In re (D. C.)	713
United States v. Giordani (C. C.).....	772	Western Maryland R. Co., Elkins Electric R. Co. v. (C. C.).....	724
United States v. Greene (C. C.).....	442	Western Sugar Refining Co. v. Helvetia Swiss Fire Ins. Co. (C. C.).....	644
United States v. Haas (C. C.).....	904	Western Tel. Mfg. Co. v. Swedish-American Tel. Co. (C. C.).....	308
United States v. Haas (C. C.).....	908	Western Union Tel. Co. v. Williams (C. C. A.).....	513
United States, Johnson v. (C. C. A.).....	30	Westmoreland Specialty Co., Hogan v. (C. C.).....	289
United States, Legg v. (C. C. A.).....	1006	Whitin Machine Works, Houghton v. (C. C.).....	311
United States v. Mitchell (C. C.).....	1014	Wm. Caraway & Sons v. Kentucky Refining Co. (C. C. A.).....	189
United States v. O'Brien (C. C. A.).....	1022	William S. Kirby, The (D. C.).....	783
United States v. Oregon R. & Nav. Co. (C. C.).....	640	Williams, Natural Food Co. v. (C. C. A.)..	252
United States v. Oregon R. & Nav. Co. (C. C.).....	642	Williams, Western Union Tel. Co. v. (C. C. A.).....	513
United States v. Price (C. C.).....	904	Wilson, United States v. (C. C.).....	338
United States v. Raish (D. C.).....	911	Winters v. Baltimore & O. R. Co. (C. C.)..	106
United States, Reiss & Brady v. (C. C.)..	65	Wood & Co., Hill v. (C. C. A.).....	51
United States v. Rogoff (C. C.).....	311	Zeigler, Miller v. (C. C. A.).....	1022
United States v. Schering & Glatz, two cases (C. C. A.).....	246	Zulkowski v. American Mfg. Co. (C. C.)...	550
United States v. Schurr (D. C.).....	648		
United States v. Seventy-Nine Bags of Cheese (D. C.).....	367		

CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

PERCY SUMMER CLUB v. ASTLE et al.

(Circuit Court of Appeals, First Circuit. May 20, 1908.)

No. 682.

1. COURTS — JURISDICTION OF FEDERAL COURTS — CITIZENSHIP FRAUDULENTLY ACQUIRED.

A club was incorporated under the laws of New Hampshire for the purpose of acquiring and holding lands surrounding a lake in that state and the exclusive right of fishing therein. Subsequently some of the members incorporated a second club by the same name under the laws of New Jersey, to which the lands acquired by the first corporation were conveyed, and which also acquired other lands. Five years afterward a third club having the same name was incorporated in New Hampshire, to which all of such lands were leased. Five years later still the New Jersey corporation brought suit in a federal court in New Hampshire to establish its exclusive right of fishing in the lake. *Held* that, taking into consideration the facts that the members of the several corporations for the most part resided in New York, or further south, the length of time since complainant's incorporation, and that it had acquired additional land thereafter, it was not so clear that the sole purpose of its incorporation was to enable it to invoke the jurisdiction of the federal court as to defeat such jurisdiction.

2. FISH—PRIVATE RIGHTS OF FISHERY—INJUNCTION.

A complainant claiming the exclusive right of fishing in a body of water may maintain a suit in equity, in the nature of a bill of peace, to protect such right by enjoining other persons from fishing therein, who claim the right as members of the general public, and from committing trespasses on complainant's shore property which are only incidental to such fishing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fish, §§ 3, 8, 11.]

3. SAME—RIGHT OF FISHERY—PONDS AND LAKES IN NEW HAMPSHIRE.

Under the decisions of the Supreme Court of New Hampshire, taken together from the beginning, and based in part upon the Massachusetts ordinances of 1641 and 1647, and in part upon an appreciation of local usage from the earliest times, the right of fishing in all lakes and great ponds is free in the public, and, at least in the absence of a legislative grant, does not vest exclusively in the owner of the shore and soil; and the rule established by such decisions will be followed by a federal court in determining rights under a deed to property in that state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fish, §§ 3, 8, 11.]

163 F.—1

4. COURTS—FEDERAL COURTS—FOLLOWING STATE DECISIONS.

Where a decision of the highest court of a state, although based upon the common law, is deemed of an application especially local, its authority in a federal court is almost as great as would be given to it if it construed a state statute, especially if the rule thereby established pertains to real property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 950-958.]

State Laws as rules of decisions in federal courts, see notes to *Wilson v. Perrin*, 11 O. C. A. 71; *Hill v. Hite*, 29 O. C. A. 553.]

Appeal from the Circuit Court of the United States for the District of New Hampshire.

Philip Carpenter, for appellant.

Edwin G. Eastman, Atty. Gen., for the State of New Hampshire.

Henry F. Hoffis (Albert S. Batchellor, on the brief, and Crawford

D. Hering, on supplemental brief), for appellees.

Before COLT and LOWELL, Circuit Judges, and BROWN, District Judge.

LOWELL, Circuit Judge. The complainant, a New Jersey corporation, brought in 1900 a bill in equity in the Circuit Court for the District of New Hampshire against defendant citizens of New Hampshire, named and unnamed, to enjoin them from fishing in Christine Lake and from trespassing upon its shores. The complainant claims an exclusive right of fishery in the lake and an exclusive right of access to its shores. The defendants assert a right to fish existing by the common law of New Hampshire in favor of the public. The Circuit Court dismissed the bill, and the complainant has appealed to this court. 145 Fed. 53. In their answer, the defendants set up that this court was without jurisdiction, because the complainant's citizenship in New Jersey was collusively acquired for the purpose of giving jurisdiction to the federal courts; that the complainant was really a New Hampshire corporation, and so the diversity of citizenship alleged in the bill was based upon fraud. This question was little argued before us or before the Circuit Court. Considerable evidence was taken thereupon. In their supplementary brief the defendants seem disposed to waive their objection. Nevertheless we are bound to dispose of the jurisdictional question before we consider the merits of the case. If this objection of the defendants be well founded, the Circuit Court was altogether without jurisdiction of the cause, although both parties had agreed to submit thereto. In 1883 certain persons organized a corporation under the laws of New Hampshire, styled the "Percy Summer Club," to which corporation most of the land in question was duly conveyed. In 1890 the members of the New Hampshire corporation, or some of them, organized the present complainant under the laws of New Jersey, and in the same year caused to be made to the complainant a conveyance of all the real estate belonging to the original New Hampshire corporation. Other land was subsequently acquired by the complainant from other persons. In 1895, when a compromise was proposed concerning the fishery in Christine Lake,

some members of the New Jersey corporation, and other persons acting with them, organized a second New Hampshire corporation under the same name. This second New Hampshire corporation took by lease from the complainant the latter's real estate, but that lease was terminated in 1899. The corporate purposes of the three several corporations above-mentioned were the same. The defendants contend that the court will look beneath the citizenship of the complainant in New Jersey, as established by the legal fiction which follows incorporation, and will treat the complainant, not as the veritable owner of the property here in question, but as a person who has been given a legal title thereto with the sole purpose that the real party in interest, a citizen of New Hampshire, may obtain a trial of its controversy with the defendants, also citizens of New Hampshire, in the federal courts.

The defendants rest their contention upon *Lehigh Mining & Mfg. Co. v. Kelly*, 160 U. S. 327, 16 Sup. Ct. 307, 40 L. Ed. 444, which undoubtedly resembles the case at bar in some important respects. The differences between the two cases are considerable, however, and, in our judgment, they are material. The *Lehigh Company* was incorporated immediately before the commencement of the suit. The complainant before us was incorporated 10 years before this bill was brought. In the *Lehigh Case*, as stated by Mr. Justice Harlan, no purpose but that of gaining federal jurisdiction was suggested by the plaintiff's incorporation. In the case at bar most of the complainant's members were residents of New York or of places further south. Some of these men testified that the New Jersey incorporation was resorted to for the greater convenience of corporate meetings. In the *Lehigh Case* the Virginia corporation was held ready to accept a reconveyance from the plaintiff after the close of the litigation. In the case at bar the New Hampshire corporation of 1883 has been neglected for many years, and the rights under its charter may well have lapsed. Except as evidence of the intention of the members, the New Hampshire incorporation of 1895 does not concern us, being subsequent to that in New Jersey. In the *Lehigh Case* the plaintiff held no property except that conveyed to it by the Virginia corporation. In the case at bar the complainant has acquired land from parties other than the New Hampshire corporation. The complainant has spent considerable sums of money upon the property. On the whole, while we may suspect that a desire to enter the federal courts was the chief cause of the New Jersey incorporation, yet the defendants have not shown that this was the sole cause of that incorporation so clearly as to justify us in treating it as a mere subterfuge. The Circuit Court, therefore, had jurisdiction of the case.

At the argument the defendants contended that the bill should be dismissed because the complainant had an adequate remedy at law. We do not find this objection anywhere stated in the pleadings, and we agree with the learned judge of the court below that the case was not without the jurisdiction of the Circuit Court by reason of a want of equity. We also agree with him that the controversy before us was not *res judicata* between the parties.

We come next to the merits of the case. Christine Lake is a natural lake said to contain about 140 acres, situated in the town of Stark

county of Coös and state of New Hampshire. There are several tiny streams flowing into it, and it delivers its waters through an un-navigable outlet into the Ammonoosuc river. The complainant claims title to the whole border of the lake by mesne conveyances under grants from the English crown made in 1773 and 1774. The complainant's paper title does not go back beyond 1834; but the earlier land records of Coös county were destroyed by fire in 1886, and we may fairly infer the loss of a deed or of a series of deeds which granted to the complainant the title and rights conveyed by the crown to the grantees of Stratford and of Percy.

The Stratford grant made by the crown to the "grantees of Stratford" in 1773 was expressed to include "all that tract or Parcell of Land situate lying and being within our said Province of New Hampshire containing by admeasurement 48603 acres, and is to contain something more than ——— miles square out of which an allowance is to be made for high Ways and unimprovable lands by Rocks Mountains and rivers 2600 acres free according to a plan and survey * * * butted & bounded as follows, viz." (Then followed the boundaries expressed as in an ordinary deed.) "To have and to hold the said tract of land as above expressed together with all privileges and appurtenances to them and to their respective heirs and assigns forever by the name of Stratford, upon the following conditions." The conditions are immaterial. The Percy grant of 1774 used similar language. Construed according to the common law of England, these grants passed to the grantees the fishery in Christine Lake. *Bristow v. Cormican*, 3 App. Cas. 641.

The first Constitution of New Hampshire, adopted in 1784, provided that:

"All the laws which have heretofore been adopted, used and approved, in the province, colony, or state of New Hampshire, and usually practiced on in the courts of law, shall remain and be in full force until altered and repealed by the Legislature; such parts thereof only excepted as are repugnant to the rights and liberties contained in this Constitution."

In *State v. Rollins*, 8 N. H. 550, 561 (1837), the Supreme Court said:

"There seems to be no reason to doubt, therefore, that the body of the English common law, and the statutes in amendment of it, so far as they are applicable to the government instituted here, and to the condition of the people, were in force here, as a part of the law of the province, except where other provision was made by express statute, or by local usage."

The defendants assert a local usage of free fishery in the ponds of New Hampshire, contrary to the common law of England. The latest decisions of the highest court of New Hampshire undoubtedly declare that this usage exists. If it does not exist, the common law is operative, and the complainant prevails. The existence or nonexistence of this local usage is the principal question in the case.

The complainant's argument is this: The grants made by the crown to the "grantees of Stratford" in 1773, and to the "grantees of Percy" in 1774, though these grants made no express reference to fishery, yet passed to the grantees the title both to the waters of Christine Lake and to the fishery therein. This was the construction put

upon like grants by the common law which, in 1773 and 1774, was in force in England, which was then in force in the Province of New Hampshire, and has since been established as the common law of the state by virtue of its Constitution adopted in 1784. This was the construction put by the courts of New Hampshire upon like grants until 1889, when the Supreme Court of the state overruled its former decisions and thus changed a well-established rule of property. Under these circumstances, the federal courts are not bound by the latest decisions of the state courts in the construction of the grants under consideration, but, on the contrary, are bound to secure to the complainant grantee the rights conveyed by the grants as they were first construed. To establish its position the complainant refers to *Gelpcke v. Dubuque*, 1 Wall. 175, 17 L. Ed. 520, and *Muhlker v. N. Y. & Harlem R. R.*, 197 U. S. 544, 25 Sup. Ct. 522, 49 L. Ed. 872. If this court does not deem the decisions rendered in New Hampshire before the grant to the complainant conclusive here in its favor, then the complainant makes the alternative contention that the federal courts should construe the language of the grants as to them seems right, uncontrolled by the decisions of the New Hampshire courts which have been rendered since the grants to the complainant were made. For this alternative contention, the complainant refers to *Burgess v. Seligman*, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359, and to *Roberts v. Lewis*, 153 U. S. 367, 14 Sup. Ct. 945, 38 L. Ed. 747. The defendants, on the other hand, rely upon the latest decisions of the New Hampshire courts.

As our decision of this case must depend largely (1) upon the course of decision in the Supreme Court of New Hampshire, and (2) upon the relation of the federal courts to this course of decision, we must examine carefully and at some length (1) the decisions of the Supreme Court of New Hampshire concerning lakes and the fishery therein, and (2) the decisions of the Supreme Court of the United States concerning the authority which should be attributed by the federal courts to the decisions of local courts upon the law of real estate, and upon the construction of deeds. Before dealing with the cases decided by the Supreme Court of New Hampshire, however, mention must be made of the Massachusetts ordinances of 1641 and 1647, which have affected considerably the fishery law of eastern New England, and have often been referred to by the New Hampshire court. Without some account of these ordinances, the opinions of that court could not be made intelligible.

In 1641 the Colony of Massachusetts Bay, which adjoined New Hampshire on the south made the following provision in its Body of Liberties:

"Every Inhabitant that is an howse holder shall have free fishing and fowling in any great ponds and bayes, coves and rivers, so farre as the sea ebbs and flows within the presincts of the towne where they dwell, unless the free men of the same towne or the Generall Court have otherwise appropriated them, provided that this shall not be extended to give leave to any man to come upon others proprieltie without there leave."

Colonial Laws of Mass. (Whitmore's Ed. of 1889) p. 37, No. 16. The Massachusetts Body of Liberties is reprinted in 1 Laws of New

Hampshire, p. 748, as, in the opinion of the learned editor, "made operative by colonial legislation in New Hampshire as well as in Massachusetts Bay." In 1647 the provision above quoted was amplified and amended by the General Court of Massachusetts Bay as follows:

"Every Inhabitant who is an householder shall have free fishing and fowling in any great ponds, bayes, coves and rivers, so farr as the sea ebbs and flowes, within the precincts of the towne where they dwell, unless the free-men of the same towne or the General Court have otherwise appropriated them. Provided that no town shall appropriate to any particular person or persons, any great pond containing more than ten acres of land, and that no man shall come upon anothers propriety without their leave otherwise then as hereafter expressed. The which clearly to determine, It is declared, that in all creeks, coves and other places, about and upon salt-water, where the sea ebbs and flowes, the proprietor of the land adjoining, shall have propriety to the low-water-mark, where the sea doth not ebb above a hundred rods, and not more wheresoever it ebbs further. Provided that such proprietor shall not by this liberty, have power to stop or hinder the passage of boates or other vessels, in or through any sea, creeks or coves, to other mens houses or lands. And for great ponds lying in common, though within the bounds of some town, it shall be free for any man to fish and fowle there, and may pass and repass on foot through any mans propriety for that end, so they trespass not upon any mans corn or meddow." *Ib.* 170.

This ordinance has been construed to leave fresh ponds of less than 10 acres in the ownership of the riparian owners. By St. 1869, p. 678, c. 384, §§ 7, 8, the limit of private ownership in Massachusetts has been raised to 20 acres.

In *Storer v. Freeman*, 6 Mass. 435, 437, 4 Am. Dec. 155, the Supreme Court of Massachusetts held that the ordinance of 1647 was "annulled with the charter by the authority of which it was made." The reference is to the forfeiture of the charter of the Colony of Massachusetts Bay in 1685. This supposed annulment of the ordinance has since been doubted by the same court. *Commonwealth v. Alger*, 7 Cush. (Mass.) 53; *Commonwealth v. Roxbury*, 9 Gray (Mass.) 451 (and the note thereon of the learned reporter, afterwards Chief Justice of the Supreme Court of Massachusetts and associate justice of the Supreme Court of the United States); *Litchfield v. Scituate*, 136 Mass. 39, 46; *Attorney General v. Revere Copper Co.*, 152 Mass. 444, 25 N. E. 605, 9 L. R. A. 510; *Watuppa Co. v. Fall River*, 154 Mass. 305, 28 N. E. 257, 13 L. R. A. 255; *Attorney General v. Herrick*, 190 Mass. 307, 76 N. E. 1045; *Boston v. Lecraw*, 17 How. 426, 15 L. Ed. 118; *Shively v. Bowlby*, 152 U. S. 1, 19, 20, 14 Sup. Ct. 548, 38 L. Ed. 331. In *Butler v. Attorney General*, 195 Mass. 79, 82, 83, 80 N. E. 688, 689, 8 L. R. A. (N. S.) 1047, the court observed:

"The ordinance is treated as settling the common law of Massachusetts, and as embodying the local law as to the *jus privatum*, which in England is represented by the crown, and the *jus publicum*, which is there represented by the Parliament, both of which in this country are subject to the exercise of legislative power."

Whatever be the precise force of the ordinance as an existing statute, several matters are well settled in connection with it: First, it expresses the law of the land then contained in the Colony of Massachusetts Bay; second, it likewise expresses the law of the land then

contained within the Colonies of Plymouth and of Maine, and in the islands of Martha's Vineyard and Nantucket, which then belonged to New York. In no place outside the Bay Colony did it have the force of statute law. *Barker v. Bates*, 13 Pick. (Mass.) 255, 23 Am. Dec. 678; *Emerson v. Taylor*, 9 Greenl. (Me.) 42, 23 Am. Dec. 531; *Barrows v. McDermott*, 73 Me. 441. The fishery of great ponds was thus free in Massachusetts to the south of New Hampshire, and in Maine to the north and east. From 1640 to 1679, the whole or part of the territory contained in the present state of New Hampshire was subject to the jurisdiction of the colony of Massachusetts Bay under circumstances and with limitations which we need not here discuss. During this period the ordinances above referred to were adopted. In several cases the Supreme Court of New Hampshire has treated the Massachusetts ordinances as having a material, though somewhat anomalous effect upon the law of New Hampshire. These cases and others relating to the right of fishery in ponds we next consider.

In *State v. Gilmanton*, 9 N. H. 461 (1838), *Id.*, 14 N. H. 467 (1843), the boundaries of a town were in question, described in the grant as "running * * * to Winipisiogee pond, or river that runs out of said pond * * * then north to Winipisiogee pond; then on the pond and river to meet the first line." 9 N. H. 462. As there was controversy whether the water in question was a river or something else, the court observed:

"The question whether the water be a river or not is important only upon the ground that, if it be a river, the town, as it extends to the river, is bounded by the center of the stream, whereas if it strikes any large body of standing water, by whatever name it is called, it is bounded by the water's edge." 14 N. H. 478.

See, also, 9 N. H. 463. The jury found the water in question to be a river, and the decision of the case, which deals with a political rather than a private boundary, is not in point.

In *Nudd v. Hobbs*, 17 N. H. 524, 526, 527 (1845), the court said that:

"By the union of the settlements in New Hampshire with the colony of Massachusetts, the laws of the Massachusetts colony were extended over those settlements, and justice was administered here according to the rules there prescribed. This union continued until 1679, and during that time the ordinances relating to lands bounding on the seashore would seem to have been in force here, as a part of the laws regulating the title to real property. If this be so, it may perhaps be held that the first enactment of the General Assembly of the province of New Hampshire, under the commission constituting a president and council for its government, which provided that the laws they had formerly been governed by should be a rule in judicial proceedings, so far as they would suit our Constitution, and not be repugnant to the laws of England, until others were legally published, included the ordinance of 1641, so that it has been transmitted as the rule in relation to this species of property to the present day."

In *Nudd v. Lamprey*, an unreported case, decided in 1847, referred to in *Concord Mfg. Co. v. Robertson*, 66 N. H. 1, 25 Atl. 718, 18 L. R. A. 679 (1889), the court held that the owner of the upland had not the exclusive right to take seaweed from the adjoining flats. In his opinion Chief Justice Parker said:

"The court instructed the jury that the seashore belonged to the owner of the adjoining land to low-water mark. If this ruling be correct, it must be because the English common law has been abrogated by the Massachusetts ordinance of 1641; but we cannot hold that that ordinance was adopted here either in practice or as law. The temporary union of this state with Massachusetts did not make that ordinance the abiding law of this state. There was no possession upon which plaintiff can maintain his action. We know of no legislation by which the ordinance of 1641 is in force here, and the counsel for plaintiff seem to admit that they do not understand how it is in force in Massachusetts and Maine."

Notwithstanding this language, the ordinances continued to be noticed by the Supreme Court of New Hampshire as having some effect upon the interpretation of New Hampshire law.

Bell v. Offutt (1860) was a writ of entry to recover so much of the bed of Massabesic Pond as was situated adjoining and over against the plaintiff's land. After argument before the full court, and after the preparation of an opinion by Mr. Justice Fowler, which was concurred in by the rest of the judges, the case was settled by an entry of "neither party." It follows that Mr. Justice Fowler's opinion has not the authority attaching to an opinion of the full bench rendered in a case which has been litigated to final judgment, and so it has not been reported. Nevertheless we feel justified in referring to it as an exposition of local law made by persons chosen to interpret the laws of New Hampshire, whose pronouncement was deprived of full authority only by an act of the parties, unconnected with the opinion formed by the judges. For the history of this case we refer to the original draft of Chief Justice Doe's opinion in the Concord Mfg. Co. Case, printed as an appendix to the complainant's brief in the case at bar.

Massabesic Pond is situated in Auburn, and contains about 1,200 acres. The precise form of the deed in controversy in *Bell v. Offutt* was discussed in the introduction to the opinion above referred to. The judges, however, expressly rested their conclusion upon a rule of law that conveyances of the land about a navigable pond in New Hampshire do not pass title to the bed of the pond. For example, Mr. Justice Foster said:

"The lakes and large ponds of fresh water in this country are clearly navigable waters, and the dominion and property in them and the lands under them are of public right and inseparable from the power of government unless by express or explicit grant for the purpose, if at all. * * * Thereupon the title to the land under the navigable waters of New Hampshire, whether tide waters, lakes, or ponds, reverted in the crown to be holden in trust for the public as a prerogative of the government, unless specially dissevered therefrom by apt words clearly expressing an intention to separate the same from the government. Inland waters, where the public have been used to exercise a free right of passage and of fishery from the time whereof the memory of man runneth to the contrary, are public navigable waters. Public user is the most convincing evidence of the navigability of water—the most unfailing test to apply. * * * Tried by this test, there can be no doubt, we think, that Massabesic Pond and all the large bodies of fresh water in New Hampshire are navigable. By the Colony Ordinance of 1641 in Massachusetts Ancient Charters, 148, 149, all great ponds, defined to be ponds of over 10 acres in extent, were expressly declared to be public, and, though lying within any town, not liable to be appropriated to any particular person or persons. It is believed that this ordinance, if not formally, was practically at least adopted as of binding force in New Hampshire by the extension of the juris-

dition of Massachusetts over our territory; at all events, the history of legislation here from the earliest organization of the government shows that the fisheries in such ponds and the streams flowing from them were regarded as of public right. There is scarcely a lake or pond of any considerable magnitude within the limits of the state which has not at one time or other been the subject of special legislative control by the prohibition of the right therein at particular seasons, and the regulation of the mode of taking fish therefrom at other times. So, too, several acts have been passed annexing islands in our lakes and ponds to the neighboring towns. Now, upon the doctrine upon which plaintiff in the present case contends, all these legislative acts were clearly usurpations—unauthorized and unjustifiable attempts by the Legislature to interfere with and control the private and exclusive rights of the owners of these lakes and ponds to the fish and islands within their waters. But, in our view of the matter, these acts furnish the most conclusive evidence that these lakes and ponds were regarded, used, and treated by the Legislature, both provincial and state, as of public right—as possessing all the distinguishing characteristics of public navigable waters.”

The reference to the Massachusetts ordinances of 1641 and 1647 is to be noted as indicating that the decision in *Nudd v. Lamprey* was not intended to exclude that ordinance from all effect upon New Hampshire titles.

While the conclusion in *Bell v. Offutt* was rested upon the navigability of Massabesic Lake, and that lake is several times as large as Christine Lake, yet no test of navigability in *Bell v. Offutt* was suggested which does not apply to the latter. Massabesic Lake is not comparable in size to Winipisiogee. The opinion recognizes also the difference between a boundary upon a nonnavigable fresh water stream and that upon a lake.

In *Clement v. Burns*, 43 N. H. 609, 621 (1862), a case concerned with the right of the owner of the upland to the adjoining flats, the court said:

“As a rule of positive law, the ordinance of 1641 was not binding upon New Hampshire; but when we consider that a union was effected in that same year between New Hampshire, or so much of it as was then settled, and Massachusetts, which was continued for about forty years, making them practically one government, we should naturally expect that the same usages would spring up here under that ordinance.”

In this remark the court accepted the statement of the Supreme Court of Massachusetts in *Storer v. Freeman* that, by reason of the forfeiture of the Massachusetts charter, the ordinances of 1641 and 1647 had ceased to have any legislative force. In that respect the New Hampshire court did not distinguish between Massachusetts and New Hampshire.

In *State v. Franklin Co.*, 49 N. H. 240, 6 Am. Rep. 513 (1870), the court had to consider the right of fishery in Lake Winipisiogee now admitted to be public. The decision of the case does not concern us, but, in order to establish the freedom of the fishery, Mr. Justice Smith referred to *West Roxbury v. Stoddard*, 7 Allen (Mass.) 158, a case which is wholly concerned with the rule of law embodied in the Massachusetts ordinances. Considered together, these New Hampshire cases which we have already referred to indicate, at the least, that in New Hampshire, as well as in Plymouth and in Maine, the Massachusetts ordinances concerning fresh water ponds express the present

law of the land, though the basis of this law in all these places may be doubtful.

In *State v. Roberts*, 59 N. H. 256, 47 Am. Rep. 199 (1879), the owner of the land surrounding Christine Lake was indicted for a violation of chapter 55, p. 44, Laws 1872, which reads as follows:

"No person shall catch, kill or destroy any trout [in certain months]. This act shall not be construed to apply to any waters in which any person or persons have now by law the exclusive right to take * * * trout."

The court held that, if there was free communication through which trout passed from the lake to the Ammonoosuc river, the state might limit the time in which trout should be caught within the lake itself; and so the case was left open for further proof. Manifestly the decision did not cover the case at bar, but the complainant relies upon the language of the court. As this language constitutes a chief support of the complainant's case, we quote it at some length:

"At common law the right of fishery in navigable waters was public and common to all, and in waters not navigable it was limited to the riparian owner of the soil, and belonged exclusively to him. * * * Hence, while the riparian owner has the exclusive right of fishery upon his own land, he must so exercise that right as not to injure others in the employment of a similar right upon their lands upon the stream above and below. * * * But, while the Legislature has power to regulate and limit the time and manner of taking fish in waters which are public breeding-places or passageways for fish, it has not assumed to interfere with the privileges of the owners of private ponds having no communication through which fish are accustomed to pass to other waters. Such ponds, whether natural or artificial, are regarded as private property, and the owners may take fish therefrom whenever they choose, without restraint from any legislative enactment, since the exercise of this right in no way interferes with the rights of others. The Legislature protects the owners of such ponds in the enjoyment of their privileges, and they are expressly excepted from the statutory restrictions by the third section of the act upon which the indictment in this case is founded. The defendant is in possession, claiming the ownership of North Pond. There is no suggestion that the public have any rights in its waters other than as a breeding place for the supply of fish to other streams, or a channel for their passage. If, as the defendant claims, the trout are within his control, and there is no communication through which they can pass from the pond to other waters, the indictment cannot be maintained. If, as is claimed in behalf of the state, there is free communication through which trout pass from the pond to the streams leading into it and to the Ammonoosuc river, the indictment can be maintained upon proof of those facts."

In *Chase v. Baker*, 59 N. H. 347 (1879), the defendant was sued for a violation of Gen. Laws 1878, c. 179, § 1, since repealed, which provided that any person taking fish in any pond wholly in the control of a riparian owner and used for breeding should be liable to a fine, to be recovered, as it seems, at the suit of the riparian owner. The court gave judgment for the defendant, observing that:

"The plaintiff was not owner or lessee of all the land under or around and adjoining the pond, and cannot maintain this action."

We are unable to find either in the decision or in the opinion in *Chase v. Baker* anything to support the complainant's contention. The statute gave to the owner of all the land about a breeding pond the exclusive right of fishery therein. This is not to deny the general right of the public to fish in great ponds. In those states wherein the

Massachusetts ordinances are admitted to express the law, the right of the Legislature to grant exclusive fishery in a great pond has been recognized. *Commonwealth v. Vincent*, 108 Mass. 441.

In *State v. Roberts*, 59 N. H. 484 (1879), the defendant had been convicted of the offense charged in the case above referred to. The evidence was before the court concerning the passage of trout from Christine Lake to the Ammonoosuc river. The defendant's exceptions were overruled, and his conviction upheld. The court said in its opinion:

"Subject to the right of the state to regulate the destruction or preservation of fish, their free passage, and the use of the water as a highway, the owner of the land upon unnavigable streams and inland bodies of water has therein the exclusive right of fishery. 3 Kent Com. 510, *418; *Vinton v. Welsh*, 9 Pick. (Mass.) 87. The right of the Legislature to enact penal laws to prevent the undue destruction of fish does not depend upon the fact that any particular body of water does not furnish a supply of fish, but upon the fact that like other wild animals they are free, and the owner of the soil under the water containing them has not on that account any property in them. The fact that the defendant owned the land around North Pond gave him no exclusive property in the four trout before they were caught, unless their natural freedom had been destroyed by falling under the absolute control of the riparian owner. If the trout were not the prolific source of other trout for connecting streams, their freedom of passage to and from and through the pond prevented the defendant, a riparian owner, from acquiring property in them against the right of the state to preserve them for the enjoyment of future anglers. The fact that the fish were in water surrounded by the defendant's land, unless the water was so inclosed as to be absolutely within his control, and the free passage of the fish to and from it was entirely and rightfully obstructed, gave him no more property in them than he would have obtained in a wild deer that came upon his land, or a wild bird that might have alighted upon it." Page 486.

It will be noticed that the decision in this case did not involve the exclusive right of the riparian owner to fish in a great pond. The defendant was indicted for a violation of the game law, and his conviction was upheld. The complainant in this case does not rely upon the decision in *State v. Roberts*, but upon the language used *arguendo* by the Supreme Court. We may doubt if the court, in speaking of the exclusive rights of riparian owners, did not have in mind the exclusive rights which were so frequently given by the Legislature of New Hampshire, rather than those which are based upon common law.

In *Concord Mfg. Co. v. Robertson*, 66 N. H. 1, 25 Atl. 718, 18 L. R. A. 679 (1889), a riparian owner upon the outlet of a great pond brought suit against another riparian owner for an unreasonable diminution of the water of the pond by the defendant's cutting ice thereon. The Supreme Court held that the agreed facts did not show "that the defendant's removal of ice was an unreasonable use of the pond, or that the plaintiffs suffered damage." The case was ordered to stand for trial. In the long opinion of the court Chief Justice Doe discussed the title to the water of great ponds, and declared that it was in the public. Most of the cases above cited and many others there came under his careful consideration. The decision in *Concord Mfg. Co. v. Robertson* has no bearing upon the case at bar, but the language used indicates beyond a doubt an opinion favorable to the defendant before us.

In *State v. Welch*, 66 N. H. 178, 28 Atl. 21 (1889), the defendant was indicted for fishing in Christine Lake in 1884, contrary to General Laws 1878, c. 179, § 1, which read as follows:

"If any person shall, at any time, catch, kill or destroy in any manner any fish in any pond, reservoir, or spring prepared or used for the purpose of breeding, growing, or preserving the same, or from any brook or stream running through or supplying such pond or reservoir on land owned or leased for the purpose aforesaid, or shall break down any dam or embankment of the same, or shall in any way poison or pollute such water, or shall place therein any fish, or the roe, spawn, or fry of the same without permission of the owner or lessee of the land upon or through which such waters stand or flow, he shall for every such offense be fined not exceeding fifty dollars, or be imprisoned not exceeding six months, or both; provided, that said owners or lessees shall post in at least two conspicuous places on said land a notice with the words 'reserved for fish culture or preservation, trespass forbidden,' plainly painted, printed, or written thereon, and keep the same thus posted. This section shall be interpreted to apply only to such ponds, streams or springs as are wholly within the control of some person owning the land around the same, who has made some improvement or expended money or labor in stocking the same with fish for his own use."

This statute has been amended by St. 1885, p. 264, c. 61, which added the words: "And in no case shall it apply to natural ponds." The indictment therefore charged an act which would not have been criminal if committed within four years of the time of the court's opinion. The prosecution did not rely upon the statute as giving to the riparian owners the fishery in the pond, but claimed private ownership of the pond and its fishery at common law. The court cited the *Concord Mfg. Co. Case*, and set aside the conviction; whether on the ground that the indictment was defective, that the statute was unconstitutional, that it had been amended, or that it did not apply to the case, cannot be gathered from the opinion of the court. The decision, therefore, is not clearly in point, but the court said:

"One of the reserved questions was raised by the objection (presented by the defendant at the trial) that the club had no such private right as was necessary to bring the case within the statute. Whatever view is taken of the evidence tending to show, as the state claimed, that the club owned the surrounding land, it had no tendency to show that they owned the pond. The bed of the pond was reserved, set apart, and held in trust for the public use." Page 179 of 66 N. H., page 22 of 28 Atl.

In *Percy Summer Club v. Welch*, 66 N. H. 180, 28 Atl. 22 (1889), the New Hampshire corporation of 1883, the complainant's grantor, brought a bill in equity to restrain the defendant from fishing in Christine Lake. Upon the authority of the two cases last cited, the court held that the bill could not be maintained. In *Dolbeer v. Suncook Waterworks Co.*, 72 N. H. 562, 58 Atl. 504 (1904), the riparian owners about a pond of 15 acres sought damages for the appropriation of the pond. The court denied the petition on the ground that the pond was public property. These two decisions support directly the defendant's contention in the case at bar.

We have thus completed our review of the New Hampshire decisions. Read together, they show that, from the beginning, the New Hampshire court has tended to hold free the fishery in all considerable lakes and ponds, basing its action partly upon the analogy of the Massachusetts ordinances, and partly upon an appreciation of local usage.

This is not the less indisputable because the reasoning of the New Hampshire court, with all respect be it said, has not always been consistent, nor has its language been clear. Moreover, a confusion between an exclusive fishery secured to the riparian owner by the game laws and an exclusive fishery at common law has led to some overstatement about the latter, until the controversy respecting Christine Lake brought a definite statement of the law in accordance with the tendency of the earlier decisions and in favor of these defendants. It may seem strange that the ownership of the water and fishery of the numerous ponds of New Hampshire remained so long without unequivocal and authoritative decision. But, in completing our search among the neighboring states, we have found that in Vermont the ownership of the fishery in a pond appears to depend on the language of the state Constitution. *N. E. Trout Club v. Mather*, 68 Vt. 338, 35 Atl. 323, 33 L. R. A. 569 (1895). No decision of the Supreme Court of Rhode Island on the subject has been called to our attention. In the one case found in Connecticut there had been an express conveyance of the pond by the proprietors of the colony. *Turner v. Hebron*, 61 Conn. 175, 22 Atl. 951, 14 L. R. A. 386 (1891). From time to time, by special acts, the Legislature of New Hampshire has made the act of fishing in sundry ponds criminal on the part of all but riparian owners. Both complainant and defendants have based argument upon these statutes. The former has contended that the Legislature thus recognized the private right of the riparian owner to the fishery, making an infringement of this right a crime where it had before been only a trespass. The defendants, on the other hand, have contended that these statutes manifest the authority of the Legislature to deal with the fishery in ponds. Not much weight can be attached to either argument. Where the fishery in great ponds is undoubtedly public, as in Massachusetts, the Legislature has in some cases granted an exclusive fishery to private individuals. We mention the matter here in order to show that the arguments referred to have not been overlooked.

Having followed the course of decision in the Supreme Court of New Hampshire from its earliest reference to the Massachusetts ordinances down to its final decision of the question here involved in favor of the defendants, we have next to consider the degree to which federal courts having the same questions before them, will follow the decisions of a state court. The matter has been considered by the Supreme Court so often that we need refer to little which is outside its reports.

The decisions of the Supreme Court which review upon writ of error the decision of a state court upholding a statute which is alleged to impair a contract are not here in point. There the Supreme Court exercises no right of general review, but must affirm the judgment of the state court unless it contravenes the Constitution of the United States. Hence the Supreme Court in those cases neither follows nor refuses to follow the course of decisions of the state court, but, having a particular judgment of that court before it, reverses the judgment or leaves it undisturbed according as it does or does not contravene the federal Constitution. Other decisions made by the state

court upon the same subject have ordinarily nothing to do with the case. *N. O. Waterworks v. Sugar Co.*, 125 U. S. 18, 30, 8 Sup. Ct. 741, 31 L. Ed. 607; *Mobile Transportation Co. v. Mobile*, 187 U. S. 479, 491, 23 Sup. Ct. 170, 47 L. Ed. 266.

Where the litigation originates in a federal court, as in the case at bar, or has been removed to it from a state court, the federal court itself must render judgment. In so doing, it searches for precedents, and gives proper weight to those precedents which are found in the courts of that state wherein the federal court exercises its functions. The interpretation of state statutes and of state Constitutions is generally for the state courts, and the federal courts, in their construction of these writings, ordinarily follow the construction which has been adopted by the state courts before the controversy arose. *M'Cutchen v. Marshall*, 8 Pet. 220, 8 L. Ed. 923; *Great Southern Hotel Co. v. Jones*, 193 U. S. 532, 24 Sup. Ct. 576, 48 L. Ed. 778. This has sometimes been done, even if an overruling of earlier decisions in the state court calls for an overruling by the federal court of decisions which it has formerly made. *Green v. Neal*, 6 Pet. 291, 8 L. Ed. 402; *Fairfield v. County of Gallatin*, 100 U. S. 47, 25 L. Ed. 544. But the federal court does not yield invariably. *Rowan v. Runnels*, 5 How. 134, 12 L. Ed. 85; *Burgess v. Seligman*, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359.

Where the change of opinion in the state court concerns the interpretation of a state statute and results in an avoidance of contracts already entered into on the faith of the earlier decisions of the same court, the federal court, in construing the state statute, deems itself bound to follow the earlier state decisions, so far as those contracts are concerned, but, as to contracts made since the change of decision in the state court the federal court follows the later decision. *Gelpcke v. Dubuque*, 1 Wall. 175, 17 L. Ed. 520. We mention the rule of *Gelpcke v. Dubuque* only because it is relied on by the complainant. We have before us no statute of New Hampshire to construe, and the case is therefore inapplicable. It is true that St. N. H. 1887, p. 466, c. 86, declared the waters of all ponds over 20 acres to be public. But the decisions of the New Hampshire courts rendered since the passage of that statute have been rested expressly and altogether upon the common law.

Where the controversy before the federal court is concerned, as here, not with the construction of state statutes, but with the construction put by the state court upon the common law, the rule is different. Certain matters have been held by the Supreme Court to appertain to general law apart from local conditions, and as to these the decisions of the courts of the state where the federal court sits are deemed to have no peculiar authority. *Swift v. Tyson*, 16 Pet. 1, 10 L. Ed. 865. Where, however, the decision of the state court, though based upon the common law, is deemed of an application especially local, this decision is given an authority almost as great as would be assigned to it if it construed a state statute. As was said by Mr. Justice Bradley in *Burgess v. Seligman*, 107 U. S. 20, 33, 34, 2 Sup. Ct. 10, 21, 22, 27 L. Ed. 359:

"Since the ordinary administration of the law is carried on by the state courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the state, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of the state Constitutions and statutes. Such established rules are always regarded by the federal courts, no less than by the state courts themselves, as authoritative declarations of what the law is. But, where the law has not been thus settled, it is the right and duty of the federal courts to exercise their own judgment; as they also always do in reference to the doctrines of commercial law and general jurisprudence. So, when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there has been no decision, of the state tribunals, the federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the federal courts will lean towards an agreement of views with the state courts if the question seems to them balanced with doubt."

The case before us concerns the construction to be put upon the language of a deed. The language is of common use. The construction put upon this language, as is admitted, has varied in the states of the Union. In interpreting the language of a deed of land lying in a particular state the interpretation put upon that language by the state court necessarily carries peculiar weight. "The question of the title of a riparian owner is one of local law." *Whitaker v. McBride*, 197 U. S. 510, 512, 25 Sup. Ct. 530, 531, 49 L. Ed. 857. To decide the case before us, we need not decide if, in construing the deeds upon which the complainant relies, we are bound to follow *Concord Mfg. Co. v. Robertson*, and *Dolbeer v. Waterworks Co.*, or if we should merely "lean towards an agreement of views with the state courts if the question seems to them (the federal courts) balanced with doubt." We need not agree with all the reasoning of the learned Chief Justice in the *Concord Mfg. Co.* Case in order to recognize that the considered decisions of the Supreme Court of New Hampshire concerning the interpretation of New Hampshire deeds are entitled to peculiar weight. As was said by that court in *Dolbeer v. Suncook Waterworks Co.*, 72 N. H. 562, 563, 564, 58 Atl. 504:

"At the December Term, 1889, three cases were decided in which the character of natural, freshwater ponds, as to being public or private waters, was considered: *Concord Mfg. Co. v. Robertson*, 66 N. H. 1, 25 Atl. 718, 18 L. R. A. 679; *State v. Welch*, 66 N. H. 178, 28 Atl. 21, and *Percy Summer Club v. Welch*, 66 N. H. 180, 28 Atl. 22. In the last two cases the question was definitely raised whether a pond containing 300 to 500 acres, situated in the midst of a tract of land belonging to a single owner, was the private property of the landowner or was public property; and it was decided that it was public property. The question was not fully discussed in these cases, but the first case was cited as authority for the decisions without additional comment, thus adopting the conclusion therein reached and the reasoning by which it was supported. If, as the plaintiff's counsel suggest, the question was not before the court in the first case, and so what was said upon it should be regarded as dictum if attention is fixed upon that case alone, yet when the three cases are considered together in connection with the fact that they were decided at the same term, by the same court speaking through the same judge (Chief Justice Doe), and with the further fact that the first case is cited as the authority for the decisions in the other two, it becomes apparent that the first case must be treated as authoritative on the question."

Even if the cases decided before *State v. Roberts* are not in point, yet they contain many dicta which indicate that in the absence of an express grant from the state the fishery of a great pond is not of private ownership, and the facts in *Bell v. Offutt* are hardly distinguishable from those in the case before us. Had it been reported, it must have affected considerably the arguments upon both sides. Therefore we find nothing which requires us to differ from the considered opinion of the Supreme Court of New Hampshire.

We agree with the Circuit Court in holding that, apart from the fishery, the interference with the complainant's rights in the borders of the pond does not warrant the interposition of a court of equity.

The decree of the Circuit Court is affirmed, and the appellees recover their costs of appeal.

GARRIGAN v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. April 14, 1908. Rehearing Denied June 4, 1908.)

No. 1,341.

1. INJUNCTION—VIOLATION—CONTEMPT—CIVIL OR CRIMINAL PROCEEDINGS.

Where, in a proceeding to punish respondent for contempt in violating a strike injunction, there was neither allegation nor proof of his relation to or privity with either of the persons enjoined prior to or apart from alleged acts in violation and contempt of such injunction, the proceedings were strictly criminal in their nature, under the rule that a proceeding for civil contempt obtains only for the benefit and enforcement of the rights of the parties to a suit, while proceedings for criminal contempt are to punish for acts in contempt of the power and dignity of court.

2. SAME—PROOF BY AFFIDAVITS.

Where a criminal contempt for violating an injunction is sought to be established by affidavits, the facts, to authorize a conviction, must be clearly established.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 514.]

3. SAME—STRIKE INJUNCTION—DUTY TO OBEY—PERSONS NOT PARTIES.

A person not one of the parties enjoined by a strike injunction, while not strictly chargeable for breach or violation of the injunction in the same sense as those terms are applicable to the parties, is nevertheless bound with other members of the public to observe its restrictions when known, to the extent that he must not aid or abet in its violation by others, nor set the known command of the court at defiance by interference with or obstruction of the known administration of justice, and if he does so the court's power to punish is absolute.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 495.]

4. SAME—PETITION.

A petition for violation of a strike injunction by a person not a party, alleging in the alternative that respondent knew, or by the exercise of ordinary intelligence might have known, of the issuance of the injunction, was insufficient to charge him with knowledge thereof.

5. SAME—CRIMINAL CONTEMPT—PRESUMPTION OF INNOCENCE.

In a proceeding for criminal contempt in violating a strike injunction, respondent is entitled to the benefit of the presumption of innocence.

6. SAME—VIOLATION—KNOWLEDGE—EVIDENCE.

In a proceeding for a criminal contempt in the violation of a strike injunction, evidence held insufficient to warrant a finding that respondent

who was not a party to the original proceedings, had knowledge of the injunction, or that his act constituted a contempt.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 514.]

7. SAME.

That respondent, a city fireman, assaulted a guard on one of petitioner's wagons during a strike, after the guard had been arrested and was in the custody of the city police authorities, and had therefore ceased to act as a guard, did not constitute a violation of a strike injunction, restraining persons from interfering with persons managing petitioner's horses, wagons, etc., in the conduct of its business.

In Error to the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois.

For opinion below, see 141 Fed. 679.

The plaintiff in error, Daniel Garrigan, was adjudged by the Circuit Court guilty of contempt, in the violation of an injunctive order issued by that court, in aiding and abetting the parties enjoined and interfering with the business and employees under the protection of such order, and the proceedings and judgment are brought for review by this writ of error.

The judgment recites the proceedings and findings and reads as follows:

"It appearing to the court that on April 28, 1905, the Employers' Teaming Company filed its bill of complaint in equity in said court, in and for said district and division thereof, praying for an injunction, both temporary and permanent, and that on said April 28, 1905, on the application of said the Employers' Teaming Company, said court duly entered of record, in said chancery proceeding, a temporary stay and injunctive order, and that said the Employers' Teaming Company thereafter filed a petition in said chancery proceeding for a rule directing Daniel Garrigan to show cause by a short day why he should not be attached for contempt of said court for violating said temporary stay and injunctive order; and it further appearing to the court that affidavits were duly filed with and in support of said petition, and that upon the filing and presentation of said petition and affidavits, said Daniel Garrigan was duly ruled by said court, in said chancery proceeding, to show cause by May 31, 1905, at 10 o'clock a. m. why he should not be attached for contempt of said court for violating said temporary stay and injunctive order; and that said Daniel Garrigan was duly and personally served with a certified copy of said rule, and that he thereafter filed an answer thereto, supported by affidavits, and that rebuttal affidavits were filed by said the Employers' Teaming Company; and the court having heard and considered said petition, answer, and all said affidavits, and also oral evidence then and there offered in open court by said the Employers' Teaming Company and also by said Daniel Garrigan; and the court having heard the arguments of counsel for said respective parties, and being fully advised in the premises, and said Daniel Garrigan having been present in open court in person and by counsel at the hearing on said rule, and being also now here present in open court in person and by counsel—the court finds: That said Daniel Garrigan on May 2, 1905, in the city of Chicago, in said district, had full knowledge of the existence of said temporary stay and injunctive order and of the terms thereof, and with such knowledge did then and there knowingly, willfully, and intentionally violate said stay and injunctive order, and did then and there, with full knowledge of the existence of said temporary stay and injunctive order, and of the terms thereof, knowingly, willfully, and intentionally aid and abet the defendants, or some of them, to said bill of complaint in committing acts and grievances complained of in said bill of complaint and prohibited by said stay and injunctive order. And the court further finds that said Daniel Garrigan on the date and at the place last aforesaid, and with full knowledge of the existence of said temporary stay and injunctive order, and of the terms thereof, did knowingly, willfully, and intentionally and contrary to and in violation of the terms of said stay and injunctive order interfere with, hinder, obstruct, and aid and abet the defendants, or some of them, to said bill of complaint in interfering with, hindering, and obstructing the business of said the Employers' Teaming Company, and also its employees

and agents, while they were then and there engaged in the conduct and operation of its business; that said Daniel Garrigan has failed to show cause why he should not be attached and punished as for contempt of this court for violating said temporary stay and injunctive order; that said contempt has tended to defeat and impair the rights and interests of said the Employers' Teaming Company and to obstruct justice, and bring the administration of justice into contempt. Wherefore, the premises considered, it is hereby ordered, adjudged, and decreed that said rule to show cause be and the same hereby is made absolute. And it is further hereby ordered and decreed by the court that the said Daniel Garrigan was and is, and he hereby is adjudged, guilty of and in contempt of this court, and that said Daniel Garrigan stand committed to and be confined and imprisoned in the county jail of Du Page county, in Wheaton, in said county, in the state of Illinois, for any during the period of three months, unless he shall be sooner discharged therefrom by due process of law, and that a warrant of commitment do now issue in due form for the arrest forthwith of said Daniel Garrigan, directed to the United States Marshal for the Northern district of Illinois, and that, when arrested by said marshal, said Daniel Garrigan be committed to said jail, and that he be there held for the said period of three months, unless sooner discharged therefrom by due process of law, and that said term of imprisonment shall begin when said Daniel Garrigan is lodged in said jail, as herein provided."

The injunctive order referred to ran against various trade organizations and individuals, named as defendants in the bill filed by the Employers' Teaming Company—the plaintiff in error not being named therein, nor party of record in any form—and "each and every of the agents and servants of the said defendants and of each of them, and any and all other persons and associations now or hereafter aiding or abetting or confederating or acting in concert with said defendants or any or either of them, in committing the acts and grievances or any of them complained of in said bill of complaint," and restrained the commission of various acts, including the following: "Hindering, obstructing, or stopping any of the business of the complainant, the Employers' Teaming Company, in the maintenance, conduct, management, or operation of any of its business, barns, stables, horses, wagons, or properties of any kind in the city of Chicago; * * * also, from in any manner interfering with, hindering, obstructing or stopping the passage along and through the streets of said city of any of complainant's wagons, teams, or teamsters in and about the business of complainant; * * * and also from accompanying, following, talking with, or calling upon any person or persons employed by or doing business with said complainant against the express will of said person or persons, for the purpose of or in such manner as to intimidate, threaten, or coerce any such person or persons; * * * and also, either singly or in combination with others, from picketing, besetting, or patrolling any place or places where said complainant's employes, teams, wagons, stables, barns, or other property may be or happen to be in said city; * * * and also, from ordering, assisting, aiding, or abetting in any manner whatsoever any person or persons to commit any of the acts aforesaid." It further provided for service of the order upon and in respect of the defendants therein, and that it "shall be binding upon all of said defendants and all other persons whomsoever from and after the time they severally have knowledge of the allowance of this order."

Daniel L. Cruice and William H. Slack, for plaintiff in error.
Levy Mayer, for the United States.

Before BAKER and SEAMAN, Circuit Judges, and SANBORN, District Judge.

SEAMAN, Circuit Judge (after stating the facts as above). The plaintiff in error was not a party to the bill filed by the Employers' Teaming Company for injunctive relief, nor a member of either of the associations named as defendants therein, nor named in the re-

straining order whereof violation is averred in these contempt proceedings, and neither averment nor proof appears of his relation to or privity with either of the parties enjoined, prior to or apart from the alleged acts in violation and contempt of such order. Thus the proceedings and conviction which are brought for review under this writ of error are distinctly criminal in their nature, and reviewable in conformity with the established doctrine of such procedure. *Bes-sette v. W. B. Conkey Co.*, 194 U. S. 324, 326, 24 Sup. Ct. 665, 48 L. Ed. 997; *Matter of Christensen Engineering Co.*, 194 U. S. 458, 459, 24 Sup. Ct. 729, 48 L. Ed. 1072. Whatever of confusion appeared in the authorities, prior to the decisions above cited, as to the distinction in contempt proceedings between those of civil and criminal nature—the one remedial for the benefit and enforcement of the rights of parties to a suit, and the other to punish for acts in contempt of the power and dignity of the court—that classification has become the settled rule for testing the nature of the proceeding and reviewable questions.

The proceedings against the plaintiff in error were instituted by a petition filed by the Employers' Teaming Company, as complainant in the above-mentioned bill, averring, in substance, the issuance of the injunctional order referred to, its wide publication in newspapers in Chicago, and posting conspicuously on all the wagons of complainant which were engaged in the operation described, and stating "upon information and belief that each of the persons hereinafter named as respondents to this, its said petition, did at the time of the commission of the acts hereinafter complained of have full knowledge and notice of the issuance of said temporary stay or injunctional order, and knew, or by the exercise of ordinary intelligence might have known, of the issuance of said injunctional order." Thereupon the petition charges that the plaintiff in error (and numerous other persons named) "violated said injunctional order as aforesaid, at the time, place, and in the manner set forth in the affidavits of Solon W. Baxter" and seven other persons attached to and made a part of the petition. An answer was filed by the plaintiff in error, under a rule entered and served to show cause why he should not be adjudged guilty of contempt and after raising various objections to the petition and proceeding, which denies under oath commission of the several acts and offenses charged in the petition and affidavits, and denies knowledge or notice of the injunction, or violation thereof "intentionally or otherwise." Motion was made and denied to discharge the rule to show cause upon this sworn answer, and the case proceeded to hearing, with sufficient objections urged and saved on behalf of the plaintiff in error to raise the various propositions on which error is assigned.

The evidence upon which the conviction rests appears in a bill of exceptions, and consists mainly of *ex parte* affidavits, purporting to be made by witnesses of the occurrences in controversy—with a single witness, one Dimick, produced and testifying in open court—which affidavits were submitted on behalf of the parties respectively. In the opinion filed by the trial court it is aptly remarked that the

opposing affidavits, "as is usual in such controversies, were directly contradictory of each other"; and that, in "such irreconcilable conflict of testimony, it is often impossible to get a clue to the truth." While these affidavits concur in proving a case of mob violence during the attempted movement of complainant's teams and wagons through the streets of Chicago, and riotous interference with the persons guarding them, those introduced for the prosecution and defense are "directly contradictory" in all the facts bearing upon the issues involved, both in respect of the conduct of the parties, collectively and individually, engaged in the riot, and of the part and conduct of the plaintiff in error therein. Assuming, without deciding, that it was within the discretion of the trial court to hear the case upon such affidavits, instead of ascertaining the facts from testimony taken in open court, as was the course adopted in the *Savin Case*, 131 U. S. 267, 268, 9 Sup. Ct. 699, 33 L. Ed. 150, and mentioned as of course in *United States v. Shipp*, 203 U. S. 563, 575, 27 Sup. Ct. 165, 51 L. Ed. 319, the facts to authorize conviction must nevertheless be clearly established, and the affidavits introduced here exemplify the infirmity of such *ex parte* means for the "legal understanding" of facts in controversy intended by the rules of evidence.

In any view of the charges of contempt and evidence so received, it is unquestionable that the only issues of fact were: (a) Whether the accused had knowledge of the injunction; and, if such knowledge appeared, whether he committed acts, either (b) in aid of its violation by the parties enjoined, or (c) in plain defiance of its terms—and thus in contempt of the authority and commands of the court. As it is neither charged nor proven that the plaintiff in error was one of the parties enjoined, he is not chargeable for breach or violation of the injunction, in the well-recognized sense of those terms applicable to parties. He was bound, alike with other members of the public, to observe its restrictions when known, to the extent that he must not aid or abet its violation by others, nor set the known command of the court at defiance, by interference with or obstruction of the administration of justice; and the power of the court to proceed against one so offending and punish for the contemptuous conduct is inherent and indisputable. *Seaward v. Paterson*, 1 L. R. Ch. Div. (1897) 545, 554, 76 Law Times (N. S.) 215; *In re Reese*, 107 Fed. 942, 47 C. C. A. 87, 90. We believe the above-mentioned distinction in contempt proceedings, between disobedience of the injunction by parties and privies and the conduct of others in contempt of the authority and commands of the court, to be elementary, and the sufficiency of the evidence in the case at bar to support conviction must be tested thereunder. The question discussed in the briefs, whether the general averment in the petition that the plaintiff in error "violated said injunctive order," authorized reception of this evidence to establish either class of contempt relied upon for conviction, is not involved in our view of the effect of the affidavits, incorporated in the petition, that they aver such facts and furnish notice for the introduction. The petition is plainly defective, however, in the averments to charge the plaintiff in error with knowledge of the injunction—stating alternatively that he "knew, or by the exercise of ordinary intelligence

might have known, of the issuance"—but laying out of view for the present inquiry the objection raised thereupon, we proceed to consideration of the versions of fact on which the finding and conviction are predicated, to ascertain their bearing and sufficiency.

The present proceedings arose out of notorious conditions of mob violence which attended a strike in Chicago, known as the "teamsters' strike," in April and May, 1905. We are not authorized, however, to consider upon this review either the serious questions, public or private, which were involved, or the effect of the disturbances and violence upon the business and welfare of the community, as pressed to attention in the argument in support of the judgment. The issues to be determined are not of riotous and unlawful conduct, in attack upon the teams and guards, nor whether the testimony tends to show commissions of offenses by the plaintiff in error against the state and public, either by way of inciting a mob to acts of violence or in breaches of the peace. Such offenses are not within the cognizance of the trial court, and the judgment cannot rest on their commission, however convincing the proof may appear. While the "contempt proceeding is sui generis," it is distinctly criminal in its nature (*Besette v. W. B. Conkey Co.*, supra), and the accused is clearly entitled to the benefits of the common-law presumption of innocence, with its strict requirement of proof for conviction, although the pleadings may not be subject to the technical rules of the criminal law.

Taking up the affidavits introduced in support of the charges of contempt, they plainly state a vicious attack upon two teams of the complainant and the persons attending as guards, by a mob and individuals named, for the manifest object of obstructing the teams and injuring the guards. They identify the plaintiff in error as one of the assailants, "in the uniform of a city fireman," and state: That he was following up the teams and guards, in their passage through the street; that he was observed "throwing stones at the colored men guarding the teams," was swearing at the guards, "calling vile names," and cried out to the crowd, to "hang the damned niggers"; and that he ultimately assaulted and struck one of the guards, after such guard was arrested by the city police force, was in their custody and either in a police wagon or "getting into it." The single witness, Dimick, called to testify upon the hearing, states only the last-mentioned assault upon the guard so arrested and in custody in the police wagon. These versions of fact, in substance—without a fact stated to connect the mob violence or individual attacks with parties named in the injunction, either as associations or individuals, or with express defiance of such injunction, and with no proof tending to show knowledge of the injunction or intent to defy its commands, aside from the alleged publications of the order in the public press and notices thereof borne upon the wagons thus interfered with—constitute the evidence upon which the plaintiff in error is adjudged guilty of contempt. On the part of the plaintiff in error, his presence when the conflict occurred is admitted, but his testimony is specific in denial of every act of violence or participation above mentioned, and he states, in substance, that his only part in the disturbance was to assist "the police to protect life and property," and that he did so assist in quelling the

riot and arresting rioters, in conformity with his understanding of his duty, as one of the city firemen. This version is supported by several affidavits, by policemen and other witnesses, and subsequent proceedings in the criminal court were introduced by way of corroboration. Further statements by these affiants, in reference to the conduct of persons acting as guards, are deemed immaterial in any view of the issues.

With the stories thus contradictory as to the participation and conduct of the plaintiff in error, we are impressed with the view indicated in the opinion of the trial court that it is difficult, to say the least, to ascertain the true version; but solution thereof is not involved here as a reviewable question. The findings by the court stated in the judgment are in general terms, in effect, that plaintiff in error, (a) with full knowledge of the injunction, (b) did willfully and in violation of its terms interfere with, "and aid and abet the defendants, or some of them, to said bill," in interfering with "the business of said the Employers' Teaming Company" and its employes and agents engaged therein, and (c) that he "has failed to show cause why he should not be attached and punished as for contempt." While we are not at liberty to refer to the opinion of the court for other or specific findings of fact, we assume for the purposes of the present inquiry that the above-mentioned statements of fact by the witnesses for the prosecution are adopted by the finding as the true version, and thus made conclusive here for the purposes of review; and it is further assumed that the deductions in the findings, as stated, amount to a finding of both of the classes of contempt above defined, namely, aiding and abetting violation of the injunction by a party, and contemptuous interference as an outsider. Thereupon, the question is presented whether these deductions are sustained by proof.

We are of opinion that each of the findings is unsupported, in any admissible view of the facts so established. The finding that the plaintiff in error had "full knowledge of the injunction"—a fundamental requisite for either charge of contempt—rests alone on the alleged publicity of the issuance, through newspapers and notices thereof which were posted on the wagons intercepted by the mob. No testimony appears of word or action on the part of the plaintiff in error, or in his hearing, in reference to the injunction; nor that his attention was directed to the wagons, their contents, or any notices thereon. He is clearly entitled to the benefit of "the presumption of innocence, as evidence in favor of the accused, introduced by the law in his behalf" (*Coffin v. United States*, 156 U. S. 432, 458, 460, 15 Sup. Ct. 394, 39 L. Ed. 481, reaffirmed in the recent opinion of this court in *Dalton v. United States*, 154 Fed. 461, 83 C. C. A. 317), which arises alike in respect of notice and conduct, as "an instrument of proof created in his favor"; and the mere inference of "full knowledge," derived solely from the above-mentioned facts, is without force, as we believe, to overcome the express denial of knowledge on the part of the accused, fortified by the presumption thus defined. The finding of such knowledge therefore is unsupported by the needful proof to authorize conviction and cannot be upheld under the fore-

going view. So the question whether the insufficient averment there-
of in the petition constitutes reviewable error does not require solution.

Upon these premises therefore, that knowledge of the injunction is unproven, and that no proof appears that the plaintiff in error was engaged by or with any person or association enjoined in its violation, we are of opinion that the evidence fails to establish cause for his conviction of contempt of court, within either of the classes found and adjudged against him. The misconduct stated by the witnesses for the prosecution—in assailing and abusing the guards, who were protecting the movement of the teams, and inciting the mob to like interference—however criminal in its nature and disturbing in purpose and effect, thus standing alone, does not constitute contempt within either definition of such offense. Willful defiance and contempt of the authority and order of the court cannot be intended or committed without information that such authority has been exercised in the issuance of an injunction protecting the movement and services thus interfered with. Nor is the alleged misconduct brought within the finding of violation of the order, in aiding or abetting “the defendants, or some of them, to said bill of complaint, in committing the acts and grievances complained of,” for the further reason that it does not appear in evidence that any such parties were engaged in the attack, directly or indirectly. In reference to the alleged subsequent assault upon one of the guards, when such guard was under arrest and in the custody of the police authorities, we deem it sufficient to remark that the guard was not then serving as escort, and any offense then committed was against the dignity of the state, and not that of the court issuing the injunction.

For want of evidence that the plaintiff in error was guilty of contempt of court in his alleged misconduct, the judgment of the circuit court is reversed, with direction to discharge the rule against the plaintiff in error.

PHILIPPI COLLIERIES CO. v. THOMPSON.

(Circuit Court of Appeals, Fourth Circuit. May 6, 1908.)

No. 758.

1. **VENDOR AND PURCHASER—CONSTRUCTION OF CONTRACT—CONSTRUING INSTRUMENTS TOGETHER.**

Where a deed to property and notes for a part of the purchase money are executed at the same time, they should be regarded as one instrument and read together.

2. **SAME—INTEREST PAYMENTS—ENFORCEMENT OF LIEN RESERVED IN DEED.**

A deed to property, executed in September, 1905, after providing for a deferred payment of purchase money on September 1, 1906, with interest, contained the following further provisions: “And the remaining sum * * * is to be paid in nine equal annual payments * * * from September 1, 1906, with interest on said annual payments from September 1, 1905, at the rate of 6 per cent., payable annually, as evidenced by their negotiable promissory notes for said several sums bearing even date herewith, * * * to secure which deferred payments a vendor's lien is hereby expressly retained. * * * It is expressly understood that, in case default be made in the payment of any of said deferred payments of purchase money or the accrued annual interest when due, then

and in that event all remaining unpaid payments shall be immediately due and payable." The notes were severally made payable September 1, 1907, and each year thereafter, "with interest at the rate of 6 per centum per annum from September 1, 1905, until paid." *Held* that, construing the deed and notes together as one contract, the interest on the entire amount of the deferred payments was payable annually, and that on the failure of the purchaser to pay the first year's interest on September 1, 1906, the vendor was entitled to declare the entire amount due and to foreclose the lien therefor; such suit being based upon the deed, and not upon the notes.

Appeal from the Circuit Court of the United States for the Northern District of West Virginia, at Clarksburg.

Wm. A. Glasgow, Jr. (John Bassel and Edward W. O'Meara, on the briefs), for appellant.

John W. Davis (Ira E. Robinson, Warder & Robinson, and Davis & Davis, on the briefs), for appellee.

Before PRITCHARD, Circuit Judge, and WADDILL and McDOWELL, District Judges.

PRITCHARD, Circuit Judge. This is an appeal from a decree of the Circuit Court of the United States for the Northern District of West Virginia. On the 22d day of September, 1905, Albert Thompson and wife sold and conveyed to the Philippi Collieries Company certain coal property, with the improvements thereon, in Barbour county, W. Va. The price which the purchaser agreed to pay was \$400,000, and of that sum \$50,000 was paid in cash and the remainder to be paid as follows: Twenty-five thousand dollars, with interest at 6 per cent., on March 1, 1906; \$25,000, with interest at 6 per cent., on September 1, 1906; "and the remaining sum of three hundred thousand dollars (\$300,000) is to be paid in nine (9) equal annual payments of thirty-three thousand three hundred and thirty-three dollars and thirty-three cents (\$33,333.33) each, from September 1, 1906, with interest on said annual payments from September 1, 1905, at six per cent. (6 per cent.), payable annually, as evidenced by their negotiable promissory notes for said several sums, bearing even date herewith and payable at the First National Bank of Philippi, Philippi, W. Va., to secure which deferred payments a vendor's lien is hereby expressly retained upon all the property by this deed conveyed." On March 1, 1906, the purchaser (appellant) paid the note for \$25,000 then due, with interest at 6 per cent. from September 1, 1905. On September 1, 1906, the purchaser paid the note for \$25,000 then due, with interest at 6 per cent. from September 1, 1905. After payment by the purchaser of \$100,000 of principal and \$2,250 of interest, on account of the price of the property, on September 1, 1906, the vendor (appellee) demanded that, in addition to the payment of the note then due, the purchaser should pay \$18,000, the interest claimed from September 1, 1905, to September 1, 1906, one year, on \$300,000, the remainder of the purchase money evidenced by the nine negotiable promissory notes above mentioned. The purchaser declined to pay this \$18,000 then, on the ground that he was only required to pay the interest each year upon the note becoming due. The vendor claimed that the purchaser

was in default by reason of failing to pay the \$18,000 above mentioned, and by reason thereof that the entire balance of purchase money, to wit, \$300,000, with interest thereon from September 1, 1905, amounting to \$18,000 became due and payable.

The important part of the deed, so far as the questions presented by this record are concerned, is to be found on page 47, as follows:

"The residue of said purchase money, to wit, three hundred and fifty thousand dollars (\$350,000), is to be paid as follows, to wit: Twenty-five thousand dollars (\$25,000) is to be paid on the 1st day of March, 1906; with interest at six per cent. (6 per cent.) from September 1, 1905; twenty-five thousand dollars (\$25,000) on September 1, 1906, with interest at six per cent. (6 per cent.) from September 1, 1905. And the remaining sum of three hundred thousand dollars (\$300,000) is to be paid in nine (9) equal annual payments, of thirty-three thousand three hundred and thirty-three dollars and thirty-three cents (\$33,333.33) each, from September 1, 1906, with interest on said annual payments from September 1, 1905, at six per cent. (6 per cent.), payable annually, as evidenced by their negotiable promissory notes for said several sums, bearing even date herewith and payable at the First National Bank of Philippi, Philippi, W. Va., to secure which deferred payments a vendor's lien is hereby expressly retained upon all the property by this deed conveyed. It is expressly understood that in case default be made in the payment of any of said deferred payments of purchase money, or the accrued annual interest when due, then and in that event all remaining unpaid payments shall be due and payable," etc.

The nine notes referred to in the deed as evidence of the payments of principal and interest to be made were uniform and of the following form:

"No.

"\$33,333.33/100.

Philippi, W. Va., September 22, 1905.

"On the 1st day of September, 1907, after date, with interest at the rate of six per centum per annum from September 1, 1905, until paid, Philippi Collieries Company promises to pay the order of Albert Thompson thirty-three thousand three hundred and thirty-three and 33/100 dollars, for value received, negotiable and payable at the First National Bank of Philippi, West Virginia. This note is one of eleven, two of which are for twenty-five thousand dollars each, and the remaining nine for thirty-three thousand three hundred and thirty-three and one-third dollars each, the first two payable in six and twelve months from September 1, 1905, respectively, and the other nine in two, three, four, five, six, seven, eight, nine, and ten years from said September 1, 1905, respectively, with interest from that date, negotiable and payable at the First National Bank of Philippi, West Virginia, and secured by a vendor's lien retained in the deed this day executed by Albert Thompson to said Thompson to said corporation, the Philippi Collieries Company, for certain lands, coal and other property situated in Barbour county, West Virginia, and the right is expressly reserved in each and all of said notes to pay the whole number thereof and the amount due thereon at any time upon the maker giving three months' notice to said Thompson, or his assignee of its purpose so to do.

"Philippi Collieries Company,

"By Robert G. Young, Its President.

"Attest: Albert Blackburne, Secretary."

On January 21, 1907, Albert Thompson filed his bill against the Philippi Collieries Company in the Circuit Court of the United States for the Northern District of West Virginia to enforce the vendor's lien reserved in his deed to the Philippi Collieries Company, alleging that by reason of the purchaser's failure to pay the \$18,000 of interest on the \$300,000 of purchase money on September 1, 1906, the entire

\$300,000. with interest from September 1, 1905, became then due and payable. On February 20, 1907, the defendant answered, and, proof having been taken on other points presented by the bill, on the 26th of February, 1907, a decree was entered by the Circuit Court, declaring that by reason of the failure of the purchaser to pay, on the 1st of September, 1906, the \$18,000 of interest then accrued on the \$300,000 balance of purchase money, evidenced by the nine notes, payable annually on the 1st day of September, from 1907 to 1915, both inclusive, the entire balance of the purchase money became due and payable on September 1, 1906. The decree required the defendant to pay to the plaintiff the sum of \$326,750, with interest thereon from February 26, 1907, and, unless the same was paid "within the period of ninety (90) days next following the date of" the decree, the special masters therein appointed were required to sell the property conveyed to the Philippi Collieries Company by Albert Thompson and apply the proceeds to the discharge of the vendor's lien aforesaid. From this decree the appellant, the Philippi Collieries Company, appealed, on the ground that up to the 1st of September, 1906, it had paid to Thompson the sum of \$75,000; that on that day a further note of \$25,000, with interest from September 1, 1905, became due and payable, and was paid by it; and that the interest upon the remaining nine notes, amounting in all to \$300,000, was not then due and payable, and that the court below erred in holding that any part of the interest upon said notes became "due and payable" on September 1, 1906.

The question involved in this controversy is as to whether the interest on the several notes executed by appellant becomes due and payable annually. In order to correctly determine this question, it becomes necessary to consider the transaction between the parties in its entirety. This is the only means by which we can arrive at a correct conclusion as to the intention of the parties at the time the contract was consummated. The language of that portion of the deed, or vendor's lien, which relates to the matters at issue, reads as follows:

"And the remaining sum * * * is to be paid in nine annual payments * * * from September 1, 1906, with interest on said annual payments from September 1, 1906, with interest on said annual payments from September 1, 1905, at the rate of 6 per cent., payable annually. * * * It is expressly understood that in case default be made in the payment of any of said deferred payments of purchase money, or the accrued annual interest when due, then and in that event all remaining unpaid payments shall be immediately due and payable," etc.

Thus it is expressly provided, first, that, if default shall be made of any deferred payments of the purchase money, in that event all the remaining payments shall be due and payable. It is also provided as a condition that, when the accrued annual interest shall become due and default shall be made in the payment of the same, in that event all the remaining unpaid installments shall become due and payable. If these notes represented the entire contract, the contention of appellant that the interest on the same is not due until the maturity of each note would undoubtedly be true; but it must be borne in mind that at the time the notes were executed the deed was also executed, and that the execution of the notes with full knowledge of the provisions

contained in the deed had the effect of writing into the notes the provisions of the deed, thereby making them a part of the contract between the parties. The acceptance of the deed by the grantee made it a complete contract, and the parties are bound by all the provisions and covenants which it contains, and are affected with notice of them.

It is a well-established rule of construction that written instruments relating to a particular transaction should be construed so as to give force to the entire agreement and in order that each provision of the same, if possible, may prevail. In the case of *Low et al. v. Blackford et al.*, 87 Fed. 392, 31 C. C. A. 15, in the syllabus, it is stated:

"A mortgage and bonds and coupons secured thereby are to be construed as one contract."

Also in the case of *Brewer v. Penn Mutual Life Ins. Co.*, 94 Fed. 347, 36 C. C. A. 289, it is said:

"Where notes and a deed of trust securing the same are executed at the same time, they should be regarded as one instrument and read together."

In the case of *Kitchin v. Grandy*, 101 N. C. 97, 7 S. E. 668, among other things, it is stated:

"The guaranty was accepted on these terms, and most clearly it limits the claim of the defendant upon the notes and crops to \$1,500, and excludes all above that sum. It cannot be necessary to refer to authority for the proposition that papers executed at the same time, or acted upon conjointly, together constitute the contract, and ascertain the respective relations and obligations of the parties to it."

The following cases fully sustain this view of the matter:

"Where a deed of trust and mortgage are executed at the same time to secure the same notes, they should be construed as one instrument." *Wheeler & Wilson Mfg. Co. v. Howard* (C. C.) 28 Fed. 741.

"The decided weight of the opinion in this country is that a note and mortgage executed at the same time and as one transaction are to be construed together, and so far as possible construed as one instrument." *Swearingen v. Lahner*, 98 Iowa, 147, 61 N. W. 431, 26 L. R. A. 765, 57 Am. St. Rep. 261.

"The mortgage may describe the note as well, and thus qualify the terms of the note. For instance, where a note was given payable in five years from date, with interest at 10 per cent., and at the same time a mortgage was given to secure the payment of the note, in which it was stipulated that the interest should be 'payable annually,' the agreement was held to be that interest at 10 per cent. should be payable annually, and that foreclosure might be had for the nonpayment of interest." 1 Jones on Mortgages, § 71.

"Where a note is secured by mortgage, and there is a provision in the mortgage not contained in the note, the mortgage will control." *Daniel on Negotiable Instruments*, § 835.

"A note and a mortgage securing the same, when executed contemporaneously, are to be construed as constituting one contract, and the stipulations of the mortgage with reference to the maturity of the debt because of a failure to pay interest when due will be given effect, so as to cause the note to become due and payable before the time expressed on its face." *Evans v. Baker*, 5 Kan. App. 68, 47 Pac. 314.

The principles enunciated in the foregoing cases fully sustain the contention of counsel for the appellee in the case at bar. The notes being silent as to when interest shall become due, it is well settled that the provisions of the mortgage or vendor's lien should control. There is nothing contained in the vendor's lien inconsistent with the conditions contained in the notes. It is provided in the notes that interest

on the same shall be paid at the rate of 6 per cent. per annum, and it is expressly provided in the deed that the payments shall be made annually, and that in case of default in the payment of interest annually, or of principal at maturity, the whole amount of the note shall become due and payable. The deed, from the very nature of the transaction, is controlling, especially in view of the fact that the notes are silent as to the time of payment of interest. The remedy afforded the vendee upon the payment of the amount due the vendor is contained in the deed, which is in the nature of an agreement to convey title to the premises when the several amounts as evidenced by the notes shall have been paid.

Appellant had full knowledge of the provisions contained in the deed as to the payment of annual interest at the time the notes were executed, and it necessarily follows that the execution and delivery of the notes to the vendor, under such circumstances, was in the nature of an acceptance of the terms contained in the deed as to the time when the interest should become due and payable. The vendor, on the one hand, contracted with the vendee that upon the happening of certain conditions, to wit, the payment of the interest annually as it became due and the payment of the notes at maturity, he would make a good and sufficient title to the premises in question. The vendee, on the other hand, executed the notes in question and agreed to pay the principal at the times specified therein, and made no provision as to the time of the payment of interest, thereby assenting to the provisions of the deed with respect to the payment of the same as a part of the contract between the parties. The notes are simply evidence of indebtedness, and beyond this no special importance in a case like the one now before us can be attached to them.

This is not an action at law based upon the notes, or any of them, but is a suit in equity, predicated upon the deed, for the purpose of enforcing a lien which it provides in accordance with the terms of such deed, or vendor's lien, by which this lien was created. The vendor, having reserved this lien for his protection, has elected to come into a court of equity for the purpose of enforcing the remedy therein provided; the notes being used simply for the purpose of indicating the amount of the indebtedness and nothing more. The vendee, at the time of the purchase of the property in question, with full knowledge of the provisions of the lien reserved by the vendor, acquiesced in the same. Therefore the only question before us is as to whether there has been a compliance on the part of the vendee with the terms of the instrument upon which the vendee relies for the enforcement of his lien, and, it appearing that the stipulations of the deed have not been complied with, it becomes the duty of the court to enforce the same by proper decree.

We have carefully considered the case of *Railway v. Sprague*, 103 U. S. 756, 26 L. Ed. 554, and are of opinion that it does not apply to the case at bar. There is an obvious distinction between the facts in that case and the circumstances under which the vendor's lien was retained in this instance. There a mortgage was executed for the purpose of securing the payment of the bonds described on the face of

the mortgage. In that case the bonds which were intended to be put in circulation on the market constituted the original and terminating contract, and it was the intention of the parties, by the execution of the mortgage, to provide the means by which the payment of the same was to be secured. In a case like that, where notes or bonds are issued for the purpose of placing the same in circulation, it is the policy of the law to treat the holders of the same as innocent purchasers, and as such it would be manifestly unfair to hold that they had notice of any provision not appearing on the face of such instruments. In the case of *Coles v. Withers*, 33 Grat. (Va.) 195, the court clearly draws the distinction between securities of the former and latter classes in the following language:

"Indeed, it may be a question whether a reserved lien is not of a higher nature than a mere mortgage security. In many cases the mortgage is treated as a mere incident to the debt, whereas the lien reserved is an express charge inherent by its nature upon the land, which, in equity, is a natural primary fund for its payment. However that may be, a vendor who reserves a lien upon the land, and takes also the bond of the vendee for the purchase money, has two securities, to either of which he may resort at his pleasure. The lien is a security not for the bond, but for the debt. Clearly, therefore, the mere cancellation or the surrender of the bond cannot extinguish the debt, and the lien given for its payment, unless the transaction manifestly and plainly was so intended. So long as the debt exists, the court will never presume the chief security taken for its payment has been surrendered, without satisfaction, unless upon the clearest and most convincing testimony."

And further in the opinion in the same case it is said:

"These securities should not be confounded with mere personal securities, or obligations for the payment of money of any class or grade whatever. A bond, promissory note, or a simple contract for the payment of money in any shape or form is a personal contract, which surely cannot, at law or in equity, be assimilated to or governed by the principles applicable to a mortgage of any description. The plaintiffs do not ask to have their specialty or simple contract enforced as a means of obtaining payment from their debtors. They are here as vendors against the defendant as their vendee, and they claim the benefit of the lien they hold as an incident to that relationship."

For the reasons herein stated, the judgment of the court below is affirmed.

Affirmed.

WADDILL, District Judge (concurring). I concur in the result reached by the court, but base my conclusion upon the fact that this is a proceeding to enforce a vendor's lien for unpaid purchase money for property sold, expressly reserved upon the face of the deed or contract of conveyance by the vendor. In such case, where there is uncertainty as to the meaning of the undertaking regarding the time of payment of interest upon arrearages of the purchase money, the conveyance, constituting the vendee's muniment of title, should be looked to to elucidate the ambiguity, and control in the ascertainment of the parties' rights thereunder, rather than any note, bond, or other evidence of indebtedness given by the vendee for the payment of such unpaid purchase money. *Coles v. Withers*, 33 Grat. (Va.) 186, 195, 196, and cases cited. In the ordinary foreclosure suit, or suit to enforce the lien of a mortgage, trust deed, or other security upon prop-

erty, executed by the debtor, or mortgagor, or lienor, for the purpose of securing payment of obligations, whether in the shape of mortgage bonds or notes, or other evidence of debt, in case of ambiguity in the terms of the mortgage, trust deed, or other obligation so given to secure such indebtedness, as respects the payment of interest thereunder, I have no doubt that the evidence of debt thus given under an instrument in the hands of the holder thereof would control where, as in this case, the time of payment of interest is explicitly stated in the evidence of debt. *Railway Co. v. Sprague*, 103 U. S. 756, 26 L. Ed. 554. A different rule doubtless prevails if the time of payment of interest in the evidence of debt is not clear and explicit; but where it is, as here, under the ordinary mortgage or trust deed, it, and not the instrument securing the same, should control.

JOHNSON v. UNITED STATES.

(Circuit Court of Appeals, First Circuit. July 2, 1908.)

No. 744.

1. BANKRUPTCY—OFFENSES—PROSECUTION—TRIAL—RECEPTION OF EVIDENCE—OBJECTIONS.

On trial of a bankrupt for concealing property belonging to the estate from the trustee, a general objection to the introduction of the bankrupt's schedules of assets and liabilities was sufficient; the only possible ground being that they were incompetent under Rev. St. § 860 (U. S. Comp. St. 1901, p. 661), declaring that no pleading, etc., obtained from a party or witness by means of a judicial proceeding, should be used against him in any court of the United States in any criminal proceeding, etc.

2. SAME—EVIDENCE—RECORDS—BANKRUPTCY SCHEDULES.

In a prosecution of a bankrupt for concealing property belonging to the estate, the schedules filed by him are inadmissible against him, under Rev. St. § 860 (U. S. Comp. St. 1901, p. 661), providing that no pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding, shall be given in evidence or in any manner used against him in any court of the United States in any criminal proceeding, since such schedules, indicating the parties to the proceeding, the extent of their supposed claims, and the subject-matter of the distribution, as required by Bankr. Act July 1, 1898, c. 541, §§ 7 (8) 17 (3), 30 Stat. 548, 551 (U. S. Comp. St. 1901, pp. 3425, 3428), are in the nature of pleadings, or at least are within the policy of the law, as indicated by the change thereof made by the provisions of section 860.

3. SAME—NATURE OF BANKRUPTCY PROCEEDING.

A bankruptcy proceeding is a proceeding in rem.

4. SAME—CONCEALMENT OF PROPERTY.

The offense of concealing property by a bankrupt from his trustee consists of a continuous concealment of the property from the trustee during the whole course of the bankruptcy proceedings, or beyond, and is therefore not necessarily consummated by an omission of the property from the schedules.

5. SAME—EVIDENCE.

In order to prove a continuous concealment of property by a bankrupt from his trustee, it is not necessary to take up each moment of the bankrupt's life while the proceedings lasted, and prove what he did as a means of proving what he did not; it being sufficient to introduce secondary evidence of the property disclosed by the bankrupt, and he

being entitled at his election to introduce his schedules to show that the property claimed to have been omitted was in fact included, as a matter of defense.

G. SAME—REPRESENTATIONS.

The schedules of a bankrupt are a representation that the property set forth is all the property known to the bankrupt, and hence, on an indictment against the bankrupt for concealing property from the trustee, cannot be admitted on the ground that they are offered, not for the purpose of putting in evidence the statements contained in them, but only to show the fact that other statements are not contained in them.

In Error to the District Court of the United States for the District of Massachusetts.

William H. Garland, Asst. U. S. Atty. (Asa P. French, U. S. Atty., on the brief).

Harvey H. Pratt, for plaintiff in error.

Before HOLMES, Circuit Justice, and COLT and PUTNAM, Circuit Judges.

HOLMES, Circuit Justice. The plaintiff in error, hereafter called the defendant, was indicted for concealing from the trustee of his estate in bankruptcy property belonging to the estate. He was convicted and sentenced, and the case is here on exceptions to the admission of evidence and to other rulings of the court. It is objected generally that most of the exceptions were not taken in proper form, as required by Rule 11 (150 Fed. xxvii, 79 C. C. A. xxvii) and otherwise. The objection might be serious with regard to most of them if we saw more merit in them than we do; but we do not need to consider it except in a single case, and in that we think that it should not prevail.

The Government, after putting in the creditors' petition filed against the defendant, the order appointing a receiver, notice to the bankrupt, the adjudication, the appointment of the trustee, the order of reference and the list of debts, offered the schedules of assets and liabilities filed by the bankrupt in the District Court. The defendant objected, the objection was overruled, the schedules were admitted, and the defendant excepted. It is said that the grounds of the objection should have been stated, but we are of opinion that the only possible ground was sufficiently obvious to entitle the defendant in fairness to have it considered by us upon its merits.

The ground, of course, was Rev. St. § 860 (U. S. Comp. St. 1901, p. 661):

"No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture: Provided, that this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid."

The Government argues that the schedules are not pleadings, discovery or evidence, and that therefore the section does not apply; but we are not satisfied that the fagot can be taken to pieces and broken stick by stick in this manner so easily. We quite agree that vague

arguments as to the spirit of a constitution or statute have little worth. We recognize that courts have been disinclined to extend statutes modifying the common law beyond the direct operation of the words used, and that at times this disinclination has been carried very far. But it seems to us that there may be statutes that need a different treatment. A statute may indicate or require as its justification a change in the policy of the law, although it expresses that change only in the specific cases most likely to occur to the mind. The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before.

This section of the Revised Statutes goes beyond and outside of the Fifth Amendment. It applies, even to a sworn bill or answer in chancery, what is said to be the rule of common law, that pleadings are not evidence against the party concerned. Langd. Eq. Pl. § 33; *Boileau v. Rutlin*, 2 Exch. 665. It makes this a general provision, and its object seems to us clear. We think that object was to prevent the required steps of the written procedure in court preliminary to trial from being used against the party for whom they were filed. We should be surprised if an allegation in a writ should be held to be outside the protection of the statute, if there should be a case in which that protection was needed. On the same principle we think that schedules in bankruptcy are protected. We can see no reason that would apply to an answer in equity that does not apply to them. They are required by the law. They are a regular step in the written procedure preliminary to the proof of facts. If necessary, it might be argued that they are pleadings within the meaning of the act. Bankruptcy is a proceeding in rem. The schedules indicate those who are to be made parties to the proceeding, the extent of their supposed claims, and the subject-matter of the distribution. Bankruptcy Act July 1, 1898, c. 541, §§ 7 (8), 17 (3), 30 Stat. 548, 551 (U. S. Comp. St. 1901, pp. 3425, 3428). They have such characteristics of pleadings as are possible at that stage of a proceeding of this kind against all the world.

It is true that in *Tucker v. United States*, 151 U. S. 164, 14 Sup. Ct. 299, 38 L. Ed. 112, the decision takes up the words of the section and discusses them somewhat as the Government has done. But the affidavit that was admitted in that case fell under the head of evidence, if under any, and therefore by express limitation had to be "obtained from" the prisoner. As it appeared to have been filed voluntarily it was held to be excluded from the privilege by the very words of the act. In *re Kanter* (D. C.) 117 Fed. 356, is not an authority in any aspect. Compare *Jack v. Kansas*, 199 U. S. 372, 26 Sup. Ct. 73, 50 L. Ed. 234; *Hale v. Henkel*, 201 U. S. 43, 68, 26 Sup. Ct. 370, 50 L. Ed. 652.

But it is said that filing the schedules was an act. It was a representation that the property set forth was all the property known to the

bankrupt to which the trustee had a right. If the offense punished by the statute had been an active misrepresentation, there might be force in the argument that there was an implied exception from the statute, even as we read it, analogous to the express exception in the case of perjury. But the offense is not making a misrepresentation at a given time and place; it is the continuous concealment of the property from the trustee during the whole course of the bankruptcy proceedings or beyond. The omission from the schedule would amount to nothing if the bankrupt had disclosed the property to the trustee. To prove this continued concealment, it is not necessary, of course, to take up each moment of the bankrupt's life while the proceedings lasted, and to prove what he did as a means of proving what he did not. The moment of filing the schedules is no more important than any other moment, and although the fact of a misrepresentation in them would corroborate testimony that certain property was not disclosed, it is like any other corroborative evidence and is not necessary in order to make out the offense. The Government asks what answer it could give to the suggestion that the schedules might disclose the property. The answer is plain. The defendant was free to put them in.

What we have said suggests a part of the answer to another objection that might be urged. It might be said that if the schedules are not put in, their contents must be proved by secondary evidence. That they did not set forth the property was a part of the import of the trustee's testimony that he never was informed of it. But when it is necessary to cover a considerable time by a negation, it would be intolerable if the general result should be excluded by the suggestion that there was better evidence for one moment of that time. We believe that it has been held that the proper way of proving that a certain matter was not mentioned in a particular conversation is to prove what was said. But no one would maintain that, in a case like this, the trustees must reproduce all the possibly many conversations with the bankrupt. If the statutes forbid the Government to put in the schedules and yet require the negation to be proved, by implication they permit secondary evidence as to that moment and secure the rights of the defendant by allowing him to put the documents in.

The Government argues further that if it be assumed that the schedules did not disclose the property, the statements contained in the schedules were not given in evidence, but the fact that other statements were not contained in them. This refinement does not need much answer. If it were desired to prove that a man did not say a certain thing at a certain time, proof of what he did say might establish it and would be evidence and used as evidence of the *factum probandum*. Moreover, the schedule was a representation that the property set forth was all the property known to the bankrupt, and therefore an affirmative act in aid of the concealment, as we already have said.

In the present case the schedules were filed in an involuntary proceeding, in accordance with a requirement of the bankruptcy act, § 7 (8). Therefore it would be possible to take a distinction between this case and that of voluntary proceedings. But such a distinction

naturally would be open to doubt, and we prefer to put our judgment on the broad ground that the schedules are protected by Rev. St. § 860, to whichever class the proceedings belong.

The judgment and the verdict in the District Court are set aside, and the case is remanded to that court for further proceedings in accordance with law.

McSHERRY MFG. CO. et al. v. DOWAGIAC MFG. CO.

(Circuit Court of Appeals, Sixth Circuit. July 23, 1908.)

No. 1,667.

1. APPEAL AND ERROR—REVIEW.

Where the master, on an accounting in a suit for infringement of a patent, has made a finding of damages in favor of the complainant, and the action of the Circuit Court in overruling an exception to such finding is assigned as error, on appeal the duty is imposed on the Appellate Court to examine the evidence to ascertain whether there was any legal evidence to sustain the finding.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4011-4018.]

2. SAME—DAMAGES RECOVERABLE.

Where complainant, in a suit for infringement, has based its claim to recover damages on its loss of profits on sales prevented by defendants' sale of infringing articles, but has failed to prove by competent evidence that it would have made such sales, it cannot change its ground in the appellate court and recover on the basis of a reasonable royalty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1070-1078.]

On Petition for Rehearing.

For former opinion, see 160 Fed. 948.

COCHRAN, District Judge. 1. Counsel for appellee notes the fact that the quotation made in the opinion from Walker on Patents is from the first edition thereof, and that, though the statement quoted was carried into the second edition, it was omitted from the third and fourth. It is uncertain whether he claims that this quotation states the law incorrectly. No inference can be drawn from its omission from the later editions of his work that Walker thought that it did. The same law is stated there, though in somewhat different and more expanded form. Possibly in saying that the patentee must "show" certain things he put the matter too strongly, as this word might be taken to mean that the patentee must demonstrate the existence of those things. To prevent such misconception, in the second edition, he added these words:

"But these points may be sufficiently established without being demonstrated, because demonstration would generally be impossible and because every reasonable doubt relevant thereto is to be resolved in favor of the plaintiff."

In the fourth edition he put the matter in this way. He said that evidence as to the patentee's ability to supply the articles "must be direct and strong" and as to whether the persons who bought the infringing articles from the infringer would have bought them from the

patentee had no infringer interfered, "though not necessarily direct, must at least be legitimate circumstantial evidence," and where the infringement was wanton it "need not be so strong as where it was unintentional or was the result of error of information or of judgment."

In this connection we would direct attention to the decision of the Supreme Court in the case of *Boesch v. Graff*, 133 U. S. 697, 10 Sup. Ct. 378, 33 L. Ed. 787. There, the patentee granted no licenses and had no established license fee, but supplied the demand for the patented article, a lamp burner, and was able to supply the demand. The damages claimed were on account of reduction of prices, the right to recover which stands on exactly the same ground as damages on account of lost sales. The master had found that the infringement was willful, wanton, and persistent, and for plaintiff as to the damages claimed, and his action had been affirmed by the lower court. On appeal the decree was reversed. Mr. Chief Justice Fuller said:

"When, however, a plaintiff seeks to recover because he has been compelled to lower his prices to compete with an infringing defendant, he must show that his reduction in prices was due solely to the acts of the defendant, or to what extent it was due to such acts. *Cornely v. Marckwald*, 181 U. S. 159, 9 Sup. Ct. 744, 33 L. Ed. 117. There must be some data by which the actual damages may be calculated. *New York City v. Ransom*, 23 How. (U. S.) 487, 16 L. Ed. 515; *Rude v. Westcott*, 130 U. S. 152, 9 Sup. Ct. 463, 32 L. Ed. 888."

It was held that there were no such data in that case, because, as the master had found, there had been on sale in the market during the infringing period lamp burners of the same general class as plaintiff's. Here we have that exact situation. Owing to the fact that during the infringing period many other shoe grain drills besides appellant's, infringing and not infringing, and other grain seeding machinery, were to be found on sale in the market in competition with appellee, it is impossible to say how many, if any, of the sales made by appellant were sales lost by appellee.

2. The result of our consideration of the evidence before the master was a conclusion that there was no legal evidence whatever that appellee would have sold any certain number, at least, of its shoe grain drills to appellant company's customers had it not sold them, and we took pains to set forth quite fully the substance of that evidence. In the elaborate brief filed in support of the petition for rehearing no attempt is made to attack this showing in any substantial particular; but it is claimed that in so carefully considering that evidence—"wading through it," according to counsel—we have assumed the function of a master, which we had no right to do. The master had found in favor of the appellee the profits which it would have made had it sold the number of shoe grain drills which appellant company sold in addition to those which it did sell. To this finding the appellant company excepted. This exception imposed on the lower court, and the assignment of that court's ruling against the exception imposed on this court, the duty of considering the evidence carefully to see if there was any legal evidence to support this finding, and that is what we did.

3. It is urged very earnestly that appellee is entitled to a reasonable royalty on the shoe grain drills sold by the appellant company. In support of this position a certain statement in the first three editions of Walker on Patents (section 563), and the authorities cited in support thereof are relied on. That statement is in these words:

"Where damages cannot be assessed on the basis of a royalty, nor on that of lost sales, nor on that of hurtful competition, the proper method of assessing them is to ascertain what would have been a reasonable royalty for the infringer to have paid."

In his fourth edition, Walker put the matter thus:

"Where damages cannot be assessed on the basis of a royalty, nor on that of lost sales, nor on that of hurtful competition, only nominal damages can be recovered for the infringement of a patent."

He thereby eliminated a reasonable royalty as an element of damages in a patent infringement case. This he did on the authority of *City of Seattle v. McNamara*, 81 Fed. 863, 26 C. C. A. 652.

It is urged that that decision was wrong, and that Walker erred in following it. The case of *McCune v. Baltimore & Ohio Railroad Company*, 154 Fed. 63, 83 C. C. A. 175, is cited as showing this.

We note that all the cases cited by Walker or by counsel for appellee which bear on the question of reasonable royalty were actions at law. This is a suit in equity in which appellee has sought and obtained a decree for the profits made by appellant company on shoe grain drills sold by it. Before, then, the question as to the right to recover a reasonable royalty in any case can be approached here, it must be held that a royalty, fixed or reasonable, can be recovered in equity as damages when plaintiff has sought and been allowed the profits made by defendant. But we do not find ourselves called on to determine this question, or the further question whether in any case a reasonable royalty can be recovered. It is sufficient to say that in the brief filed in support of the petition for rehearing for the first time in this case has it been urged that appellee was entitled to a reasonable royalty. Possibly in a case like this, where there have been a number of infringers, in view of the difficulty of proving in a suit against one that the sales made by him were lost by the patentee, if a reasonable royalty is recoverable, the prudent course is to sue for such royalty instead of the profits which would have accrued to the patentee had he made the sales. This course was not taken by the appellee. It staked its case on the right to recover profits lost by it and prepared it along that line. The record does not present data from which this court can determine what would be a reasonable royalty, nor would it be proper, even if we had power, to send the case back so that appellee might abandon its claim to such profits and seek a reasonable royalty.

4. It is still insisted that appellee was balked in its effort to prove that the sales made by appellant company were sales lost by it through action of the court taken at the latter's instance in the course of the preparation of the case, and that some effect should be given to this consideration. In so far as the action complained of was that had in Minnesota, to which reference is made in the opinion, no further

answer to the complaint need be made than what was there said; but attention is called to the facts that prior to that action appellant company's bookkeeper, when on the witness stand, refused to answer a certain question, that the lower court on application by appellee refused to compel him to answer, and that this court on application by appellee refused to direct the lower court by a writ of mandamus to direct the witness to answer. The testimony called for had not the slightest relevancy to the question as to whether appellant's sales had been lost by appellee. It was simply as to the prices at which the Minnesota Moline Plow Company had sold its customers the shoe grain drills which it had purchased from the appellant company. The appellee's motion to the lower court was to require the witness to answer as to said prices and as to whether a showing as to those prices was proper evidence in the accounting. That such was the scope of the testimony sought in this instance confirms us in the view intimated in the opinion that such was the scope of the testimony sought shortly afterwards in Minnesota. The appellee was then engaged in an attempt to make out the profits arising from appellant company's sales for which it was accountable, and the testimony sought which it was prevented from producing had a bearing on this matter and none other. There is not the slightest indication in this record that the appellee desired to bring out who the customers of the Minnesota Plow Company were with a view of putting them on the stand and inquiring of them whether they would have bought appellee's shoe grain drill had they not bought that of appellant company or in any other way through this information making this out. Appellant company's bookkeeper in his testimony gave the name of every customer it had for its shoe grain drill and the exact number and kind of shoe grain drills purchased by him. Yet this information was not followed up in any way to show that any of these customers would have purchased of appellee had they not bought of appellant company. Appellee, through its agents, knew exactly where appellant company came into competition with it, and how many, if any, of its old customers bought of appellant company instead of it. Certain of its managing agents testified, as pointed out in the opinion, as to certain customers lost by appellee. Yet this information and testimony was not followed up by any definite testimony tending to show how many sales appellee lost. We do not mean to intimate that the testimony of any of appellant company's customers that they would have bought of appellee had they not bought of it, with nothing else, would be sufficient to make out that appellee lost those sales. We express no opinion on this subject. The record indicates that appellee thought, as did the master and the lower court, that it was sufficient to make out a case of lost sales, that appellee could have supplied the shoe grain drills sold and appellant company was a wanton infringer, and that it is simply an afterthought that if it had not been for the refusal of said witnesses to answer in the particulars stated, and said courts had made them answer, the evidence would have been fuller along this line than it is.

5. It is further urged that the decree should be affirmed as to the individual defendants, because they filed no exceptions to the master's

report. It is thought that, notwithstanding the appellant company is not liable for any damages on account of lost sales, and it duly excepted to the master's report, the individual defendants, its officers, are liable because they did not except also. We do not find it necessary to decide whether they were bound to except also had the report included them. It is sufficient to say in response that the report was against the appellant company only. This was probably the reason why the exceptions were filed by it alone.

The petition for rehearing is overruled.

CUCCIARRE v. NEW YORK CENT. & H. R. R. CO.

(Circuit Court of Appeals, Seventh Circuit. April 14, 1908.)

No. 1,400.

1. TRIAL—INSTRUCTIONS—CURING ERROR.

In an action for injuries to a passenger, plaintiff claimed damages for alleged deafness, and the court instructed that the burden of proof was on plaintiff to show by a preponderance of the evidence that such condition was the result of the accident, and not of some other cause, and, if the jury were in doubt on that question, plaintiff could not recover any damages on account of such alleged deafness; that the jury could not speculate or guess as to what caused the deafness, but plaintiff must prove by a preponderance of the evidence that it was the direct result of the accident. At the close of the charge, plaintiff's attorney procured an instruction that plaintiff was not required to prove beyond a reasonable doubt that his condition was the direct result of the injury, but it was sufficient if he made such proof by a preponderance of the evidence. *Held* that, while the charge on such subject was erroneous, the error was cured by the instruction given at plaintiff's request.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 703-718.]

2. SAME—OBJECTIONS—WAIVER OF ERROR.

Where, at the close of the charge, plaintiff's counsel only requested a modification of the instructions on the burden of proof, and on this being allowed defendant's counsel asked if he was through, whereupon plaintiff's counsel said "I have nothing more to say," he thereby waived any objection to an instruction on the degree of care required of defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 683.]

3. REMOVAL OF CAUSES—CITIZENSHIP—EVIDENCE—FEDERAL JURISDICTION.

Plaintiff sued defendant, a foreign corporation, in the Illinois state courts, whereupon the cause was removed by defendant to the Circuit Court of the United States on a verified petition alleging that defendant was a citizen of New York and that plaintiff was a citizen of Illinois. No issue was taken on such petition, but at the trial on the merits it was proved incidentally that plaintiff was a minor 15 years of age, that he was born and the family to which he belonged had lived in Sicily until a month prior to the accident, and that the family other than the father, who was then dead, sailed for the United States a month preceding the accident, and were on their way from New York to Chicago when the accident occurred. *Held* that, in the absence of evidence as to where the father died or that the father was not a citizen of Illinois, the evidence was insufficient to establish that plaintiff was not a citizen of Illinois at the time he was injured so as to defeat federal jurisdiction.

4. SAME—PROCEEDINGS AFTER REMOVAL—OBJECTIONS TO JURISDICTION—WAIVER.

Where defendant, a foreign corporation, when sued by an alleged alien in the Illinois state courts, removed the cause to the federal Circuit Court for the Northern District of Illinois, it thereby waived any objection to the venue and its right to be sued in the federal district of its residence.

In Error to the Circuit Court of the United States, for the Eastern Division of the Northern District of Illinois.

James C. McShane, for plaintiff in error.

Ralph M. Shaw, for defendant in error.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

GROSSCUP, Circuit Judge. The action in the court below was to recover damages for personal injuries received by the plaintiff in error while a passenger for hire, upon the defendant in error's train, in the state of New York, the train having been derailed by running over a cow at a public road crossing, while running at a high rate of speed—the plaintiff in error's prima facie case being the establishment of these facts. In rebuttal of the prima facie case thus made, the defendant in error showed that at the crossing where the cow was run over, high board fences extended from the outer edge of the railroad right of way to the tracks; that the train approached this crossing from the east at a rate of speed of about forty miles an hour; that on account of a cut through which the train passed, about five hundred feet east of the crossing, and the high board fences, the engineer could not see the cow until he was close upon her; that he saw her first when he was within about two hundred and fifty feet of the crossing—the cow then being within about fifteen feet of the track, and either standing still or approaching the track; that she remained in his vision only about a second; and that it would have been impossible for him to stop the train before reaching the crossing. There was no other evidence bearing upon negligence unless it be that of the track foreman, who testified that the cow probably came on to the highway through a wagon gate opening from a field or orchard into the highway immediately north of the railway tracks—that gate having been seen by him to be open for some days prior to the accident. There was also some question as to whether plaintiff in error's deafness was due to the accident or not.

There are assignments of error relating to jurisdiction, and assignments relating to the merits; the latter being chiefly in the giving of instructions eight, nine and thirteen. These instructions are as follows:

Instruction 8:

"The court instructs the jury, that if you believe, from the evidence in this case, that the plaintiff is now totally deaf, nevertheless if, after carefully considering all the evidence in the case, you are in doubt as to whether or not the total deafness is the result of the accident complained of, or the result of some other illness, or infectious disease, not attributable to the accident, then you are instructed that the plaintiff is not entitled to recover from the defendant, because of any alleged deafness. The burden of proof, as I have stated, is upon the plaintiff to prove by a preponderance of the evidence, that the condition now complained of was the result of the accident, and was not the result of some other cause. If you are in doubt upon this question, you are

instructed, that the plaintiff is not entitled to recover any damages in this cause because of his alleged deafness."

Instruction 9:

"You are instructed that it is not the province of the jury to speculate, or to guess, as to what caused the present deafness of the plaintiff, if you believe that he is deaf. As I have previously stated to you, the burden is upon the plaintiff to prove by a preponderance of the evidence that the condition complained of was the direct result of the accident. If, after considering all the evidence in this case, you are in doubt as to whether or not the plaintiff's deafness, if you believe he is deaf, was the result of the accident, or was the result of some other cause, then the plaintiff is not entitled to recover any damages because of the said alleged deafness, and you must not speculate or guess upon this subject. Before the plaintiff can recover any damages, for any alleged deafness in this case, as I have stated to you, the burden is upon the plaintiff to prove by a preponderance of the evidence the fact that the alleged deafness is the direct result of the accident in question."

Instruction 13:

"The court instructs you, that the law did not exact, from the defendant in this case, all the care and diligence which the human mind may possibly conceive, or such as would render the transportation of the plaintiff free from peril. The duty which the defendant, in this case, did owe to the plaintiff has sometimes been stated as being the highest degree of care, but the court instructs you that the phrase 'highest degree of care' does not mean that the defendant was liable, to the plaintiff, for failure to take such precaution as would necessarily insure the plaintiff, Cucciarre, from all possible injury while en route on its train. The phrase 'highest degree of care' is not used by the courts in any such meaning. By the 'highest degree of care,' is meant the highest degree of care which a cautious and prudent man would exercise under like circumstances, or, as it has sometimes been defined, the law merely requires, of the defendant, everything necessary to the security of the passenger, reasonably consistent with the business of the carrier, and the means and conveniences employed. If you find from the evidence that the defendant, in this case, did everything necessary to the security of the plaintiff reasonably consistent with the business of the carrier, and the means and conveniences employed, then you are instructed that the plaintiff is not entitled to recover from the defendant, and you should find the defendant not guilty."

Instruction thirteen, when applied to the facts of the case above stated does not seem to us to be necessarily erroneous. Instructions eight and nine, standing by themselves, are erroneous. But at the conclusion of the charge to the jury, the following colloquy took place—

(Mr. McShane, speaking for plaintiff in error): Just one point, Your Honor, that I think in the instructions read might be misleading. I ask the Court to charge insofar as the question of cause and effect between the injury and his condition, is concerned that the law does not require that the plaintiff prove beyond a reasonable doubt, that his condition is the direct result of the injury, but that it is sufficient if he makes that proof by the preponderance of the evidence, that is correct isn't it?

The Court: That is correct.

Mr. McShane: I don't want any misunderstanding about it.

The Court: That's absolutely correct and I so charge the jury.

(Mr. Shaw, speaking for the defendant in error):

Mr. Shaw: Are you through Mr. McShane?

Mr. McShane: Yes, I have nothing more to say.

We are of the opinion that whatever error may have crept into the instructions, looked at apart from the rest of the case, such error

was cured by the colloquy in the presence of the jury just quoted; for in that colloquy counsel for the plaintiff in error got the court to say directly to the jury, that it was sufficient to establish that plaintiff in error was injured, if such fact was established by a preponderance of evidence. And as to instruction thirteen, if any objection to that were to be taken, or exception noted, it ought to have been done when counsel for defendant in error inquired of counsel for plaintiff in error if he was "through," and received the reply that he had nothing more to say. So much for the assignments of error as to the merits. Now as to the jurisdiction.

The cause was originally brought in the Circuit Court of Cook County, and removed by petition to the Circuit Court of the United States, the petition upon oath stating that the defendant in error was a citizen of the state of New York, and that the plaintiff in error was a citizen of the state of Illinois.

No issue was taken upon these averments of the petition. But at the trial, in the evidence to maintain the issues upon the merits, it incidentally came out that the plaintiff in error was fifteen years of age; that he and his family were born and lived upon the Island of Sicily, until the month preceding the accident, when they (his father being then dead) sailed for the United States, arriving in New York just before the accident; and that they were on their way from New York to Chicago when the accident occurred.

We are not able to say conclusively from this that plaintiff in error was not a citizen of Illinois. There is no evidence tending to show where his father died, or that the father was not a citizen of Illinois, the family being on their way from Italy to join him. The petition states positively that plaintiff in error was a citizen of Illinois, and mere inferences cannot be taken against this positive averment of the petition, especially where no distinct issue relating to the jurisdiction has been raised upon which the parties were given opportunity to submit evidence.

But were it established that the plaintiff in error was an alien, want of jurisdiction of the court below would not be shown. True, the defendant in error, though it could not object to being sued in some federal court by the alien, might object to such suit in the Northern District of Illinois. But it did not so object. On the contrary, it removed the case into that court, thereby waiving its objection to the venue; and the plaintiff in error having filed no motion to remand, the jurisdiction of the court below was complete. *Central Trust Co. v. McGeorge*, 151 U. S. 129, 14 Sup. Ct. 286, 38 L. Ed. 98.

Ex parte Wisner, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264, is not in point. In that case Wisner was a citizen of Michigan, and Beardsley, the defendant, a citizen of Louisiana—the cause having been brought in a state court of Missouri and removed into the United States Court for one of the Districts of Missouri—a case in which the plain prohibition of the act of March 3, 1887, c. 373, § 1, 24 Stat. 552 (U. S. Comp. St. 1901, p. 508), was applicable, viz.: That between citizens of different states no civil suit should be brought in any Circuit or District Court in any other District than that whereof

one of them was an inhabitant. There is no such prohibition relating to suits between aliens and citizens of the different states.

The judgment of the Circuit Court is affirmed.

HUTCHINSON, PIERCE & CO. v. LOEWY.

(Circuit Court of Appeals, Second Circuit. May 5, 1908.)

No. 237.

1. TRADE-MARKS AND TRADE-NAMES—INFRINGEMENT—INJUNCTION.

The owner of a technical trade-mark is entitled to an injunction to restrain its infringement, regardless of the intention of the infringer or the consequences of the infringement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, §§ 63, 110.]

2. SAME.

A case of technical infringement of a registered trade-mark held not made out where the trade-mark of defendant was not identical with complainant's nor so like it as to be readily taken for it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, §§ 64, 66, 67.]

Appeal from the Circuit Court of the United States for the Southern District of New York.

Archibald Cox and Phelps, Evins & East, for appellants.

Ira Jay Dutton (E. T. Fenwick and L. L. Morrill, of counsel), for appellee.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge. This is an action in equity for an injunction, an accounting of profits and damages; the complainant alleging that the defendant has infringed its technical trade-mark applied to shirts and has also been guilty of unfair competition. As the complainant is a corporation of the state of New York, and the defendant is a citizen of the same state, the court's jurisdiction extends only to the use of the registered trade-mark in commerce between the states, with foreign nations and the Indian tribes.

There is no testimony showing that the defendant has passed off or intended to pass off his goods for the complainant's, or that the defendant has made profits or the complainant sustained damage. Such an intention and such consequences are quite immaterial inasmuch as the cause proceeds solely upon the complainant's ownership of its technical trade-mark. If the defendant infringes it, the injunction should issue regardless of his intention or of the consequence. *Lawrence Manufacturing Co. v. Tennessee Manufacturing Co.*, 138 U. S. 537, 11 Sup. Ct. 396, 34 L. Ed. 997; *Gannert v. Rupert*, 127 Fed. 962, 62 C. C. A. 594.

The complainant has registered in the United States Patent Office as its trade-mark used for more than 10 years theretofore in commerce

among the several states the word "Star" and the outline of a six-pointed star either singly or together, as follows:



The defendant uses as its trade-marks on its shirts, a comet consisting of a five-pointed solid star with a nebulous tail, together with the words "The Comet" as follows:



These two trade-marks are obviously not identical, and the defendant cannot be said to have literally appropriated the complainant's property. And not using the identical mark, he cannot be said to have appropriated the complainant's property, unless he uses something so like it as to be readily taken for it. But the complainant claims that it is entitled to an exclusive property in the word and symbol "Star" as applied to shirts, whether they are used alone or in combination with other words and symbols.

A comet is defined in the Standard Dictionary as:

"A heavenly body consisting of a coma surrounding a bright star-like nucleus with a nebulous tail or train, often of great length."

The head of the comet in the defendant's trade-mark is a solid five-pointed star, but we do not think his trade-mark sufficiently resembles the complainant's to be mistaken for it or to cause confusion or to deceive purchasers, which is the test prescribed as to registration in section 5 of the Trade-Mark Act of February 20, 1905 (33 Stat. 724, c. 592, amended by Act May 4, 1906, c. 2081, 34 Stat. 168 [U. S. Comp. St. Supp. 1907, p. 1008]).

The complainant relies upon the case of *Hutchinson v. Blumberg* (C. C.) 51 Fed. 829, as showing that a star cannot be applied as a trade-mark to shirts even in combination with other symbols, as, for example, a crescent; but this was a case of unfair competition, and the court found that the defendant gave such prominence both to the word and symbol "Star" as to deceive purchasers and cause them to think they were buying complainant's "Star" shirts. Judge Blodgett

said nothing to indicate that an injunction should issue as against a trade-mark so little like complainant's as is the defendant's in this case, where complainant relies solely upon the property right in the trade-mark.

The decree is affirmed, with costs.

NOTE.—The following is the opinion of Hazel, District Judge, in the court below:

HAZEL, District Judge. The bill charges the infringement of the complainant's trade-mark, which originated in its business of manufacturing shirts, waists, and blouses in the year 1840. The trade-mark was registered under the act of Congress of 1906 on April 3, 1906, and consists "of the word 'star' and the representation of a star, used singly or together." Its distinctive characteristic is the outline of a small star to represent that word, signifying to the trade the high class of manufacture of complainant's articles, which have become widely and favorably known as the "Star Shirt," "Star Waist," etc. The asserted infringement by the defendant consists in the use of a solid star in combination with a curved tail in resemblance of a comet. The nucleus of the comet has a five-pointed star, with a tail following it, and the words "The Comet" are printed in black or red type over or underneath such symbol. I am of the opinion that the defendant's trade-mark or brand is clearly distinguishable from that of complainant. There is no reasonable probability of the ordinary purchaser being deceived into buying the defendant's manufacture as that of complainant. The rule is well established that a trade-mark, word, or symbol has the elements of a property right, and may not be unlawfully used by a rival in business, either alone or as an accessory to such prior appropriation, and in such cases a right to injunctive relief follows, without proof of confusion of proprietorship, or that buyers have been actually misled by such use. But if a defendant's design or symbol is essentially different and distinguishable in appearance, so that by no possibility can his article be taken for complainant's genuine production, a cause of unlawful appropriation is not maintainable. *McLean v. Fleming*, 96 U. S. 245, 24 L. Ed. 828; *Liggett & Myers Tobacco Co. v. Finzer*, 128 U. S. 182, 9 Sup. Ct. 60, 32 L. Ed. 395.

The complainant's star in outline, as shown by the drawing, has six points and is one inch in diameter, while the defendant's star is a solid body, seven-sixteenths of an inch in diameter, and the tail, colored red or black, is one inch long. The word "star" is not used by the defendant in combination with the symbol; but, as already mentioned, the words "The Comet" prominently appear in connection therewith. It must be conceded that a comet ordinarily has not the visible outline of a star. Its point is a formation of nebulous matter, and is preceded or followed by a luminous curved train; but, notwithstanding defendant's exaggerated point, neither upon the clothing of defendant's manufacture nor on its box label is the emblem as a whole of such similarity to complainant's mark as in my judgment would warrant restraining its use, in the absence of proof that confusion of goods existed or that intending purchasers had been deceived in buying defendant's article for that of complainant. The ordinary purchaser, buying with reasonable caution, would not, on account of the brand or mark, mistake the goods of the defendant for those of the complainant, and the visual impression received by a comparison of the two marks negatives the presumption of fraud, or that deception is apt to occur from such use. Moreover, it is proven that the goods of the defendant have been known to the public by and under the designation of "The Comet" since 1867, while the complainant and its predecessors have sold its goods by the designation of "Star" since 1840.

Attention is directed to the cases of *Hutchinson v. Blumberg* (C. C.) 51 Fed. 829, and *Same v. Covert*, (C. C.) 51 Fed. 832. In the first-mentioned case the defendant's device or symbol consisted of a star and crescent in combination with the word "Star." In the opinion of the court the star was the prominent feature in the appropriated trade-mark, and because of such prominence, in connection with the word "star," the defendant's goods, it was decided, were

apt to become known as "Star Goods," and hence the public, intending to buy complainant's manufacture, would be misled into buying that of the defendant. The court held that the crescent was merely incidental to the representation of the star. In the Covert Case, which is also clearly distinguishable, the outline of a star was used with the words "Lone Star" on shirts and clothing. It is not difficult to suppose that such representations are calculated to deceive the public, so that they would purchase defendant's goods under the mistaken belief that they were those of complainant. It is thought that there is nothing in the case of *Gannert v. Rupert*, 127 Fed. 962, 62 C. C. A. 504, cited by complainant, to conflict with these views. In that case the court held that, as the publication "Home Comfort" was circulated in the same territory of complainant's paper, "Comfort," which also had the words "The key to a million homes" printed on the title page, the infringement was clearly established, without proof of confusion.

Of course, every case must be decided upon its own facts, and though the owner of a valid trade-mark has the unquestionable right to its exclusive use, and colorable imitations thereof which tend to mislead are forbidden, yet the resemblance to the original must impart to an ordinary purchaser exercising reasonable care a misleading or false impression as to the origin of the goods he is buying. In this case the words "The Comet," used to advertise defendant's goods, and which are prominently printed in connection with the symbol, materially differentiate the star trade-mark in suit, and I think negative the inference of colorable imitation which otherwise might be considered clearly established. In support of the views herein expressed reference is made to the following adjudications: *McLean v. Fleming*, supra; *Liggett & Myers Tobacco Co. v. Finzer*, supra; *Kann v. Diamond Steel Co.*, 89 Fed. 706, 32 C. C. A. 824.

The bill is dismissed, with costs.

CULLOM et al. v. TRADERS' INS. CO.

(Circuit Court of Appeals, Seventh Circuit. April 14, 1908.)

No. 1,410.

1. INSURANCE—CORPORATIONS—VOLUNTARY DISSOLUTION—STATUTE—CONSTITUTIONALITY.

Hurd's Rev. St. Ill. 1905, c. 73, § 2, authorizing the voluntary dissolution of an insurance corporation on the application of a majority in number or interest of the members or stockholders, on due notice, etc., is constitutional.

2. SAME—NECESSITY OF CONTROVERSY—JURISDICTION.

Under Hurd's Rev. St. Ill. 1905, c. 73, § 2, authorizing a majority in number or interest of the members or stockholders of an insurance company to apply for voluntary dissolutions thereof, it is not necessary to confer jurisdiction of the subject-matter of such application that a controversy exist for adjudication.

Appeal from the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois.

C. W. Powell, for appellants.

Noble B. Judah and Charles H. Hamill, for appellee.

Before GROSSCUP, SEAMAN, and KOHLSAAT, Circuit Judges.

SEAMAN, Circuit Judge. The appellants were complainants below in a bill filed against the Traders' Insurance Company, appellee-defendant, with several individual defendants named but not served

with process, which was dismissed, upon demurrer, for want of equity, and this appeal is from the decree of dismissal.

The complainants are citizens of Alabama, and the defendant corporation is an insurance company, incorporated under an act of the Legislature of Illinois, with capital stock, located at Chicago, and engaged for many years in the business of insurance against fire in various states, including Alabama and California. Relief is sought under the bill, to set aside (as nullities) orders appointing a receiver of the corporation and a decree of dissolution, entered in the circuit court of Cook County, to have a receiver appointed to take over all assets, and have them marshaled and distributed in conformity to equity. For right of action on behalf of themselves and other creditors of like interest, the complainants aver: That the corporation had established a fund known as "the reserve fund for insurance in force," to protect and pay "unearned premiums," which constituted a trust fund in favor of claimants of unearned premiums, for distribution to such claimants in preference to other creditors; that the complainants, as general agents of the corporation for Alabama, pursuant to agreement with the corporation and under the terms of its license to transact business in that state, had paid a large amount of such claims and were entitled to subrogation and reimbursement out of such fund; and that claimants entitled to such fund and preferential payment were threatened with deprivation of their equities unless protected in this suit, brought for their benefit. Other averments respecting liabilities of stockholders—(1) to general creditors for dividends received in violation of the law of Illinois, and (2) to California creditors for fire losses sustained under policies issued in that state—are not material, for the present consideration.

In respect of the proceedings and receivership in the circuit court of Cook county, the bill expressly avers, in substance: The filing of a petition therein, May 5, 1906, by "a majority of the stockholders in interest of said the Traders' Insurance Company"—set out in the petition and conforming to the statutory requirements in Illinois (Hurd's Rev. St. 1905, p. 1165, c. 73, § 2) for "voluntary dissolution" of insurance companies—followed by an answer of the corporation, confessing the facts alleged, and stating that it "has become and is entirely insolvent" by reason of losses in the recent San Francisco fire; that the court forthwith appointed a receiver of the assets and enjoined further prosecution of business by the corporation; and that on June 18, 1906, a decree of dissolution was entered, providing for continuance of the receivership, to collect, marshal, and distribute the assets, with jurisdiction of the cause retained to that end. With these proceedings and conceded possession of the res in the state court, support for the interference sought under the bill rests upon averments: (1) That the act providing for the proceeding is unconstitutional; and (2) that the proceedings were collusive, raised no actual controversy for adjudication, and were coram non judice.

We are of opinion that neither of such contentions is tenable. The statute of Illinois under which the state court entertained the proceeding is entitled "An act in regard to the dissolution of insurance companies," approved February 17, 1874, compiled in Hurd's Rev. St.

1905, c. 73, pp. 1164-1165, and 2 Starr & C. Ann. St. 1896 (2d Ed.) pp. 2283-2286, c. 73, pars. 268, 269. Section 1 provides for "involuntary dissolution," upon petition filed by the Auditor of State, and section 2, entitled "voluntary dissolution," reads:

"Sec. 2. When a majority, in number, or interest, of the members or stockholders of any insurance company incorporated in this state, desire to close its concerns, they may apply by petition to the Circuit Court of the circuit in which the company is located, setting forth in substance the grounds of their application; and the court, after due notice to all the parties interested may proceed to hear the matter, and for reasonable cause decree a dissolution of the corporation; and corporations so dissolved shall be deemed and held extinct, in all respects as if their charter had expired by their own limitation, subject, however, to the provisions hereinafter prescribed."

Subsequent sections provide for receiverships and proceedings in conformity with equity powers and practice.

The constitutionality of the act, in reference to the provisions of section 1 for involuntary dissolution, on petition of the State Auditor, was upheld in *Ward v. Farwell*, 97 Ill. 593, 605, and subsequently reaffirmed (*Chicago Life Ins. Co. v. Auditor of Public Accounts*, 101 Ill. 82, 88; *Chicago Mut. Life Indemnity Ass'n v. Hunt*, 127 Ill. 257, 275, 20 N. E. 55, 2 L. R. A. 549; *Republic Life Ins. Co. v. Swigert*, 135 Ill. 150, 160, 25 N. E. 680, 12 L. R. A. 328), and the rulings upon objections there raised are equally applicable, as we believe, to the contentions here that section 2 violates constitutional rights. This view is well fortified by *Chicago Life Ins. Co. v. Needles*, 113 U. S. 574, 579, 5 Sup. Ct. 681, 28 L. Ed. 1084, and no ground for intervention appears under these averments.

The provision referred to (section 2) expressly authorizes a decree of dissolution upon petition of a majority in interest of the stockholders, after hearing, and no controversy is needful to confer jurisdiction of the matter. So the averments that a majority of the directors, controlling the corporation, appear among the petitioning stockholders and thus procured the appearance and answer on the part of the corporation—upon which collusion is averred—are without force. That it was in fact a voluntary proceeding for winding up the affairs of the corporation brought it within the unmistakable meaning of the statute, conferring upon the majority stockholders a right commonly granted in corporations organized for profit of stockholders. Thus the court acquired equitable jurisdiction, under the statute, when the requisite petition was filed. The regularity of its proceedings thereupon is not open to attack or inquiry, in another court of co-ordinate jurisdiction (*Farmers' Loan & Trust Co. v. Lake Street Elevated R. R. Co.*, 177 U. S. 51, 61, 20 Sup. Ct. 564, 44 L. Ed. 667), and the bill was rightly dismissed for want of equity.

Other contentions for and against the sufficiency of the bill do not require consideration, and the decree of the Circuit Court is affirmed.

SUN CO. v. HEALY.

(Circuit Court of Appeals, Second Circuit. May 22, 1908.)

No. 250.

SHIPPING—LIABILITY OF VESSEL FOR DAMAGE TO CARGO—HARTER ACT—FAULT IN MANAGEMENT OF VESSEL.

Damage to a cargo of molasses, through its dilution by sea water while being pumped out at the port of destination, *held* to have been due to a sea valve connecting with one of the pumps having been left partially open, which was a fault in the management of the vessel, from liability for which the owner was protected by Harter Act Feb. 13, 1893, c. 105, § 3, 27 Stat. 445 (U. S. Comp. St. 1901, p. 2046); it being affirmatively shown that the valve was in good condition and that it was properly closed when the cargo was loaded and at the commencement of the voyage.

[Ed. Note.—Statutory exemptions of shipowners from liability, see notes to *Nord-Deutscher Lloyd v. Insurance Co.*, 49 O. C. A. 11; *Ralli v. New York & T. S. S. Co.*, 83 C. C. A. 294.]

Appeal from the District Court of the United States for the Southern District of New York.

Wallace, Butler & Brown, for appellant.

J. Parker Kirlin and Charles R. Hickox, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. The libelant chartered the respondent's steamer Toledo for two voyages with cargoes of molasses of from 425,000 to 475,000 gallons from Guanica, Porto Rico, to New York. The respondent, under an option in the charter party, substituted the steamer Paraguay, constructed to carry liquid cargo in bulk in six separate tanks on each side. On the second voyage, which is the one in question, the master signed a bill of lading for 473,968 gallons, more or less, all on board to be delivered. The molasses was run from a large storage tank near the shore at Guanica, first into No. 1 port and starboard tanks nearest the bow, and afterwards into Nos. 2, 3, 4, and 5 tanks running aft on each side; No. 6 tank being empty. The cargo was loaded by the shore pumps. While loading a weeping rivet was discovered in the No. 1 starboard tank, which, though admitted to be negligible, caused the charterer's agent to direct that the molasses be pumped out of it into No. 1 port tank. It had received only a comparatively small amount of the molasses, estimated by one witness as about 2 feet from the floor of the tank and by others as about 4 feet; the tank having a depth of 12 feet. During the voyage to New York some molasses was pumped from No. 1 port tank in No. 6 starboard tank for the purpose of giving the vessel a better trim.

When the steamer arrived at Hoboken, where her cargo was to be pumped into a storage tank, and before discharging had begun, samples were taken from each tank. The charterer, finding the molasses in No. 1 port and in No. 6 starboard to be thin, directed that it should be discharged into barrels after the cargo in the other tanks had been discharged into the storage tank, which was done. It is

said that No. 1 port tank contained molasses 2 feet 5 inches deep, No. 6 starboard 2 feet 3½ inches, and that it was all, amounting to about 10,000 gallons, thin. Tanks 2, 3, 4, and 5 were quite full, and the samples from them showed the molasses to be heavy. The discharge of the tanks containing the heavy molasses began June 21st at 2 p. m. The superintendent of the storage company found, as he thought, that the molasses running into the tank was thin. He attributed this at first to the heat and various other causes. At a little after 5 p. m. he reported to the office that 3 feet of molasses had been discharged into the storage tank, which would have been at the rate of about 20,000 gallons an hour. The office replied that this was impossible and that something must be wrong. Accordingly at 6:50 he ordered the pumps to be stopped and the molasses valves closed. An examination of the sea valve showed that it was screwed hard down. The drain pipe of the starboard pumps showed a leakage of molasses thinner than the molasses in the tank. If the sea valve had been then open, the sea water would have been running through, which it was not. The sea valve was then opened, the valve and pumps flushed out, the sea valve closed again, and at 8:45 the discharge of cargo recommenced. The molasses delivered was then found satisfactory by the superintendent and no further complaint was made. At the time the complaint was made the second engineer said that some one must have left the sea valve open, though no one found it open.

Molasses being a sticky fluid, the output is always less than the intake; but in this case the output was considerably larger than the quantity named in the bill of lading. This libel is filed by the owner of the vessel to recover the freight. The answer sets up several defenses, only one of which is material and relied on at this stage of the case, viz., that the sea valve was not entirely closed, whereby water was admitted to the starboard pump and a large portion of the cargo diluted and damaged. The sea valve itself was in perfect order before the voyage began, at the time of the examination above mentioned, and no repair was subsequently made to it. The testimony from the ship is most positive that the valve had been closed before cargo was loaded at Guanica, and had been tried and found closed before the discharge of cargo began at New York. The proofs also show that the officers and men connected with the valve and the pump were competent and had been engaged with due care. In our opinion the vessel owner is protected for damage to the cargo arising from the opening of the sea valve by section 3 of the Harter act (Act Feb. 13, 1893, c. 106, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946]), unless it be found that the valve was open before the loading of the cargo began and remained open until the defect in the molasses delivered had been discovered. This section protects the vessel owner alike, whether he is acting as a bailee or as a common carrier.

It is contended that the sea valve must have been open when the cargo was loaded, because the molasses which was pumped at Guanica from No. 1 starboard into No. 1 port tank, and at sea from No. 1 port into No. 6 starboard, was on arrival found to be thin. Only the

starboard pump is complained of, and, as the molasses from No. 1 port to No. 6 starboard was pumped by the port pump, the only leaking that could have occurred, even with the sea valve open, would have been while pumping what was apparently a small quantity from No. 1 starboard into No. 1 port tank. Both pumps were overhauled at sea. If the sea valve of the starboard pump had been open when this operation was going on, the sea water would have poured out of the pump into the pump room. The testimony is absolute that no such thing happened; and it seems certain that, if it had happened, the engineers would have then closed the sea valve, so that no water could have got into the pipes when the cargo was discharged at Hoboken. Therefore we do not believe that any difference of thickness in the molasses in No. 1 port and No. 6 starboard tanks was due to the fact of the sea valve being partly open.

Still we are convinced that between 2 and 6:50 p. m., June 21st, while the cargo was being discharged at Hoboken, the sea-valve connection with the starboard pump must have been open. This may have happened through negligence in not closing it when it was examined before the discharge began. If so, the act was committed in the management of the vessel, within the third section of the Harter act; and the protection of the act is not confined to the voyage, but extends to the final delivery of the cargo. The *Glenochil* [1896] Prob. 10. The sea valve was an appliance of and a part of the vessel. When the cargo began to be discharged, the molasses came in direct contact with the valve; but the valve was not used to discharge the cargo. Any act done to the valve was as much management of the vessel as would have been an act done to the engines, boilers, anchors, or compass, resulting in injury to the cargo. We find nothing in the case of *The Germanic*, 196 U. S. 589, 25 Sup. Ct. 317, 49 L. Ed. 610; to the contrary.

But it is said that the specific gravity of molasses, compared with water, being 12 to 8, and the molasses in the tanks being higher than the water outside the ship, the molasses would have flowed into the sea, if the sea valve were open, instead of water entering the ship. While molasses is heavier than water, it is a sticky material, and in a pipe of the diameter of eight inches the friction might, for all we know, more than make up for the difference in the specific gravity. At all events, we are satisfied that sea water was pumped into the ship through the valve, that this happened in accordance with the laws of nature, whether we understand exactly how or not, and that the vessel owners are protected from liability by the Harter act.

The decree is affirmed, with interest and costs.

HILL v. R. D. WOOD & CO.

(Circuit Court of Appeals, Third Circuit. June 18, 1908.)

No. 18 (1,699).

CUSTOMS DUTIES—CLASSIFICATION—"PLATES"—"PLATE STEEL."

Thin, checkered, steel plates about 12 by 5 feet, specially adapted for use in the construction of floors for boiler rooms, are dutiable as steel "plates," under Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 135, 30 Stat. 161 (U. S. Comp. St. 1901, p. 1638), rather than as "plate * * * steel," under paragraph 126, 30 Stat. 159 (U. S. Comp. St. 1901, p. 1637).

Buffington, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

Jasper Yeates Brinton, Asst. U. S. Atty. (J. Whitaker Thompson, U. S. Atty., on the brief), for appellant.

Comstock & Washburn (J. Stuart Tompkins, of counsel), for appellee.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

DALLAS, Circuit Judge. This is an appeal by the collector of customs for the port of Philadelphia from an adjudication of the Circuit Court of the United States for the Eastern District of Pennsylvania, respecting the classification of certain merchandise imported by R. D. Wood & Co. during the month of April, 1904. This importation consisted of steel plates measuring 12 feet by 59 inches and 5/16 inch thick, which the collector assessed at six-tenths of one cent per pound, under paragraph 126 of the Tariff Act of July 24, 1897 (chapter 11, § 1, Schedule C, 30 Stat. 159 [U. S. Comp. St. 1901, p. 1637]). The appellee protested that they were dutiable at the rate of four-tenths of one cent per pound, under paragraph 135 of that act. The Board of General Appraisers sustained this protest, and the Circuit Court affirmed that ruling.

The two paragraphs of the tariff act which have been referred to are as follows:

"Par. 126. Boiler or other plate iron or steel, except crucible plate steel and saw plates hereinafter provided for, not thinner than number ten wire gauge, sheared or unsheared, and skelp iron or steel sheared or rolled in grooves, valued at one cent per pound or less, five-tenths of one cent per pound; valued above one cent and not above two cents per pound, six-tenths of one cent per pound; valued above two cents and not above four cents per pound, one cent per pound; valued at over four cents per pound, twenty-five per centum ad valorem; Provided, that all sheets or plates of iron or steel thinner than number ten wire gauge shall pay duty as iron or steel sheets."

"Par. 135. Steel ingots, coggled ingots, blooms, and slabs, by whatever process made; die blocks or blanks; billets and bars and tapered or beveled bars; mill shafting; pressed, sheared, or stamped shapes; saw plates, wholly or partially manufactured; hammer molds or swaged steel; gun-barrel molds not in bars; alloys used as substitutes for steel in the manufacture of tools; all descriptions and shapes of dry sand, loam, or iron-molded steel castings; sheets and plates and steel in all forms and shapes not specially provided for in this act, all of the above valued at one cent per pound or less, three-tenths of one cent per pound; valued above one cent and not above one

and four-tenths cents per pound, four-tenths of one cent per pound; valued above one and four-tenths cents and not above one and eight-tenths cents per pound, six-tenths of one cent per pound; valued above one and two-tenths cents per pound, seven-tenths of one cent per pound; valued above two and two-tenths cents and not above three cents per pound, nine-tenths of one cent per pound; valued above three cents per pound and not above four cents per pound, one and two-tenths cents per pound; valued above four cents and not above seven cents per pound, one and three-tenths cents per pound; valued above seven cents and not above ten cents per pound, two cents per pound; valued above ten cents and not above thirteen cents per pound, two and four-tenths cents per pound; valued above thirteen cents and not above sixteen cents per pound, two and eight-tenths cents per pound; valued above sixteen cents per pound, four and seven-tenths cents per pound."

The pieces or parts involved in this case were intended for use in the construction of the floor of a boiler or engine room, and were especially adapted to form such a floor. These facts were found by the General Appraisers, and investigation of the entire evidence has convinced us, not only that they were correctly found, but also that the court below was right in accepting the Board's determination that the provision of paragraph 135 for "plates * * * in all forms and shapes not specially provided for," covered these articles. The question seems to be whether they were steel plates or plate steel, and upon such a question it would be profitless as well as difficult to enlarge. It is enough to say that, although the ingenious and forceful argument of the appellant's counsel has been attentively considered, we have not been persuaded that these goods were not properly classed as steel plates.

The decree is affirmed.

BUFFINGTON, Circuit Judge (dissenting). The importation in this case consisted of checkered plate iron in sheets as they came from the rolls of a plate mill. Such sheets are aptly described in paragraph 126 of the tariff act by the words "boiler or other plate iron." The sheets were rolled abroad to certain dimensions to permit their being, when brought to this country, economically cut into floor plates to fit the galleries, stairs and floor of a municipal pumping plant at Cincinnati. After importation they were cut to such particular shapes as fitted them for floor plates for galleries, stairs, and lower floor and were used as such. Had the sheets been cut to such shapes before importation, or to the particular shapes, as was the case in *United States v. Vandergrift*, 142 Fed. 448, 73 C. C. A. 564, they would have fallen under paragraph 135; but, being imported in the form of sheets as they came from the rolls, they retained, when imported, their original generic character of sheets of "boiler or other plate iron," and should have been assessed under that section. Because they are not, I dissent.

F. W. MYERS & CO. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. April 14, 1908.)

No. 157 (1,810).

1. CUSTOMS DUTIES—CLASSIFICATION—GROUND CORUNDUM—"EMERY"—SIMILITUDE.

Corundum and emery being used for the same purposes, and emery being merely an impure grade of corundum, ground corundum ore is similar to emery and is dutiable by similitude under Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 419, 30 Stat. 191 (U. S. Comp. St. 1901, p. 1674), relating to "emery, * * * ground," etc.

2. SAME—"SAND."

In Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 671, 30 Stat. 201 (U. S. Comp. St. 1901, p. 1688), relating to "sand, crude or manufactured," the term "sand" is inapplicable to any metalliferous mineral, though it be in comminuted fragments; and corundum ore, being a mineral of this character, is not, when ground, classifiable as "sand, * * * manufactured."

[Ed. Note.—For other definitions, see Words and Phrases, vol. 7, pp. 6326, 6327.]

Appeal from the Circuit Court of the United States for the District of Vermont.

For decision below, see 155 Fed. 502, affirming a decision by the Board of United States General Appraisers, G. A. 6,277 (T. D. 27,059), which had affirmed the assessment of duty by the collector of customs at the port of Burlington.

Walden & Webster (Henry J. Webster, of counsel), for importers.
Alexander Dunnett, U. S. Atty.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

NOYES, Circuit Judge. The merchandise in question is ground corundum ore. The government contends that it comes by similitude within paragraph 419 of the tariff act (Act July 24, 1897, c. 11, § 1, Schedule N, 30 Stat. 191 [U. S. Comp. St. 1901, p. 1674]):

"Emery grains, and emery manufactured, ground, pulverized or refined, one cent per pound."

The importers claim that it is free of duty, as manufactured sand, under paragraph 671:

"* * * Sand, crude or manufactured, not otherwise provided for in this act."

Corundum is "alumina, or the oxide of the metal aluminum, as found native in a crystalline state." Century Dictionary. Emery is "granular corundum, more or less impure, generally containing magnetic iron." Century Dictionary. Similar definitions appear in other authorities, and it cannot be questioned that emery is merely an impure grade of corundum, or that emery and corundum are used for the same purposes. Corundum is certainly similar to emery. In fact, it is almost the identical article. It was properly assessed for duty as emery under the similitude clause, unless the importers' contention that it actually is sand be correct.

Definitions of the word "sand" may be found sufficiently broad to include any mineral when reduced to fine particles. Other definitions limit the term to fine particles of stone, and in ordinary use it is confined to fine particles of silicious stone; common sand consisting almost entirely of silica. The decision of this case, however, does not require us to accurately define the word "sand." We are rather called upon to say what it does not include, as used in the tariff act, than what it does include. Obviously the word as so employed does not include gold dust or any of the precious metals when reduced to fine particles. Almost equally clear is it that the baser metals—e. g., iron or zinc—when ground would not commercially be called sand; and we think it also follows that the term is inapplicable to any metalliferous mineral, although it be in comminuted fragments. Corundum is a mineral of this character. It is an ore, rather than a mere stone or rock, and, in our opinion, does not become manufactured sand when ground.

The decision of the Circuit Court is affirmed.

ORR & LOCKETT HARDWARE CO. v. MURRAY.

(Circuit Court of Appeals, Seventh Circuit. January 21, 1908. Rehearing Denied May 6, 1908.)

Nos. 1,382, 1,383.

PATENTS—INFRINGEMENT—PROFITS RECOVERABLE—STORE LADDERS.

The Murray patent, No. 442,531, for a store service ladder, is for an entire new article, and the patentee is entitled to recover from an infringer the entire net profits made by the latter on the infringing ladders in the absence of proof that some portion of such profits was the result of something else than the patented device.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 580.]

Appeal from the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois.

These cases relate to letters patent No. 442,531, issued to Edward M. Murray, December 9th, 1890, for improvement in store service ladder; and involve the question what rule of profits and damages shall govern the accounting between the parties.

In the original case between these parties, the court sustained the validity of the Murray patent; found that the Orr & Lockett Hardware Company was infringing the same; and directed the entry of a decree for an injunction and an accounting. *Murray v. Orr & Lockett Hardware Company*, 138 Fed. 564, 71 C. C. A. 68.

The specific ladders found to be infringing devices in the original case were those known as the Columbia and Nox-em-All. In a subsequent appeal, decided by this court at the January session, 1907 (153 Fed. 369, 82 C. C. A. 445), the ladders known as the Bon-Ton and Victor ladders, manufactured and sold by the Orr & Lockett Hardware Company, were also held to be infringing devices.

On the hearing of the cases now under consideration (No. 1,382 relating to the Bon-Ton and Victor ladders, and No. 1,383 relating to the Columbia and Nox-em-All ladders), the appellant furnished to the court a statement of the net profits made by him in the manufacture and sale of all the ladders, upon the basis of which the court found in favor of appellee, and against appellant, in the sum of \$1,846.19 on account of the sale of the Victor and Bon-Ton

ladders, and \$241.07 on account of the sale of the Columbia and Nox-em-All ladders. Aside from the figures thus furnished by appellant, no testimony was offered by either side relating to profits.

The further facts are stated in the opinion.

John G. Elliott, for appellant.

Josiah McRoberts, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

GROSSCUP, Circuit Judge (after stating the facts as above). Two rules governing the question of profits, as between patentee and infringer, are laid down by the Supreme Court. The first of these rules (*Elizabeth v. Nicholson Pavement Company*, 97 U. S. 126, 24 L. Ed. 1000) is as follows: Where profits are made by an infringer, by the use of an article patented as an entirety, the infringer is responsible to the patentee for the whole of such profits, unless he can show—and the burden is on the infringer to show it—that a portion of such profits is the result of some other thing used by him.

And the second rule (*Garretson v. Clark et al.*, 111 U. S. 120, 4 Sup. Ct. 291, 28 L. Ed. 371) is as follows: That where the patent is for an improvement, and not for an entirely new article or product the burden is on the patentee to show what portion of the infringer's profits is due to the particular patented feature.

Inasmuch as appellant offered no proof, other than the patent itself, tending to show that the profits made by it upon the ladders sold by it were the result of anything else than the use of the ladder patented as an entirety, and inasmuch as no proof was offered by appellee, other than the patent itself, tending to separate or apportion the profits made by the appellant, by the use of the patent in question, from such profits as might have been due to other features, neither party has attempted to take these cases out of the rule contended for by his adversary—leaving it as the determinative question in these cases whether (the patent only being before us) the rule laid down in the *Nicholson Case*, or the rule laid down in the *Garretson Case*, is applicable to the cases before us, as the patent has already been upheld and construed by this court.

In the *Nicholson Case* the patent was upon a process or mode of constructing wooden block pavements, the pavement, as Mr. Justice Bradley says, being a complete combination in itself, differing from every other pavement, the parts so correlated to each other from bottom to top, that it required them all put together, as *Nicholson* put them together, to make the complete whole, and to produce the desired result. And on account of this the *Nicholson pavement*, though made up of old elements, was held to be a new complete thing, entitled to the application of the rule that where a patented article was copied as an entirety, the infringer was responsible for all the profits obtained.

The *Garretson* invention was for improvement in a mop head, but it did not embody a mop head as a new complete article, but only improved the old mop head by an improved method of moving and securing in place the movable jaw—an old article, in a certain specific but limited respect, improved. And it was because that this specific

limited improvement was not shown to be the source of all the profits made by the infringer upon the sale of the mop head as an entirety, that the infringer was not held responsible for the entire profits.

The Murray invention involved in this suit, as interpreted by this court, is a store service ladder practically running on only one track at or near its foot, with the upper bearing loose, intended solely to keep the ladder from tipping over; all organized to utilize the operator's weight in the adjustment of the center of gravity, whereby the ladder is propelled laterally without friction. True, into this combination there entered, as elements, the traveler at or near the foot adapted to support and carry the ladder, the horizontal guide adapted to form a rest for the upper end of the ladder, and the hooked bearings near the upper end. And true, also, it is, that some of these elements were old in the art of ladder building—some of them appearing in other patents. But the new thought in the art of ladder building, embodied in the Murray patent, was the utilizing of the man's weight to adjust the center of gravity. It was a unitary thought, to carry out which the elements already named were only agents; and a unitary thought, though thus carried, makes the ladder thus built a new article within the meaning of the Nicholson Case. The Murray patent being for a complete new thing—an entire new article—and there being no proof in the case other than the patent, the patentee, as against the infringer, is entitled to the rule laid down in the Nicholson Case.

The decree of the Circuit Court will be:

Affirmed.

POTTHOFF et al. v. HANSON & VAN WINKLE CO.

(Circuit Court, D. New Jersey. June 6, 1907.)

PATENTS—INFRINGEMENT—BATH AND PROCESS FOR COATING METALS.

The Alexander reissue patent, No. 11,624 (original No. 563,723), for an electrolytic bath for coating metals and a process of galvanically coating metals subjected to rapid oxidation, can only be sustained as involving invention by giving the claims a literal construction, and, as so construed, it is not infringed by the use of a bath which contains no basic salts of the plating metal, such as are specified in the patent as constituting the essence of the invention, but which, on the contrary, is maintained in an acid state, and is composed in part of different ingredients, is prepared differently and under different conditions, and its ingredients, where the same, are in different proportions.

In Equity. On final hearing.

Clifton V. Edwards and Julian S. Wooster, for complainants.
Knight Bros. and Henry C. Workman, for defendant.

CROSS, District Judge. The bill is founded upon reissue patent No. 11,624, issued August 3, 1897, to one Hans Alexander, assignor to Louis Potthoff. The original patent was No. 563,723. The defendants strenuously deny the title of the complainants to the reissued patent, and also its validity, both because of alleged irregularity in its issue and for want of invention in view of the prior art. As I re-

gard the case, however, it will be unnecessary to consider any of the defenses just suggested further than to say that, after a careful reading of the testimony relating to the prior art, it is demonstrated, in my judgment, that, if the patent in suit can be upheld, it can only be by giving the claims involved a literal rendering, since they cannot be interpreted broadly without destroying all pretense to novelty or invention. The patent is in no sense basic. With the claims then interpreted narrowly, as they must be, the defendant has not infringed. This is said in face of the fact that the patent is claimed to be generic, or, at least, the first in the art which has proved successful. It should be said in this connection, however, that, while it appears that the complainant corporation has indeed built up a considerable business of the character indicated by the patent, it does not appear, certainly not conclusively, that the patented process and bath are practicable. The president of the complainant corporation, the assignor of the inventor, admits that for several years the results obtained under the patent were bad, and that he was discouraged and thought of dropping the matter entirely, but that later they became satisfactory. As against his testimony, however, is that of six witnesses, all of whom were licensees or workmen for licensees under the patent, who testified that the process was not practicable but worthless, and that they were compelled to abandon it. Moreover, no present licensee of the complainants is produced to show that the process as practiced by him is the same or substantially the same as that described in the patent; hence it is at least doubtful under the evidence whether the patented bath and process are really valuable notwithstanding the testimony of the president of the complainant corporation that he has always followed them.

Speaking of his invention, the patentee says:

"My invention relates to coating or plating of metals as are subjected to rapid and permeating oxidation (iron and steel) galvanically with other metals, resisting the atmospheric influence, for the purpose of protecting such metals against disintegrating oxidation; and it consists of a process wherein basic salts of aluminium, or a basic salt of the metal to be used for the coating or plating, are used in the bath and the same metal is made the anode."

The claims involved are the first and third, which read as follows:

"1. An electrolytic bath for coating metals, composed of a solution of from five to eight parts of commercial chlorid of aluminium containing free acid in one hundred parts of water and of so much of reguline coating metal, as will dissolve therein, while the bath is heated to the boiling-point, and from two-tenths to three-tenths of a part of chlorid of the coating metal."

"3. The process of galvanically coating metals, subjected to rapid oxidation, with metallic alloys, containing a small percentage aluminium, consisting in subjecting the metals to the action of an electric current in an electrolytic bath, composed of a solution of five to eight parts of commercial chlorid of aluminium, dissolved in one hundred parts of water and of so much of reguline metal as will dissolve therein, with some organic acid added to the bath, and using an anode, made of the metal, forming the principal component of the coating alloy."

It is wholly unnecessary to cite authorities to show either that infringement must be clearly shown or that the burden of proving it rests upon the complainants. At the outset it may be said that the

complainants have not laid any legal foundation upon which to rest a qualitative or quantitative comparison between the bath of the patent in suit and that which would be formed by using defendant's salts pursuant to its directions. It is true that the complainants' expert analyzes certain salts alleged to have been procured from the defendants, but the proof fails to show that they were, as a matter of fact, manufactured or sold by the defendant. It appears that the defendant at one time sold to the Otis Elevator Company certain galvanizing and toning salts which it is alleged were handed to the complainants' expert and formed the basis of his analysis. The testimony upon this point, however, is incomplete and inconclusive. It was given by the president of the complainant company, and is all contained in the following questions and answers:

"Q. Did you hand Dr. Horne [complainants' expert] the samples of galvanizing salts and toning salt concerning which he has testified in this case?

"A. Yes; I did.

"Q. Where did you procure these samples?

"A. I took them from the original packages delivered to us from the Otis Elevator Company, furnished by the Hansen & Van Winkle Company to them. These packages were marked with the Hansen & Van Winkle firm name."

The testimony was "objected to as hearsay, and not the best evidence, or any evidence that the matters referred to were made and sold or delivered to the Otis Elevator Company by defendants. So far as the answer refers to the packages, it is objected to because the packages themselves are not produced or their absence accounted for." The evidence in question was clearly incompetent under objection. It was hearsay, and failed to establish that the packages from which the samples were taken for analysis were indeed original packages, or that they were furnished by the defendant to the Otis Elevator Company. The testimony was based purely upon assumption and hearsay. It does not appear who, on behalf of the elevator company, delivered the packages, or to whom they were delivered, or how or when they were delivered, or that the witness had any knowledge of the size, shape, character, or appearance of the original packages containing the defendant's product; nor is there any evidence to show that they had not been opened, and the contents adulterated, changed, or tampered with. Evidence of an analysis based upon proof such as that just detailed must be rejected. The testimony was taken under specific objection, and, being illegal, cannot be considered. It must be regarded as stricken out, and with it goes all of the testimony of the expert that relates to an analysis of the salts in question. Again, it appears that the analysis was not made by the expert in person, but through an assistant who was not produced as a witness. Nevertheless the expert says that he was present to give proper instructions and to satisfy himself of the results of the analysis. It is evident, however, from his admissions, that he was working to produce results which had been foreshadowed by his client, and, although he admits that the results were different in composition from what he had been led to expect, he still maintains that he had no reason to doubt the accuracy of his analysis. His evidence, if admissible at all, would certainly have been far more satisfactory and conclusive had he been able

to tell definitely from personal knowledge what was done and how it was done. It this connection, it should be added that this same expert admits that he never prepared or analyzed a galvanized bath or solution made in accordance with the defendant's instructions. For the above reasons, a very considerable part of complainants' testimony designed to show infringement is either wholly unavailable or decidedly lacking in probative force. For evidence of infringement then the complainants must rely upon an admission entered upon the record as follows:

"Defendant admits that before, but not more than six years before, the bringing of the present suit and since the granting of the letters patent in suit, it has manufactured and sold salts for use in electro-galvanic baths composed and made as follows:

"The defendant mechanically intermingles in a dry state alum and sulphate of zinc in the proportion of four (4) parts by weight of zinc to one (1) part of alum.

"With this mixture is furnished for convenient shipment a paste consisting of this mixture and sulphuric acid.

"The mixture first described and the acid mixture are sold separately to customers with directions to use them by adding the acid mixture to the other in the electro-galvanic bath in such proportion that the resulting bath contains in solution one (1) ounce of the acid mixture to two (2) pounds of the mixture of sulphate, zinc and alum.

"No materials other than the above, and water, are used in the bath, and no heat is used in preparing either mixture or in preparing the solution thereof forming the electro-galvanic bath.

"That defendant has sold no other electro-galvanic baths or salts or solutions or processes and is not preparing so to do."

And upon a letter of instructions sent by the defendant to the Otis Elevator Company, for making its solutions, as follows:

"This solution is made by dissolving two lbs. of 'H. & V. W.' galvanizing salts to each gallon of water, adding one oz. of toning salts to each gallon, first dissolving the toning salts in a portion of the solution. Zinc anodes should then be hung in the solution and allowed to remain for twelve hours, then skim and solution will be ready for use. At this point the density of the solution should be about 15 deg. Baume. Better results are obtained if solution is maintained at a temperature of 70 deg. Fahrenheit.

"The 'H. & V. W.' cast zinc anodes should be used, not only on account of purity, but for the reason that the wear is more uniform and disintegration of the metal, with subsequent loss, is much less in this form than in the rolled plate.

"Anodes should be cleaned occasionally to remove oxide.

"Should the solution, after some use, plate slowly showing too blue a color, add one-half to one-third oz. of toning salts to each gallon, first dissolving the toning salts in a portion of the solution.

"If the solution is much worked and is not brought into good action by the addition of toning salts, and should it have increased in density to 20 deg. to 22 deg. Baume, dilute to 14 deg. and bring up to 16 deg. by addition of galvanizing salts."

Then follow certain directions for removing grease, rust, or scale from the article about to be plated. These admissions, with the testimony of the complainants' expert in relation thereto, are all the evidence that remains to show infringement. The first claim in suit is for an electrolytic bath for coating metals, composed as therein described, while the third is for a process of galvanically coating metals subjected to rapid oxidation. The complainants claim that in the use

of the patent in suit a coating of zinc alloyed with aluminium is obtained. Claim 3 specifically mentions this, and it is implied in claim 1, if that claim is to be considered as setting forth the invention. The defendant denies that such an alloy as claimed can be made. Prof. Chandler, the eminent chemist and scientific expert, testified that it could not, and cites numerous well-known standard scientific authorities in support of his view. But, however that may be, the solution of the defendant does not produce any such alloy, as an analysis of its product discovers no aluminium or aluminium in alloy with zinc. This is said notwithstanding the fact that Dr. Horne, on behalf of the complainants, testified that he found a very small percentage in the defendant's product. The weight of the testimony is to the contrary. It appears, therefore, that the results produced by the two methods are different. Again, a careful reading of the specification of the patent in suit shows that the invention depends upon the use of basic salts. At the very beginning of his specification the inventor says:

"My invention consists of a process wherein basic salts of aluminium or a basic salt of the metal to be used for the coating or plating are used in the bath."

This statement, in substance, appears in five or six more places in the specification. If, therefore, any one thing is made clearer thereby than another, it is that the invention is characterized by the use of basic salts held in solution as elsewhere stated by an organic acid. Prof. Chandler has defined a basic salt as one in which there is an excess of the basic constituent of the salt or what is the same thing, a deficiency of the acid constituent. Basic salt is therefore one in which the basic constituent is in excess of that required to satisfy the acid constituent; whereas in ordinary or normal or neutral salts the acid and basic constituents are balanced; or, as Dr. Horne, the complainants' expert, puts it, a basic salt is a salt containing a preponderance of a base. That the inventor was aware of the difference between ordinary and basic salts is apparent from reading the specification. The specification of the patent, with the testimony, makes it clear that the bath of the patent is necessarily basic, and was so intended. The defendant's bath, on the contrary, is acid and contains free sulphuric acid. It is the opposite of the basic bath, and not only is it acid in the first instance, but it is maintained so by the introduction from time to time of additional acid to keep it in a proper working condition. The difference between the two baths in this respect is concisely and forcibly expressed in the brief of the defendant as follows:

"It is the patentee's main object and consistent effort to produce a bath which is basic—containing basic salts. He boils metal in a solution of salt until no more metal will dissolve. If, by reason of expense he is driven to using an acid-containing salt, his first care is to neutralize that acid or blind it. Acid is, so to speak, a *bête noire* to the inventor. But defendant deliberately and designedly chooses acid, precisely what the inventor most carefully avoids; and not only so, but defendant maintains the acid condition of his bath by addition of acid directly from time to time. In fact, defendant's bath won't work unless acid. But the patent bath will not work unless it is basic, and the patentee maintains its basicity with an organic or equivalent substance. It will not be an equivalent substance that does not maintain the bath's basic character."

The sulphuric acid added by the defendant to keep its bath in working condition is not an equivalent of the organic acid or hydrate of carbon mentioned in the patent. Prof. Chandler, speaking upon this point, says that the defendant uses no organic acid in its bath, or, to quote his exact language:

"No organic acid and no hydrate of carbon is added to it. In fact, the bath of the stipulation is employed in a condition which is the very opposite of the basic condition described and claimed in the patent in suit."

Again, not only are the components of the bath different for the most part, but wherein they are similar they differ in proportion. A patent of the character under consideration must necessarily be definite to be valuable, and a patentee cannot complain if one, by the use of different constituents or the same, but differing widely in amount, substantially differentiates his process from the patented one. Dr. Chandler has shown upon the basis of Dr. Horne's figures that the defendant's solution contains more zinc, more acid, and more aluminium phosphate than would a bath made to correspond with the patent, and, in one place, he goes as far as to say that it is apparent at the first glance that the only substance in defendant's bath that is specified in either one of the claims of the patent in suit is water. Then, too, the conditions of mixing or preparing the baths are essentially different, so that not only are the ingredients of the bath different in kind and amount, but their preparation is different. The patent prescribes conditions that will, as we have seen, inevitably result in basic salts. The complainants' expert seems to ignore this, or, to say the least, does not satisfactorily explain it. He furthermore insists that, where the claims of the patent call for chlorid of aluminium, the sulphate may be substituted, or, in other words, that the claims of the patent include either. He finds his authority for this in the specification, where it is said, "Instead of chlorid of the metals, sulphates may be used as well." At first sight, his contention seems plausible, but upon examining the preceding clause we see that the word "metals," as used in the above quotation, refers to the coating metals. The two sentences which are in juxtaposition, read together, are as follows:

"In all of these baths the coating metal [zinc, tin, tin and zinc, copper, or nickel] is made the anode. Instead of chlorids of the metals sulphates may be used as well."

Then, too, in the specification, just before the above extract, when speaking of the different coating metals which may be used, the inventor says:

"For coating with copper, sulphate of copper; for coating with tin, sulphate of tin; and for coating with nickel, sulphate of nickel."

It seems clear, therefore, that when he says, "instead of chlorids of the metals sulphates may be used," he referred, and referred only, to the coating metals, the metals selected for the anodes. Aluminium is not a coating metal under this patent. He nowhere speaks of it as such. On the contrary, it is frequently and invariably distinguished therefrom. It is introduced in the bath apparently to improve the quality or appearance of the coating metal, and in the form of chlorid is the foundation of the baths described in the patent. The defendant

does not use chlorid of aluminium so that in this respect also we find the defendant's bath and process clearly and substantially differentiated from the complainants. This opinion cannot be so well concluded or the distinguishing differences between the baths and processes of the complainants and defendant, so well and clearly expressed as by using the language of Prof. Chandler, when he said:

"The defendant's bath is not the bath of the patent in suit, nor is it any one of the baths of the patent in suit, nor is it the bath of any one of the claims of the patent in suit. * * * Defendant's bath is not prepared in the same way as the bath of the patent in suit. The most striking feature of the patent in suit is the employment of a bath containing basic salts, and extraordinary means are resorted to in the specification to render the bath basic; that is, to secure a bath in which the salts shall be the basic salts of aluminium and zinc. As the patentee states, these salts are with difficulty soluble, and, in order to keep them in solution, and prevent their being precipitated, he makes use of an addition of citric or tartaric acid, or of sugar, and thus converts these basic salts into double salts, which are easily soluble in water, as he states on page 2 of his specification, in several places, between lines 29 and 54. It must not be assumed in reading this portion of the specification that this result therein described of keeping the basic salts in solution can be accomplished by converting them into any kind of double salts. They must be converted into double salts which are easily soluble in water, and double salts containing citric or tartaric acid, or sugar. * * * No such conditions as described in the specification exist in defendant's baths. The baths are not basic baths. No such extraordinary methods are employed to render them basic as are described and claimed in the patent in suit. In fact, the very opposite treatment is resorted to. Sulphuric acid is added at the outset, and from time to time during the use of the bath. Hence no basic salts of aluminium are contained in defendant's bath originally, or permitted to be formed there, and no such means as described in the patent—that is, the use of citric, or tartaric acid or sugar—are necessary to produce such double salts as are referred to in the specification. * * *

"It is thus evident that the reason why basic salts of aluminium are not precipitated in defendant's bath is because he does not have any basic salts. He carefully avoids making them in the original preparation of his bath, and he prevents their forming in the bath during its use by the use of his toning salt. * * * Defendant does not use basic salts of any kind in the preparation of his bath, does not produce basic salts in the preparation of his bath, adds free acid from time to time to prevent the formation of basic salts, does not use aluminium chloride in any form, does not boil aluminium chloride with zinc, does not boil aluminium chloride with aluminium, does not electrolyze an excess of aluminium or zinc into aluminium chloride, to make the bath basic or to produce basic salts. As he does not produce any basic salts with the aid of chloride of aluminium, he does not require and does not use any tartaric acid or citric acid or sugar (sugar is the substance understood by the term hydrate of carbon in the specification) in order to hold basic salts in solution. He does, not add chloride of zinc to chloride of aluminium in the preparation of his bath or in the use of it."

For the following, among other reasons, then, the defendant does not infringe, it does not make the alloyed coating of the patent, employs no basic salts, but rather makes and maintains throughout an acid bath, does not use chlorid of aluminium in its salts, does not use any organic substance with its salts or bath, or any equivalent thereof, and its bath is composed in part of different ingredients from the complainants', is prepared differently and under different conditions, and its ingredients, in so far as they are the same, appear in different proportions.

The bill of complaint will accordingly be dismissed, with costs.

PREST-O-LITE CO. v. POST & LESTER CO.

(Circuit Court, D. Connecticut. June 25, 1908.)

No. 1,263.

TRADE-MARKS AND TRADE-NAMES—SUIT FOR INFRINGEMENT—DEFENSE OF LICENSE—CONSTRUCTION OF CONTRACT.

Two manufacturers of acetylene gas and tanks for holding the same for use on automobiles, each bearing a metal plate with the name and trade-mark of the maker thereon and representing that both tank and contents were its product, entered into an agreement by which each agreed not to refill and use a tank of the other without removing or obliterating the plate thereon. *Held*, that such agreement was not a license to either to use the tanks of the other, but was designed to define and protect their respective rights, and afforded no defense to a suit to enjoin infringing of trade-mark and unfair competition by using tanks of one of the parties unless the plates thereon were removed or permanently obliterated, and that the mere pasting of a paper over the plate was not such obliteration.

In Equity. On motion for preliminary injunction.

Winter & Winter, for complainant.

Gross, Hyde & Shipman, for defendant.

PLATT, District Judge. The acts complained of at this hearing are enough like those appearing in the suit in the federal court in the Northern District of New York between this complainant and the Avery Lighting Company, decided on May 19, 1908 (161 Fed. 648), so that Judge Ray's action should be followed, if he was right, unless the complainant has by its own acts lost some of its rights. In that respect the difference relied upon by the defendant is that the complainant and defendant's principal, the Puritan Gas Company, entered into an agreement about this general matter on March 7, 1908. It is seriously contended that the terms of that contract materially modify the relation between the parties. It is my duty to interpret that contract, and to discover whether it does put this defendant on any better footing than the other defendant occupied at the hearing before Judge Ray. The things which this defendant has done are manifestly beyond the spirit and the letter of that agreement, and were conceded to be so, by the defendant, at the hearing. The only question open for debate is as to whether the defendant can, in fairness, adopt any course in the treatment of complainant's tanks less drastic than that demanded by the complainant.

The defendant calls the agreement of March 7, 1908, a "license agreement." It is inartificially drawn, but I am unable to spell out of it anything which bears out in a general way the proposition that it was intended by the parties to have the effect of a license. It shows that each party recognized the validity of the other's trade-mark, and understood that the placing thereof on a plate attached to the steel cylinder signified to the world that the tank and its contents were the product of the party owning the trade-mark and served to distinguish the product from that of other manufacturers. It is plainly agreed that neither shall infringe the rights of the other, and it shows that

neither party intended to so treat the other's tanks as that any mistake could arise in the mind of any one as to what the tanks and contents in fact were. They agree definitely that neither will use the labeled tanks of the other without removing or obliterating the label, or otherwise indicating that the tank does not contain the product of the other.

Applying the rule of *noscitur a sociis*, any other method of so indicating ought to be as positive and permanent as the two methods suggested. Taking the contract at large, and examining all the ground covered by its four walls, it is a misnomer to call it a license agreement. Its principal purpose is to estop each party from denying the personal rights of the other in its trade-mark and method of using the same. It is certain that neither party is licensed to so use the other's tanks as to permit any one to believe that such tanks contain the product of the other. The pasting of a piece of paper over the name plate, no matter of what size, color, or print, would not indicate surely for all time and in all situations the fact that the tank of the complainant had been refilled with the product of the defendant. It might have that effect for the moment, but beyond that nothing would be certain. I think that it is the duty of the defendant to permanently and irrevocably destroy the guaranty which the complainant's trade-mark on its tank holds out to the world, if it wishes to refill it with any other product than that controlled by the complainant. It cannot be pretended that the spirit of the March, 1908, agreement was to permit either party to injure the other. The acts of the defendant disclosed by the affidavits show that such an interpretation has been put upon it, and the only way to prevent further wrong is to grant the prayer of the complainant in its entirety.

The defendant claims that to remove or obliterate the complainant's name plate from the tanks will surely cause explosions and great damage. The complainant denies the truth of that statement. I think that the plate can be removed or obliterated without danger, but the point is immaterial. Defendant's principal agreed in the contract not to use complainant's tanks without first removing or obliterating the plate, or taking other action, which, as I read it, must be equivalent thereto. If the defendant cannot come within the contract without danger to life and limb, it can easily refrain from interfering with complainant's labeled tanks in any manner. If the exception noted involves danger, it is not necessary to try to take advantage of the exception.

Let a decree be entered in accordance with this opinion.

REISS & BRADY v. UNITED STATES.

(Circuit Court, S. D. New York. May 23, 1908.)

No. 4,753.

CUSTOMS DUTIES — CLASSIFICATION — FRUIT IN MARASCHINO — "EDIBLE FRUITS * * * PREPARED IN ANY MANNER."

In construing Tariff Act July 24, 1897, c. 11, § 1, Schedule G, pars. 262, 263, 30 Stat. 171 (U. S. Comp. St. 1901, p. 1651), which paragraphs relate respectively to "edible fruits * * * prepared in any manner" and to "fruits preserved in * * * spirits or in their own juices," *neld*, that fruit in maraschino is dutiable under the former, rather than that the latter, provision.

On Application for Review of Decisions by the Board of United States General Appraisers.

The decisions below affirmed the assessment of duty by the collector of customs at the port of New York, on the authority of G. A. 6,473 (T. D. 27,690).

Comstock & Washburn (Albert H. Washburn and J. Stuart Tompkins, of counsel), for importers.

D. Frank Lloyd, Asst. U. S. Atty.

PLATT, District Judge. The importations involved herein consist of cherries or other fruits in maraschino. They were assessed by the collector at 1 cent per pound and 35 per cent. ad valorem under the provisions of paragraph 263 of the tariff act of 1897, and are claimed by the importers to be properly dutiable, first, at 2 cents per pound under paragraph 262 of said act, or, secondly, at 20 per cent. ad valorem under section 6 of said act. (Act July 24, 1897, c. 11, § 1, Schedule G, pars. 262, 263, 30 Stat. 171 [U. S. Comp. St. 1901, p. 1651]). The Board of General Appraisers sustained the classification of the collector, from which decision the importers have appealed. Further testimony has been taken in this court since the decision of the Board was rendered.

In accordance with my understanding of the reasoning adopted by the Circuit Court of Appeals in *Causse Mfg. Co. v. United States*, 151 Fed. 4, 80 C. C. A. 461, I am constrained to hold that the articles in question cannot be classified under paragraph 263 as "fruits preserved in sugar, molasses, spirits, or in their own juices," but fall rather under the provision in paragraph 262 for "edible fruits * * * prepared in any manner, not specially provided for."

The decision of the Board of General Appraisers is reversed.

163 F.—5

UNITED STATES v. VIRGINIA-CAROLINA CHEMICAL CO. et al.

(Circuit Court, M. D. Tennessee. July 3, 1908.)

No. 963.

1. CRIMINAL LAW—CONSPIRACY IN RESTRAINT OF INTERSTATE TRADE—INDICTMENT—SERVICE OF PROCESS ON NONRESIDENT CORPORATION.

Upon an indictment for conspiracy in restraint of trade under Sherman Anti-Trust Act July 2, 1890, c. 647, § 8, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3201), the court has power, by virtue of Rev. St. § 716 (U. S. Comp. St. 1901, p. 580), which authorizes such courts to issue all writs "necessary for the exercise of their respective jurisdictions," to issue process to another state to bring before it corporation defendants who are citizens of such state and cannot be found or served in the state or district of the indictment.

2. MONOPOLIES—INDICTMENT.

An indictment for conspiracy in restraint of interstate trade and commerce, in violation of Sherman Anti-Trust Act July 2, 1890, c. 647, § 8, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3201), considered, and held sufficient.

3. GRAND JURY—APPEARANCE OF GOVERNMENT COUNSEL—SPECIAL ASSISTANT TO UNITED STATES ATTORNEY.

Under Rev. St. §§ 363, 366 (U. S. Comp. St. 1901, pp. 208, 209), the former of which authorizes the Attorney General to employ counsel "to assist the district attorneys in the discharge of their duties," while the latter provides for the issuance of a commission to such attorneys as are specially retained by the department of justice "to assist in the trial of any case in which the government is interested," which must be construed together and as referring to the same class of special assistants, the Attorney General was not authorized to appoint special assistants to a district attorney having the authority or right to appear before and participate in the proceedings of a grand jury, and the presence of two such attorneys specially appointed for a particular case and their examination of witnesses on whose testimony an indictment was returned renders such indictment invalid.

A. M. Tillman, U. S. Atty., Oliver E. Pagan, Special Asst. Atty. Gen., and Edward T. Sanford, Asst. Atty. Gen., for the United States.

John J. Vertrees, John S. Miller, James C. Bradford, Henry A. M. Smith, Marcellus Green, Geo. F. Von Kolintz and James M. Gifford, for defendants.

McCALL, District Judge. The indictment in this case is found under the "Sherman Anti-Trust Law." The defendants are corporations and individuals, numbering about 60. The corporation defendants may be divided into three classes, viz.: (1) Foreign corporations; those chartered under the laws of other states, and which have not complied with the laws of Tennessee in relation to such corporations doing business within this state, and have no agents nor are doing business in Tennessee. (2) Foreign corporations which have complied with the laws of Tennessee, and have agents and are doing business in Tennessee. (3) Domestic corporations, those chartered under the laws of Tennessee. One class of defendants move to quash the summons and return. Another class demurs to the indictment, and also files pleas in abatement. These several defenses are

interposed, heard, and disposed of by agreement of counsel without regard to the order of pleading.

1. On Motion to Quash Summons.

Motions to quash the summonses are made by the corporation defendants which are citizens and residents of states other than Tennessee and have no agents or place of business in Tennessee. The motions are based upon the ground that defendants are foreign corporations, and had no agents or other representatives within the state of Tennessee upon whom summons could be legally served, and that summonses, issued to the states of their respective residences and citizenship, and there served, were without authority of law, and that this court has no jurisdiction over them.

This precise question was before me in the case of *United States v. Standard Oil Company*. The conclusions there reached are stated in the opinion, reported in 154 Fed. 728. The summons in that case, as in the case at bar, was issued under Rev. St. § 716 (U. S. Comp. St. 1901, p. 580), which is as follows:

"Sec. 716. The Supreme Court and the Circuit and District Courts shall have power to issue writs of *scire facias*. They shall also have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

It is respectfully but earnestly insisted for the defendants that the conclusion in that case is erroneous, and several cases are cited to sustain that contention, viz.: *McIntire v. Wood*, 7 Cranch, 506, 3 L. Ed. 420; *McClung v. Silliman*, 6 Wheat. 598, 5 L. Ed. 340; *Bath County v. Amy*, 13 Wall. 249, 20 L. Ed. 539; *Rosenbaum v. Bauer*, 120 U. S. 450, 7 Sup. Ct. 633, 30 L. Ed. 743. A careful examination of these cases discloses that the question therein decided was that the court, having no jurisdiction of the subject-matter of a controversy, could not, by virtue of section 716, Rev. St., acquire and exercise jurisdiction by the issuance of a writ of mandamus and cause the same to be served upon the party whom it was sought to force to do some act; the refusal or failure to do which being the subject of complaint. In the case of *Bath County v. Amy*, supra, the Supreme Court, after reviewing *McIntire v. Wood*, *McClung v. Silliman*, and *Kendall v. U. S.*, 12 Pet. 524, 9 L. Ed. 1181, announced the rule that the power to issue a writ of mandamus as an original and independent proceeding does not therein belong to the Circuit Court, and approving the holding in the *Silliman Case*, supra, that the power to issue writs of mandamus was authorized by section 716, Rev. St., only in cases where the jurisdiction already existed, and not where it is to be created or acquired by means of the writ proposed to be sued out. "In other words, the writ cannot be made to confer a jurisdiction which the Circuit Court would not have without it. It is authorized only when ancillary to a jurisdiction already acquired." To the same effect is *Rosenbaum v. Bauer*, supra.

In the case of *United States v. Plumer*, 27 Fed. Cas. No. 16,056, it was held that section 716, Rev. St., did not authorize the issuance of a writ of error to review the judgment of a District Court

in a criminal case, when such authority had not been given the Circuit Court by the judiciary act. In that case the defendant had been indicted, tried, convicted, and sentenced, and the right of appeal lost by the waiver of the motion for a new trial, and the court said:

"Completed, as the proceedings in this case were, the Circuit Court, at the date of this application, had no more power over it than if the indictment had not been found."

Certainly, section 716, Rev. St., does not authorize the court to re-acquire jurisdiction of a case thus finally disposed of, or to acquire original jurisdiction of the subject-matter of a controversy when there is none conferred by law. As is well said by counsel for the government:

"These cases upon which the defendants rely as a proper construction of this section are to be distinguished upon the ground that they merely deny the right to enlarge the jurisdiction of the court as to the subject-matter of litigation by the issuance of any writ under section 716."

It was held, in the Standard Oil Case, *supra*, that the court had jurisdiction of the subject-matter, and, in order to enable the court to exercise that jurisdiction, it was necessary to issue the summons under section 716, Rev. St., as was done in that case. The jurisdiction existed; but, in order to exercise it, the defendant must be brought before the court, and it became necessary for that purpose to resort to the power granted by Congress in section 716, Rev. St. It was not necessary, in order to acquire jurisdiction of the case, to resort to section 716, because jurisdiction over the offense charged in the indictment was conferred by the commerce act. It was necessary to resort to section 716 in order to enable the court to exercise the jurisdiction conferred by Congress under the commerce act.

Able counsel for defendants, it seems to us, virtually concede this proposition in their brief. There it is said that:

"The statute does not authorize writs to be issued under the general power to issue 'all other writs' in order to acquire jurisdiction. The jurisdiction must already exist in order for writs to issue under this power. The 'necessity' of the statute is a judicial one. When some kind of writ that is reasonable and proper is necessary in order for the court to exercise its jurisdiction (do what in justice ought to be done), it may issue."

The necessity is as imperative to issue summons for the resident defendant corporations before the court can exercise its jurisdiction in the trial of this case as it is to issue summons for the foreign corporations. The issuance of the writ in neither case is necessary in order to acquire jurisdiction of the case, but it is necessary in both cases to enable the court to exercise the jurisdiction it has.

In the excerpt quoted from brief of defendant's counsel, it is stated that:

"The jurisdiction must already exist in order for writs to issue under this power"—meaning section 716.

If by this is meant that jurisdiction must exist over the defendant, then the issuance of summons would be useless; but if it is meant that jurisdiction of the subject-matter must exist before summons can issue under section 716, Rev. St., then the answer is that that is

precisely the condition in this case. In other words, the issuance of the summons and its service is but one step amongst others that is necessary to enable the court to exercise its jurisdiction in the pending case, of which it has jurisdiction by statute. In my judgment, the contention of the defendants as to this branch of the case is not sustained by the authorities cited.

It is insisted that if it be conceded that the holding in the Standard Oil Company Case, *supra*, is correct, it does not follow that that case should be controlling in the case at bar. It is pointed out that the indictment in that case was found under Commerce Act Feb. 4, 1887, c. 104, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3154), which is silent as to process and procedure, and that this indictment is found under Sherman Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), which provides, among other things, that in injunction cases brought thereunder process may issue to any state, but is silent as to process to bring those indicted thereunder before the court to answer the criminal charge. Because of this omission, it is argued that the rule, "*Expressio unius est exclusio alterius*," applies. Removal Act March 3, 1887, c. 373, 24 Stat. 552 (U. S. Comp. St. 1901, p. 508), provides that no civil suit shall be brought "against any person by any original process or proceeding in any other district than that whereof he is an inhabitant." Act Aug. 13, 1888, c. 866, 25 Stat. 434 (U. S. Comp. St. 1901, p. 508). This was the law when the Sherman act was passed in 1890. So, also, section 716, Rev. St., was then and is now in force.

With these two laws in mind, Congress passed the Sherman anti-trust act, by which civil actions are authorized, and certain conduct denounced as crimes. Is it not reasonable that, while Congress was devising means by which defendants in such civil suits might be served with process and brought before the courts, it also considered that subject in relation to defendants in criminal cases? Is it not a reasonable conclusion that it inserted the clause as to issuance of process in civil cases to avoid the provision of the removal act of 1888, *supra*, and that it omitted to insert a clause as to defendants in criminal cases because that was then provided for under section 716, Rev. St., and further legislation on that subject was therefore unnecessary?

Here we find Congress engaged in perfecting and enacting a law, declaring certain acts to be crimes, and authorizing the bringing of civil suits to enjoin the commission thereof. The act upon its face discloses the fact that Congress had under consideration the subject of proper proceeding by which parties could be brought before the courts. That in civil actions thereunder, it provides that process may issue for defendants to other states than the state where the suit is pending, for the purpose, as we have seen, of avoiding the provisions of the removal act of 1888. Is it a reasonable conclusion that Congress was careful enough to make this provision as to civil suits, and so careless as to fail to insert a provision for bringing before the court corporation defendants in a criminal suit, which are citizens and residents of other states than the state wherein the indictment is pending, unless that was then provided for by a statute then in force? I cannot think so. To hold otherwise, it seems,

would necessarily imply that Congress was extremely careless, or purposely left a loophole by which such defendants could violate the Sherman anti-trust act with impunity and escape prosecution and punishment.

The motions to quash the summons and service thereof made by this class of defendants are disallowed, and this includes all nonresident corporation defendants of this class, except Swift & Co., of Illinois, and the latter's motion to quash is allowed upon the ground that it appears that it was served on a party not in any way connected with that company. The motion to quash, made by certain other defendants upon the ground that the service does not show that it was made upon the proper officer, is also allowed, but leave is granted to amend such service, if that is desirable.

2. On the Demurrer.

The individual defendants and the domestic and foreign corporations, having agents and doing business in Tennessee, demur to the indictment. The indictment is a lengthy one. Many grounds of demurrer are assigned. The briefs of counsel for and against the demurrer are exhaustive and evince much labor, research, and learning. If the court should undertake to enter upon a discussion of the many questions presented, some important and others less so, the task would be all but interminable, and, the court feels, of little real use. Suffice it to say that, after as careful an examination as the court is able to give the many questions raised, it has concluded that the demurrer should be overruled. The indictment charges the defendants, in language both apt and with certainty of meaning, with acts denounced by statute as crimes. It seems to contain every element of the offense intended to be charged, and sufficiently apprises the defendants of what they must meet. This is all that is required. *Armour Packing Co. v. U. S.* (decided by Supreme Court of United States, March 16, 1908, not yet officially reported) 28 Sup. Ct. 428, 52 L. Ed. 681.

3. On the Plea in Abatement.

We come now to consider the pleas in abatement to the indictment. This defense is interposed by the defendants who also demurred. The substance of the pleas is that Mr. E. T. Sanford and Mr. J. Harwood Graves, neither of whom is a citizen or resident of the Middle district of Tennessee, and neither of whom was the district attorney, nor an assistant district attorney, were present in the grand jury room, examining witnesses and participating in the proceedings, when the indictment was found, and that neither of them had any right to be there. Had this indictment been found subsequent to June 30, 1906, this plea would not now be before the court. On that day Congress passed an act, presently to be quoted, that provides that the Attorney General may do just what is complained of by the pleas in abatement. But this indictment was found May 26, 1906, and therefore the pleas must be considered and disposed of under the law as it was on the date that it was found. The pleas were replied to by the United States, and demurrers were filed to the replication. The sole

question which is presented by the pleas in abatement, the special traverse, and the demurrer thereto is this:

"Whether under the state of facts set forth in the special traverses, the presence of special assistants to the district attorney in the grand jury room and their participation in the proceedings before the grand jury, as therein set forth, constitute, as a matter of law, ground on account of which the indictment found against the defendants should be abated."

The facts are these: Edward T. Sanford and J. Harwood Graves, both being nonresidents of the Middle district of Tennessee, were employed, appointed, and commissioned by the Attorney General of the United States to do certain work set forth in the commission given to each of them by the Attorney General, as follows:

"You are hereby appointed a special assistant to the United States attorney for the Middle district of Tennessee to assist in the investigation before the grand jury in that district of the so-called 'Fertilizer Trust,' and in the trial of any suits and prosecutions on behalf of the United States, against the Virginia-Carolina Chemical Company, a corporation, and other corporations and individuals arising from such investigation. Your compensation will be determined by the Attorney General upon the completion of your services, and will be payable from the appropriation for the enforcement of anti-trust laws. This appointment is subject to any change which may be made by this department. Before entering upon duty, execute and file with this department the customary oath of office."

With these commissions, or letters of appointment, said Sanford and Graves repaired to Nashville, Tenn., and prior to the commencement of the investigation before the grand jury presented their letters of appointment to the United States attorney for the Middle district of Tennessee, who thereupon presented said Sanford and Graves to the honorable United States circuit judge then and there presiding, with the information of their appointment, and stated that he desired that they assist him in the investigation before the grand jury, and who were, upon motion of the United States attorney, admitted to practice law in this court. Thereupon the United States attorney presented said Sanford and Graves to the grand jury with the information that they would assist in the pending investigation. Sanford and Graves were present during the investigation by the grand jury and assisted and aided therein, and participated in the examination of witnesses and heard the testimony introduced before the grand jury. Neither of said gentlemen were present in the grand jury room after the closing of the testimony, or when the jury was deliberating as to its findings and voting upon the question of returning the bill of indictment. Upon these facts, the court is asked to abate the indictment. Should it be done?

A correct answer to this question is attended with difficulties. For more than a century it has been the settled policy of the law and of the courts in its administration and enforcement to protect inviolate the secrecy of proceedings before grand juries in the United States courts, and to guard and protect them from every agency calculated to influence them in the discharge of their duties, save and except the testimony of witnesses who appear before them for examination. None but witnesses and the proper law officers of the government have any business before them, and the latter only to examine wit-

nesses and in a proper way and at the proper time express his opinion as to the meaning of the law. There is no controversy here as to the proposition that the United States attorney and his regular assistant may attend the sessions of the grand jury for the purpose of examining witnesses, so the question narrows down to this: Were Messrs. Sanford and Graves proper officers to attend the sessions of the grand jury and examine witnesses before it?

Their letters of appointment or commissions designated them as "special assistants" to the United States attorney. It is clear that they were not United States attorneys for the Middle district of Tennessee. They are not so named in their commissions. It is well-settled that they were not assistant United States attorneys. *U. S. v. Crosthwaite*, 168 U. S. 375, 18 Sup. Ct. 107, 42 L. Ed. 507. There the court says:

"We are of the opinion that the better construction of section 365 is that one who receives a commission as special assistant to the district attorney for particular cases, or for a single term of the court, or for a limited time, is not an assistant district attorney within the meaning of that section."

There Crosthwaite was appointed special assistant to the United States attorney for the district of Idaho under section 363, the same section that authorized the appointment of Sanford and Graves as special assistants to the United States attorney for the Middle district of Tennessee. He brought suit against the United States for pay for his services. The Attorney General had declined to give to him the certificate required by section 365, and it was considered by the court whether he could be paid as an assistant United States attorney, and the court, as has been seen, adjudged that he was not such an officer.

That brings us to the question: Could a special assistant to the United States attorney, at the time of the finding of this indictment, properly appear before a grand jury, and perform the duties of the United States attorney or his regular assistant in the examination of witnesses, and conduct, or assist in, the investigations of the so-called "Fertilizer Trust," as was done in this case? It is true that the commissions given to Sanford and Graves by the Attorney General set forth that they were appointed to assist in the investigation before the grand jury in this district of the so-called "Fertilizer Trust," but, under what statute, was the Attorney General authorized to issue such a commission?

The answer by the United States is that section 363, Rev. St. (U. S. Comp. St. 1901, pp. 208, 209), authorizes it, and in these words:

"The Attorney-General shall, whenever in his opinion the public interest requires it, employ and retain in the name of the United States, such attorneys and counsellors at law as he may think necessary to assist the district attorneys in the discharge of their duties, and shall stipulate with such assistant attorneys and counsellors the amount of compensation, and shall have supervision of their conduct and proceedings."

It is pointed out the words used here, "assist the district attorneys in the discharge of their duties," are broad and cover all duties of the district attorney, and hence must embrace this duty before the grand jury. To this contention the defendants respond that this

clause in section 363 is limited and defined by section 366, which is in these words:

"Every attorney and counsellor who is specially retained under the authority of the Department of Justice to assist in the trial of any case in which the government is interested, shall receive a commission from the head of such department, as a special assistant to the Attorney General or to some one of the district attorneys, as the nature of the appointment may require, and shall take the oath required by law to be taken by the district attorneys, and shall be subject to all the liabilities imposed upon them by law."

So we have in section 363 authority for the Attorney General to appoint attorneys "to assist the district attorneys in the discharge of their duties," and in section 366 we have the Attorney General authorized to issue commissions to every attorney and counsellor retained by the Department of Justice "to assist in the trial of any case in which the government is interested." It has been held in two jurisdictions that appointments made under section 363 authorized the parties so appointed to assist the district attorney in all of his duties and authorized the appearance of such special assistant to the district attorney to go before the grand jury and participate in the investigation there pending, as was done in this case; such work being a part of the duties of the district attorneys. *U. S. v. Cobban* (C. C.) 127 Fed. 713; *U. S. v. Twining* (D. C.) 132 Fed. 129. Counsel for the United States also cites *U. S. v. Crosthwaite*, 168 U. S. 375, 18 Sup. Ct. 107, 42 L. Ed. 507, to sustain this proposition. A careful examination of the latter case leads to the conclusion that this question was not raised nor decided there; but, in so far as that case is important here, it decides that a special assistant to the district attorney, under section 363, is not a regular assistant district attorney. In the *Cobban* and *Twining* Cases, *supra*, it was held that sections 363 and 366, Rev. St., were sections taken from different acts of Congress and should be construed entirely independent of each other, and that the language, "to assist the district attorneys in the discharge of their duties," in section 363, was not limited or affected by the language "to assist in the trial of any case in which the government is interested," in section 366, and therefore special assistants to the district attorney were authorized to assist the district attorney in all of his duties, including his duties before the grand jury. The learned judges who decided these cases made no reference to *U. S. v. Crosthwaite*, *supra*, where it is stated that sections 363, 364, 365, and 366, Rev. St., are the sixteenth and seventeenth sections of Act June 22, 1870, c. 150, 16 Stat. 162, 164, which were preserved and reproduced in the Revised Statutes at the above numbers. We think therefore that they should be considered as parts of the same act and construed together. *U. S. v. Rosenthal* (C. C.) 121 Fed. 688.

We will so consider them. As we have seen, section 363 authorizes the Attorney General to appoint attorneys and counsellors to assist the district attorneys in the discharge of their duties, and fixes the compensation therefor. Section 366 does not authorize the appointment of any one, but provides for the arming of the attorneys and counsellors appointed under section 363 with commissions as evidence of their appointment, prescribes the character of oath they

shall take, and defines their duties and liabilities, and this, too, for those attorneys and counsellors only who are specially retained by the Department of Justice in the trial of any cases in which the government is interested. They are employed and retained to assist the district attorneys in discharging their duties. These duties are stated, in section 366, to be "to assist in the trial of cases." Section 363 authorizes their appointment to assist, and section 366 especially states what they are to assist in doing, viz., "in the trial of cases." Certainly, the trial of a case does not begin before a grand jury. That is a secret investigation from which the proposed defendant is excluded and prohibited from being heard in person, by counsel, or through witnesses. An entirely *ex parte* proceeding to determine whether or not, upon the testimony of the government witnesses alone, the accused should be put upon his trial before a court and jury of his peers of his own selection, when and where he can be heard in person, by his counsel and his witnesses. *U. S. v. Rosenthal*, supra.

It is to be regretted that this court cannot follow the holdings in the Cobban and Twining Cases, but is constrained to hold that no authority existed at or before the finding of this indictment authorizing the Attorney General of the United States to issue a commission that would, with the sanction of law, authorize special assistants to the United States attorney to appear before and participate in the proceedings of a grand jury, as was done in this case. The Congress of the United States so understood the law to be at that time. On June 30, 1906 (more than a month after the indictment was found), it was enacted as follows:

"That the Attorney General or any officer of the Department of Justice, or any attorney or counsellor specially appointed by the Attorney General under any provision of law, may, when thereunto specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which district attorneys now are or hereafter may be by law authorized to conduct, whether or not he or they be residents of the district in which such proceeding is brought.

"Approved June 30, 1906."

Act June 30, 1906, c. 3935, 34 Stat. 816 (U. S. Comp. St. Supp. 1907, p. 44).

Here we have Congress, after this indictment was found, enacting a law authorizing the Attorney General to do the very thing that was attempted to be done in this case; that is, appoint special assistants to the district attorneys to assist them in discharging their duties in grand jury proceedings. Mr. Gillet, of the House Judiciary Committee, reported the bill from that committee, and therein said:

"As the law now stands, only the district attorney has any authority to appear before a grand jury, no matter how important the case may be, and no matter how necessary it may be to the interests of the government to have the assistance of one who is specially or particularly qualified by reason of his peculiar knowledge and skill, to properly present to the grand jury the question being considered by it."

He understood, and Congress understood, that at that time only the district attorneys had authority to appear before a grand jury, no matter how important the case may be.

Why pass this act, if it was previously the law? This question was asked by Mr. Justice Strong, in *Bath County v. Amy*, 13 Wall. 249, 20 L. Ed. 539, in discussing the eleventh and fourteenth sections of the Judiciary Act of 1789 (Act Sept. 24, 1789, c 20, 1 Stat. 78, 81), where it was insisted the power to issue certain writs was given by section 11, and wherein by said section 14 that power was expressly granted, and he inquires:

"Why make this grant if it had been previously made in the eleventh section?"

Had the Attorney General been authorized to appoint and commission special assistants to the district attorneys, with authority to conduct proceedings before the grand juries of the country, the act of June 30, 1906, would not have been passed. There would have been no need for it. It seems needless to add that, if the contention of counsel for the government as to the law prior to the passage of the act of June 30, 1906, is correct, that act would be but declaratory thereof, and it would in no way affect it. The court, however, does not agree with counsel for the government in the contention that the act of June 30th was the law prior to that date. It follows therefore that the court is of the opinion that the Attorney General of the United States was not authorized by law to confer upon the special assistants to the district attorney the right to conduct investigations before the grand jury, as was done in this case, and that Messrs. Sanford and Graves were improperly before the grand jury under the facts stated herein above.

Did their presence and their participation in the proceedings before the grand jury influence that body in its action?

It must be assumed that the grand jury was composed of men of average intelligence and information, who would have known that the government must have been greatly interested in the finding of this indictment and in the prosecution of the defendants before it would send two eminent lawyers, neither of whom was a resident of this district, to Nashville to especially conduct this investigation. Their presence there and participation in this investigation was bound to have impressed the jury and conveyed to them the information that the Department of Justice was exceedingly anxious that this indictment be found. Who can say how far-reaching this influence was, and what effect it had on the individual juror when he came to vote upon the finding of the indictment, assuming, as we do and must, that the conduct of these special assistants before the grand jury was as circumspect in every particular as would have been that of the district attorney had he been present and alone conducting the investigation.

As is said in *U. S. v. Edgerton* (D. C.) 80 Fed. 374:

"There must not only be no improper influence or suggestion in the grand jury room, but, as suggested in *Lewis v. Commissioners*, 74 N. C. 194, there must be no opportunity therefor. If the presence of an unauthorized person in the grand jury room may be excused, who will set bounds to the abuse to follow such a breach of the safeguards which surround the grand jury."

The same authority holds that the rule that no person other than the witness and the legally authorized attorney for the government

can be present during the sessions of the grand jury is inherent in the grand jury system with all the force of a statutory enactment.

In *Wilson v. State*, 70 Miss. 595, 13 South. 225, 35 Am. St. Rep. 664, the court said:

"It is a serious mistake to suppose that the right of one accused or suspected of a crime to the orderly and impartial administration of the law begins only after indictment. Immunity from prosecutions for indictable offenses, except by presentment by the grand jury, is declared and preserved by the organic law of this and all other states, and though, by reason of the secrecy of the proceedings before that body, its action is seldom brought in review, it cannot be doubted that one whose acts are there the subject of investigation is as much entitled to the just, impartial, and unbiased judgment of that body as he is to that of the petit jury on his final trial."

In *Jacob Sharp's Case*, 107 N. Y. 476, 14 N. E. 348, 1 Am. St. Rep. 851, the court, through Judge Peckham (now of the Supreme Court of the United States), said:

"The law must protect all who come within its sphere, whether the person who invokes its protection seems to be sorely pressed by the weight of the inculpatory evidence or not. It cannot alter, for the purpose of securing the conviction of one who may be called or regarded as a great criminal, and yet be invoked for the purpose of sheltering an innocent man. In the eyes of the law, all are innocent until convicted in accordance with the forms of law, and by a close adherence to its rules."

To this doctrine this court subscribes. Let it be repeated:

"In the eyes of the law, all are innocent until convicted in accordance with the forms of law, and by a close adherence to its rules."

The result is that the demurrer to the replication is sustained, the plea in abatement allowed, and the indictment quashed.

Orders will be entered consistent with the views expressed in this opinion.

McGOVERN v. DAVID KAUFMAN'S SONS CO.

(District Court, E. D. New York. July 8, 1908.)

CONTRACTS—REQUISITES—CONDITIONAL ACCEPTANCE OF OFFER. .

Respondents, desiring to bid for the purchase of a large quantity of scrap iron offered for sale by the United States on the Isthmus of Panama to be removed within 30 days, applied to libellant for a proposition to furnish vessels to remove the iron, if purchased, to New York, and libellant replied that his firm had an offer from a steamship company, the terms of which he stated. Respondents acknowledged receipt of the proposal, stated that they had made a bid based thereon, and that "if successful we will be glad to place this business with you." The bid was not accepted because it did not meet the requirement to remove the iron within 30 days, and respondents thereupon modified it in that respect and on its acceptance contracted with another steamship company to do the freighting. *Held*, that they were under no contract obligation to libellant's firm which required them to consult him before changing their bid or to give him an opportunity to change his proposal to conform to the new bid before contracting with another, and were not liable for damages for breach of contract, either to libellant's firm or to the undisclosed steamship company on whose behalf it proposed to contract for the carriage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 96.]

In Admiralty.

Wheeler, Cortis & Haight (Charles S. Haight and John W. Griffin, of counsel), for libellant.

Wallace, Butler & Brown (Howard S. Harrington, of counsel), for respondent.

CHATFIELD, District Judge. In the month of August, 1906, the United States government offered for sale and removal some 7,000 tons of scrap iron and old machinery, which material was at Cristobal, upon the Isthmus of Panama, and which by the terms of the offer, under date of August 3, 1906, circular No. 322, of the Isthmian Canal Commission, was to be removed within 30 days from date of notice to remove, with right of resale if not so removed. The circular also stated that the material would be sold as it lay on docks at Cristobal or Colon, within reach of the ship's tackles, and must be removed by the purchaser entirely at his own expense. Other provisions were included in the circular, which has been placed in evidence, and the respondent proceeded to make a bid for this material. The proposals were to be opened upon the 31st day of August, 1906, at 10:30 a. m., at the office of the Commission in Washington. One Alexander Kaufman, a member of respondent's firm, applied to the libellant, Thomas B. McGovern, who was a member of the firm of Sonntag, McGovern & Donnell, about the 29th of August, after a conversation by telephone, to secure ships for bringing the material to Elizabethport, N. J. Mr. McGovern, on the same day, wrote to the respondent that his firm had the following firm offer from a steamship company:

"They will furnish tonnage for the carrying forward of about 7,000/8,000 tons of scrap iron from Colon or Cristobal, Isthmus of Panama, to New York, under the following conditions: They agree to have steamers in readiness to transport this material from either of the above-mentioned loading berths within 45 days of acceptance of the bid of the successful bidder by the Isthmian Canal Commission, and to move it in lots of from 2,000-4,000 tons, the size of the vessel at their option. Cargo to be delivered to them within reach of vessel's tackles at loading port as fast as ship can take it in, but not less than 350 tons per day, and to be received at destination as fast as ship can put it out, working both loading and discharging with all hatches. They agree, if desired by charterers, to discharge the scrap iron onto cars at destination, provided by so doing there is no delay in the dispatch of the ship, and that trimming into cars is not for account of steamer. Steamer to be free of wharfage at loading and discharging berths. Rate of freight to be \$3.40 per ton of 2,240 lbs. This bid is made on material covered by Isthmian Canal Commission's circular No. 322, and is made only in the event of the Commission deciding on you as a successful bidder. We would further say that delivery can be made at Elizabethport, provided there is sufficient water there for the vessels to lie safely at the wharf, and you should stipulate in your bid that wharfage is to be free at Colon or Cristobal. We understand that the rate of wharfage there is \$35 per day, but the government customarily give free wharfage for vessels taking cargoes for them. We learn the Maryland Steel Company and Joseph's are both bidding on this scrap. We shall, of course, expect, in the event of your being the successful bidder, that you will place the freighting of this cargo through us."

And upon the 30th of August the respondent replied as follows:

"We are in receipt of your favor of the 29th, in which you express your willingness to transport a tonnage of scrap iron offered for sale by the Isthmian Canal Commission at Colon or Cristobal, Isthmus of Panama, on basis

of \$3.40 per gross ton to Elizabethport, N. J., or New York City, provided you obtain free wharfage at both points, based upon 45 days' time in which to commence loading of same from official notice and 30 days' time in which to make removal of the entire tonnage. We have submitted our proposition accordingly, and if successful we will be glad to place this business with you and also take up question as to specific destination. In the meantime we will thank you for the interest and prompt attention manifested and will file your letter for future reference."

After the opening of the bids upon the 31st of August, there is a disagreement in the testimony as to the sequence of events; but it seems to be undisputed that telephonic conversations ensued between Mr. McGovern and the Kaufmans; that Alexander Kaufman, the member of the firm who had started the negotiations, saw Mr. McGovern in New York, and spoke to him about seeing Mr. Ross, the chief purchasing agent of the Commission, at the Hotel Waldorf; that Ex-Governor Voorhees, of New Jersey, as counsel for the respondent, went to Washington, and upon the 6th day of September, 1906, communicated by telephone with the Kaufmans, to the effect that their bid could not be accepted, because of the additional conditions imposed. It should be stated here that the bid of the Kaufmans, as filed on the printed blank, with relation to lot No. 1, lot No. 2, and lot No. 3, stated that "removal will be commenced within 45 days and completed within 75 days," although in the printed proposals, in the same sheet, it was specified, as has been stated, that the material must be removed within 30 days, under penalty. Gov. Voorhees then withdrew all conditions as to the time, the bid of respondent was accepted, it entered into an agreement with the Tweedie Trading Company, which is set forth in the testimony, and the goods were brought to New York upon the Tweedie Trading Company's ships.

It appears from the testimony that, subsequent to the original negotiations with Mr. McGovern and to the filing of the bid, the respondent learned that it would be compelled to pay duty upon any of the iron which might be classified as of foreign manufacture, and the rate of transportation with the Tweedie Trading Company was \$1.10 per ton. It also appears from the testimony that the removal, in fact, took 46 days, and that the respondent was compelled to pay a penalty therefor; but the arrangement of the respondent with the Tweedie Trading Company, if successfully carried out, would have accomplished the removal within the specified 30 days. Between the interval of the first telegram from the Kaufmans to McGovern, upon the 29th of August, and the writing of the letter by him, Mr. McGovern procured an offer from the Munson Steamship Line, which offer was the basis of the letter written by Sonntag, McGovern & Donnell, upon August 29th, above set forth. At the same date, between Labor Day and the 6th day of September, 1906, Mr. McGovern and his agent, Mr. Battie, made some inquiry as to the necessity for the conditions contained in the Munson Company's offer, and the Munson Company expressed its willingness and ability to furnish vessels immediately at Colon or Cristobal. Upon the 6th day of September, Mr. McGovern, on behalf of his firm, wrote to the Kaufmans asking for information, and referring to the fact that reports in the press had been noticed by the steamship people to the effect that the respondent

had received the award for the scrap iron, and that instructions as to the movements of steamships was desired. In reply to this letter, the respondent sent the following:

"Replying to your favor of the 6th the deal with the government fell through so far as your proposition was concerned."

Upon the 11th of September the firm of Sonntag, McGovern & Donnell wrote to the respondent to the effect that they considered:

"That the correspondence which passed between us constituted a preliminary contract, the performance of which was dependent, only, upon your bid being accepted by the Panama Canal Commission. The obligation on the part of the steamship company, to supply you with the necessary service at a fixed rate, and your obligation to furnish them with the material to be carried, were mutual. This view of the matter is shared in by the steamship company, who propose to hold you responsible."

The firm of Sonntag, McGovern & Donnell then assigned to Mr. McGovern its cause of action under the alleged breach of contract, which contract is stated in the assignment to have been made on or about the 30th day of August, between the firm of Sonntag, McGovern & Donnell and David Kaufman's Sons Company. The Munson Steamship Line, a corporation, also assigned on the 26th day of November, 1906, its claims and demands against the Kaufman Company, arising out of the breach of contract made on or before the 30th day of August, between the said steamship company and the said Kaufman Company, whereby the said Munson Steamship Line agreed to transport 7,000 to 8,000 tons of scrap iron from the Isthmus of Panama to New York.

So far as the statement of facts above narrated is concerned, it is believed that there is no dispute upon the record. The principal difference of fact arose over the time of the alleged interview between Mr. Kaufman and Mr. McGovern before seeing Mr. Ross, Canal Commissioner, and the details of that interview. The respondent also testified that Mr. McGovern insisted at all of the interviews over the telephone, between the 30th of August and the 6th of September, upon a rigid adherence to the terms of the bids with reference to the 45 days and 30 days, while Mr. McGovern testified that he had communicated to the Kaufmans the information that the steamship company had said that Kaufman's bid was high, that some question had arisen as to the condition of the loading, and that he would see what the steamship company could do about modifying these conditions. It is evident that the information that duty would be collected upon foreign material, and that the Tweedie Trading Company would undertake the contract at about one-third the rate, explains sufficiently the reason why the respondent entered into a contract with the Tweedie Trading Company, rather than with Sonntag, McGovern & Donnell, and the respondent cannot be blamed therefor, if it had the right so to do. It is rather difficult to see how Mr. McGovern could have been in communication with the Kaufmans with reference to a modification of his proposal, prior to the writing of the letter of September 6th, which is above set forth, and from this fact, and inasmuch as it is uncontradicted that Mr. Ross was at the Waldorf upon the 30th of August, the libellant does not seem to have sustained the burden of

proof, in order to show that his assignors communicated to the respondent any modifications of their proposal which they were willing to make, or that any suggestion of modification (if suggested) was accepted.

Considerable argument has been had and some testimony was taken with reference to the rate of loading and the terms of the offer of the Munson Steamship Company, as compared with the contract made with the Tweedie Trading Company; but it seems to be immaterial, for neither the original proposition nor the contract made with the government contained anything except the statement that the material is to be furnished at the dock, and therefore the questions of free wharfage and rate of loading did not interfere with the Tweedie Trading Company contract, nor did it interfere and was not even included in the proposal of the Kaufmans to the government, based on the Munson Line proposition. This takes it out of the power of the respondent to object that the Munson Line proposal was unavailable for these reasons; but, on the other hand, nothing is added thereby to the rights of the libellant, if the Kaufmans were in a position to make a contract with the Tweedie Trading Company with impunity.

The theory upon which the libellant has brought his suit seems to be materially at variance with the understanding of the respondent as to the rights of the libellant's assignors, against which their arguments and testimony are directed. The issue seems to be one of law, rather than of fact, while the witnesses for the respondent have in certain particulars raised issues of fact, and have given testimony to strengthen their positions which is not particularly persuasive, but which nevertheless does not bear upon the question of law involved. The libellant is an assignee. One of his alleged causes of action is for the profits of his firm in the form of commissions on the amount which would have been paid to the steamers carrying the scrap iron. The other cause of action is the damage which the Munson Line is alleged to have sustained because it did not get the contract through the agency of Mr. McGovern's firm. The Munson Line boats are stated to have proceeded to New York in ballast, rather than with the freight of this lot of scrap iron. It is unnecessary at this time to consider the question of damage, or whether the measure of damage would be the prospective amount of freight charges, rather than the actual loss involved in the delay, aside from prospective profits; but it is difficult to perceive upon what theory the Munson Line have any claim which they could assign to Mr. McGovern. If the Munson Line had a binding contract with McGovern's firm, then McGovern's firm would be charging damage because of its obligation to the Munson Line, and it is impossible to see how an undisclosed principal can have a cause of action for breach of contract, when the question at issue is whether the so-called agent of the undisclosed principal had made a binding agreement between another party and himself as principal, which agreement was to be carried out by entering into a second agreement with the person claiming to be the undisclosed principal.

Upon this view of the case, it is apparent that if any cause of action existed it belonged to Mr. McGovern personally, or to his firm, and

arose out of their loss of profits or damage from the act of the respondent, and might be claimed to include the amount of liability or the amount which the firm had been compelled to pay to the Munson Line; but it is apparent from the testimony that nothing has been paid to the Munson Line, nor has the Munson Line claimed any cause of action against Sonntag, McGovern & Donnell, and it is difficult to see, so far as the testimony in this case is concerned, how the Munson Line could have any claim, unless Sonntag, McGovern & Donnell had previously recovered from the respondent some amount in lieu of or representing damages for the delay of the vessels to be used in the proposed work while the matter was in abeyance. The cause of action must therefore be looked at entirely from the standpoint of Sonntag, McGovern & Donnell, and is, in effect, that at the request of the respondent they made certain proposals, to be used by the respondent in bidding, and that a mutual relation existed between the McGovern firm and the respondent with regard to the putting in of the proposed bid, by which mutual relation each party was bound to keep good faith with the other.

The respondent claims that this mutual good faith did not extend to an agreement to report upon the progress of the bid and negotiate further in order to have the bid accepted, if modified, and the respondent denies any conversations or communications subsequent to the original discussions by which it could be held to what would be equivalent to a partnership relation in the putting in of the bid. The libellant, on the other hand, is, in effect, claiming that a contract in the nature of a partnership had been entered into, by which the libellant's firm and the respondent had agreed that respondent should put in a bid to the government, and both parties should endeavor to have the bid accepted, and that both parties should profit in the transaction if any bid were accepted, and this involves upon the libellant's part a denial of the claim that the offer communicated through Mr. McGovern was nothing more than a proposal, which would not ripen into a contract until accepted or rejected by the respondent. The respondent contends that its acceptance or rejection of this proposal was not dependent alone upon its obtaining any contract whatever with the United States. The issue of the case is, in reality, whether the making of any contract with the government was of itself an acceptance of the offer communicated through Mr. McGovern, and bound the respondent to deal with McGovern's firm as partners of the Kaufmans, or as having an interest in the government contract.

This question must turn entirely upon the language of the two letters exchanged upon August 29th and 30th, inasmuch as the libellant does not satisfactorily show any modification of the agreement thereafter. There is nothing in the letter of McGovern's firm to the respondent, under date of August 29th, *supra*, to indicate more than a proposal, which could be accepted or rejected as the respondent saw fit, until the last clause is reached, which is to the effect that the McGovern firm expect the respondent to place the contract with them, in the event of being a successful bidder, in such language as to imply that the words "on any terms" are to be understood; but, even with these words included, it is difficult to see how the Munson Line would

become party to the arrangement. The acceptance of August 30th was to the effect that a bid had been based upon 45 days to commence and 30 days' time to remove, and stated:

"We have submitted our proposition accordingly, and if successful we will be glad to place this business with you."

It can be readily seen that the contract was what is frequently called "unilateral." Unless withdrawn, the proposition of the McGovern Company could be accepted by the respondent. But it is difficult to see what contract the respondent made with the McGovern Company, other than an agreement to submit the bid, based upon the proposed offer, and, if that bid were successful, that the respondent might accept the offer, and agreed to do so if the offer were kept open. The entire trouble with the case has arisen from the fact that, when it became necessary to shorten the time of operation, it appeared that the price could be cheapened by dealing with the Tweedie Trading Company, and the question of duty upon materials also came in, instead of the prices for freighting rising as the difficulties increased.

The libelant has sued upon his original contract, as modified; but the burden of proof as to the acceptance of a modification by the respondent does not seem to be met. The original contract seems to have been the basis of negotiations until after the refusal to accept the bid offered by the United States government, and while courtesy and fair dealing might have demanded that the respondent communicate with Mr. McGovern, and thus give him an opportunity to change his offer, and to compete with the Tweedie Trading Company's bid, there does not seem to have been any legal obligation upon the respondent by which it was bound to accept any offer by Mr. McGovern to enter into another arrangement. If the United States had refused the proposition and called for new bids, no cause of action could have been alleged, and what happened was in effect the making of a new bid by the Kaufmans, at a time when they were under no obligation to Mr. McGovern or the Munson Steamship Company to deal with them further, if the original bid was not accepted. All parties, including the Munson Line, seem to have been indulging in a speculation upon the government proposal, and resultant loss, when the particular speculation failed to turn out favorably, does not of itself prove legal damage for which a fellow speculator can be held responsible.

The libel will be dismissed.

TIERNEY v. HELVETIA SWISS FIRE INS. CO.

(Circuit Court, E. D. New York. February 6, 1908. On Rehearing, March 4, 1908.)

1. COURTS—JURISDICTION OF FEDERAL COURTS—ACTION BY ASSIGNEE.

A Circuit Court of the United States is without jurisdiction of an action brought by the assignee of a chose in action, even though plaintiff and defendant are citizens of different states, or one is an alien, unless plaintiff's assignor could have maintained his suit in the same jurisdiction.

[Ed. Note.— For cases in point, see Cent. Dig. vol. 13, Courts, §§ 865-874.]

2. REMOVAL OF CAUSES—MOTION TO REMAND—SUBSEQUENT GENERAL APPEARANCE.

After the removal of a cause into a federal court in a district in which the defendant could not originally have been sued in such court, and the filing of a motion to remand, defendant cannot improve his position by entering a general appearance.

3. COURTS—JURISDICTION OF FEDERAL COURT—SUIT AGAINST ALIEN—DISTRICT OF SUIT.

A suit by a citizen of the United States against an alien can only be maintained in a federal court in a district in which valid service can be made on the defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 810.]

4. SAME.

The facts that an alien corporation is authorized to do business in a state, and that under the state law service of process in any suit against such corporation may be made on an officer of the state, do not give a federal court within the state jurisdiction of a suit against such corporation, where it does not appear that service was made, or could have been made, within the district of such court, and the fact that defendant is authorized to do business in the district is not sufficient to authorize service to be made therein, unless it is actually so doing business.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 814.]

On Motion to Remand to State Court, and Motion for Leave to Amend Petition for Removal.

Sullivan & Cromwell (Royall Victor, of counsel), for plaintiff.

Wallace, Butler & Brown (Frederick B. Campbell, of counsel), for defendant.

CHATFIELD, District Judge. The plaintiff herein is the assignee of some 14 judgment creditors, each one of whom was the plaintiff in a separate action against the defendant (a corporation of Switzerland, and therefore an alien) in the Circuit Court of the United States for the Northern District of California; judgments in all of the actions having been entered upon the 24th day of August, 1907, and since that date assigned to the plaintiff. The present action was begun in the Supreme Court of Kings county, in the state of New York, and an order for removal to the Circuit Court of the United States for the Eastern District of New York was made, upon the petition of the defendant (appearing specially for that purpose), on the ground that the action was between a citizen of the United States and an alien, and that the plaintiff resided in the Eastern District of New York. Prior to the removal, and at the institution of the suit, an attachment had been obtained upon certain funds deposited by the defendant in the Central Trust Company of New York, and after the entry of the order of removal a judgment on default was obtained in the state court by the plaintiff, claiming that no jurisdiction existed in the United States Circuit Court, and that therefore the removal proceedings could be treated as of no effect, and as if they had not taken place. This judgment on default has since been vacated, and an appeal from the order vacating the default is pending in the state courts. To further complicate the situation, the defendant, upon ascertaining that his petition for removal should have contained a specific allegation that the causes of action assigned to the plaintiff could originally have been

brought in the United States court, moved in the state court to vacate the order of removal, in order to allow an amendment of his petition, and this motion, as it seems, was properly denied; jurisdiction over the parties, at least, having already passed to this court. The record on removal having, accordingly, been filed in this court, on the 6th day of November, 1907, and the defendant having interposed an answer in this court, upon the 11th day of November, 1907, a motion to remand for lack of jurisdiction was made by the plaintiff, and a motion for leave to amend its petition for removal was made by the defendant. These motions are now before the court.

The defendant claims that the United States Circuit Court for the Northern District of California had jurisdiction of each of the 14 causes of action on which judgment was obtained by the plaintiffs, and that the citizenship of those plaintiffs is apparent from the record, inasmuch as each suit was alleged to have been duly brought in said Circuit Court. The defendant in each case being an alien, and the claim being advanced that suits between aliens are not within the jurisdiction of the United States courts, it is argued that necessarily each plaintiff must have been a citizen of some state of the Union. The papers on removal, as now on file in this court, contain a record also of the application for an amendment to those removal papers made in the state court, and the affidavits upon which an amendment was obtained by the plaintiff contain copies of the original judgments in the Circuit Court of California, as well as the assignments of those judgments to the plaintiff.

The citizenship of the plaintiffs in those actions does not appear in any of the papers, with the exception of that of the Gutta Percha & Rubber Manufacturing Company of New York, a corporation (but there is nothing to show in which district of the state of New York this corporation has its residence), and Mrs. Margaret H. Fuller, to whose assignment is attached a power of attorney reciting that Mrs. Fuller is of the city and county of San Francisco, state of California. These allegations might be sufficient to bring the application for amendment within the doctrine of *Kinney v. Columbia Savings, etc., Ass'n*, 191 U. S. 78, 24 Sup. Ct. 30, 48 L. Ed. 103, provided jurisdiction of the plaintiff's cause of action could depend upon a showing of jurisdiction in the United States Circuit Court as to some of the plaintiff's assignors; the balance of the assignors being disregarded. Or, if the plaintiff's causes of action are separable, amendment might be allowed as to the two causes of action referred to above, if originally these two causes of action could have been maintained in the United States Circuit Court for this district. But without voluntary appearance, at least, it seems that no one of the plaintiffs could have maintained an action against the defendant in the United States Circuit Court of this district, and, as was said in *Utah-Nevada Co. v. De Lamar*, 133 Fed. 113, 66 C. C. A. 179, the Circuit Court of the United States cannot retain jurisdiction of an action brought by the assignee of a chose in action, even though the plaintiff is a citizen of another state than the defendant, unless the assignor of the plaintiff could have maintained his suit in the same jurisdiction. To the same effect is *Mexican National Railroad Co. v. Davidson*, 157 U. S. 201, 15 Sup.

Ct. 563, 39 L. Ed. 672, and *Cochran and Fidelity & Deposit Co. v. Montgomery County*, 199 U. S. 260, 26 Sup. Ct. 58, 50 L. Ed. 182. This doctrine has been well established, and, as was clearly set forth in the case of *Minnesota v. Northern Securities Co.*, 194 U. S. 48, at page 66, 24 Sup. Ct. 598, at page 602, 48 L. Ed. 870, it is the manifest duty of the Circuit Court to dismiss or remand a suit, if at any time, even after the suit has been removed, it shall appear to the satisfaction of said Circuit Court "that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court."

In the case of *Galveston, etc., Railway v. Gonzales*, 151 U. S. 496, 14 Sup. Ct. 401, 38 L. Ed. 248, as well as in *Re Hohorst*, 150 U. S. 653, 14 Sup. Ct. 221, 37 L. Ed. 1211, the provisions of Act March 3, 1887, c. 373, § 1, 24 Stat. 552 (U. S. Comp. St. 1901, p. 514), as amended by Act Aug. 13, 1888 c. 866, 25 Stat. 433 (U. S. Comp. St. 1901, p. 508), giving the Circuit Court of the United States jurisdiction of suits of a civil nature, involving a matter of over \$2,000, in which there shall be a controversy between citizens of a state and foreign states, citizens or subjects were held not to be affected by the subsequent provisions of the same section, which direct that no civil suit shall be brought before either of said courts, against any person, by any original process or proceeding, in any other district than that whereof he is an inhabitant, excepting where the jurisdiction is founded only on the fact that the action was between citizens of different states, in which event suit may be brought in the district of the residence of either the plaintiff or the defendant.

A. suit by a citizen against an alien may therefore, under the authority of these cases, be brought in any district in which valid service can be made upon the defendant. In *re Louisville Underwriters*, 134 U. S. 488, 10 Sup. Ct. 587, 33 L. Ed. 991. Each of the 14 assignors therefore might have brought suit in a district where the defendant could have been validly served, if that assignor was a citizen of the United States; but such suit could not have been brought in the Eastern district of New York, as no one of the parties plaintiff is shown by the record to have resided in this district, nor is there anything in the record to show that the alien defendant ever was or could have been legally served in this district. The defendant, after the question of the sufficiency of the removal record had been raised by the plaintiff, filed his answer in this court, and the filing of this answer is equivalent to a general appearance; but upon the original application for removal the defendant appeared specially, and it does not seem that the defendant should be allowed to voluntarily improve his position and confer jurisdiction by his own act, subsequent to notice by the plaintiff that an application to remand the case is to be made. This point was passed upon recently by this court in the case of *Donovan v. Dixieland Amusement Co. (C. C.)* 152 Fed. 661, following the decision in *Johnson v. Computing Scale Co. (C. C.)* 139 Fed. 339, and the cases therein cited. See, also, *Carson v. Dunham*, 121 U. S. 421, 427, 7 Sup. Ct. 1030, 30 L. Ed. 992.

If the defendant had appeared generally at the time of the original application for removal, he might be allowed to follow this up by the

filing of an answer, and his answer might have been the source of information as to jurisdictional facts; but, having appeared specially for the purpose of the removal only, it cannot be said that it had waived its rights to attack the service made upon it, or that it had given the United States Circuit Court in this district admitted jurisdiction over the cause of action, until after that jurisdiction had been attacked by the plaintiff.

Further, it seems that if an assignee cannot maintain an action in a United States Circuit Court in which his assignor could not have maintained the same action, under the provisions of Act March 3, 1887, c. 373, § 1, 24 Stat. 552 (U. S. Comp. St. 1901, p. 514), as amended by Act Aug 13, 1888, c. 866, 25 Stat. 433 (U. S. Comp. St. 1901, p. 508), the assignee, who is the plaintiff in the present action, can have no standing in the United States Circuit Court for this district, in the absence of any showing by the record that even one of his assignors could maintain jurisdiction against the defendant therein. Further, if the assignors had all been joined as parties plaintiff in this action, it not appearing that they were residents of the same state, but, on the contrary, it now appearing that one at least was a resident of a different state from the others, jurisdiction would not lie in the United States court.

The provisions of the act above quoted, in the portion giving jurisdiction to the Circuit Court of the United States of controversies between citizens of a state and foreign states, could not be held to cover jurisdiction of an action between citizens of different states and a citizen of a foreign state. The language of the portion of the section just referred to should be construed in the same way as the language of the portions immediately preceding, and in the case of *Smith v. Lyon*, 133 U. S. 315, 10 Sup. Ct. 303, 33 L. Ed. 635, it was held that an action could not be maintained in the United States Circuit Court in which two plaintiffs were joined, one residing in the state of Missouri, and one in the state of Texas. Also, in the case of *Galveston, etc., Railway v. Gonzales*, 151 U. S. 496, 14 Sup. Ct. 401, 38 L. Ed. 248, a suit by a citizen of one state against a citizen of the same state and an alien, was placed in the same category; that is, outside of the jurisdiction of the United States court.

It is well settled that in the case of doubt as to jurisdiction an action removed to the United States court should be remanded (*Crane Co. v. Guanica Centrale* (C. C.) 132 Fed. 713), and while the confusion and contradictory positions existing in the state court make it apparent that further litigation may follow an order remanding this action, and while it appears that the jurisdiction of the United States Circuit Court for the Northern District of California may be called in question, and may have to be passed upon herein, nevertheless, it is the opinion of this court that the case should be remanded to the Supreme Court of the state of New York, in the county of Kings, which plainly has jurisdiction, and that any federal questions involved in the issues as finally presented must be reserved for an appeal to the Supreme Court of the United States from the decision of the highest court of the state of New York.

This determination makes it unnecessary to consider whether suits between aliens can be maintained in the United States courts, or whether the statement that a suit was "duly" pending in the United States Circuit court for the Northern District of California is an allegation with reference to the citizenship of the plaintiff in that action. It need only be said that an inference of this character should not be relied upon for the purpose of retaining jurisdiction of the case.

The motion to remand will be granted, and the motion to amend will be denied.

On Rehearing.

The defendant corporation has asked for a reconsideration of the motion to remand, and has suggested three separate points with respect to which the opinion heretofore made by this court did not contain citations of all of the reported cases. It is urged that as to these points there is further room for argument. On this account, it has seemed best to refer specifically to the cases to which attention is directed, and to restate the questions referred to. These general propositions come up so frequently in connection with other questions, but so infrequently as the main point in any one case, that no one decision (when considered as to these questions alone) completely comprises all phases of the questions suggested as to removal and remand.

The first question raised is with reference to the finding of this court that nothing was shown in the removal record from which it could be inferred that the defendant was found, or could be found, for the purposes of service, within the jurisdiction of the Circuit Court of the Eastern District of New York. The defendant cites the case of *Barrow Steamship Co. v. Kane*, 170 U. S. 100, 112, 18 Sup. Ct. 526, 42 L. Ed. 964, to prove that an alien person or corporation can be sued, in an action by a citizen of the United States, in the Circuit Court of any district within which any valid service can be procured upon the defendant. This proposition should not be disputed, and valid service means such service as the United States courts will recognize, namely, service in a district within which the defendant is doing business and has some officer upon whom process can be served (who is there other than casually). But admitting this to be true, and recognizing that the language of Act March 3, 1887, c. 373, § 1, 24 Stat. 552 (U. S. Comp. St. 1901, p. 514), as corrected by Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433 (U. S. Comp. St. 1901, p. 508), "but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant," does not apply to an action by a citizen against an alien, nevertheless, the further provision of the statute that "no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant," when considered in the light of the subsequent clause limiting the bringing of actions by an assignee of a chose in action, fully justifies, it seems to this court, the conclusion formerly reached that

the service must be tested to see if that service was actually made within the district, upon the proper representative of a foreign corporation doing business therein, and also to see whether this district could have had original jurisdiction of the action itself.

These points were thoroughly considered upon the former determination of this motion. The service in the case at bar was made upon the superintendent of insurance of the state of New York, under a state law, by which his authority as the representative of a foreign corporation extends over the entire state; but it does not follow from this that the summons and complaint herein were served in the Eastern District of New York. On the contrary, the court can take judicial notice of the fact that the superintendent of insurance maintains his office at the capitol of the state, and in the Southern District of New York, and must be personally served in those districts if such service is relied upon in the federal court. Further, there is certainly nothing in the papers to show that the defendant corporation was doing any business in the Eastern district, and a constructive permissive right to do business is hardly of such a sort as would serve for an excuse upon which to found the jurisdiction of the Circuit Court of the United States, in a case like the one at bar, where doubt as to the entire service exists.

The second point urged by the defendant is that this court was wrong in suggesting that the last clause of section 1 of the act above referred to, forbidding the removal of a case in which an assignee of a chose in action is plaintiff, unless such suit could have been maintained by the original assignor in the district to the Circuit Court of which removal is asked, can apply to a suit against an alien corporation. The learned counsel has called the attention of the court to a long line of decisions, viz.: *Manufacturers' Commercial Co. v. Brown Alaska Co.* (C. C.) 148 Fed. 308; *Iowa Lillooet Gold Mining Co., Limited, v. Bliss* (C. C.) 144 Fed. 446; *Rome Petroleum & Iron Co. v. Hughes Specialty Well Drilling Co.* (C. C.) 130 Fed. 585; *Duncan v. Associated Press* (C. C.) 81 Fed. 417; *Wilson v. W. U. Tel. Co.* (C. C.) 34 Fed. 561; *Cowell v. City Water-Supply Co.* (C. C.) 96 Fed. 769; *Whitworth v. Illinois Central Railroad Co.* (C. C.) 107 Fed. 557; *Kansas Co. v. Interstate Co.* (C. C.) 37 Fed. 3; *Fales, Adm'x, v. Chicago, M. & St. P. Ry. Co.* (C. C.) 32 Fed. 673; *Gavin v. Vance* (C. C.) 33 Fed. 84; *First Nat. Bank v. Merchants' Bank et al.* (C. C.) 37 Fed. 657, 2 L. R. A. 469; *Burck v. Taylor* (C. C.) 39 Fed. 581; *Davidson v. Mexican Nat. R. R. Co.*, 157 U. S. 201, 208, 15 Sup. Ct. 563, 39 L. Ed. 672; *McCormick Harvesting Mach. Co. v. Walther's*, 134 U. S. 41, 10 Sup. Ct. 485, 33 L. Ed. 833; *Dillon on Removal of Causes*, § 96; *Creagh v. Equitable Life Assur. Soc.* (C. C.) 83 Fed. 849; *Memphis Sav. Bank v. Houchens*, 115 Fed. 96, 52 C. C. A. 176; *Pepper v. Rogers* (C. C.) 128 Fed. 987; *Ex parte Schollenberger*, 96 U. S. 378, 24 L. Ed. 853. And especially to the case of *Ex parte Wisner*, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264, by which, after much conflict, the construction placed by this court upon both parts of the statute was ultimately determined to be the law, so far as suits between citizens of the United States are concerned. These cases need not be reviewed at length. The case of *Ex*

parte Wisner, *supra*, was considered by this court upon the former motion; but, because of the extensive conflict of ideas, citation of a great number of cases was purposely avoided, and the principle was applied to the present suit against an alien, in the belief that if, under the statute above quoted, a suit on a chose in action cannot be maintained by an assignee, unless it could have been maintained originally by the assignor, no distinction should be made because of the citizenship or foreign residence of the defendant. A discussion as to whether all of the terms of the acts of 1875 and 1887, above quoted, are applicable to suits against aliens, does not affect the principles set forth in the Wisner Suit, which apply to one class equally as to the other.

A third point which is again called to the attention of the court is with relation to the doubt expressed by this court as to the extension of the phrase, "a controversy between citizens of a state or foreign states, citizens or subjects," to the case of the joinder of causes of action possessed by citizens of different states, against the subject of some foreign state. It is needless to say that this motion was not determined upon this point alone, nor does the point seem to have been settled. In the case of *Sweeney v. Carter Oil Co.*, 199 U. S. 252, 26 Sup. Ct. 55, 50 L. Ed. 178, the words "citizens of different states" were held to cover a suit between citizens of several states of the United States, and a citizen of the state in which the action was brought, which was not a state in which any of the plaintiffs resided. See, also, *Smith v. Lyon*, 133 U. S. 315, 10 Sup. Ct. 303, 33 L. Ed. 635, for a further recognition of the same principle.

In the case of *Ballin et al. v. Lehr et al.* (C. C.) 24 Fed. 193, a joint cause of action by a citizen of New York and a citizen of New Jersey against a citizen of Maryland and a subject of Prussia was removed to the United States Circuit Court, upon the ground that suits are removable in which "there is a controversy between citizens of different states, or between citizens of a state and foreign citizens or subjects." The only question considered was whether any two of the parties upon opposite sides of that suit were citizens of the same state. There was no assignment nor joinder of separate suits involved.

In the opinion heretofore filed this question was stated broadly and in such a manner as to apparently conflict with the decision in *Sweeney v. Carter Oil Co.*, *supra*. It was not intended in the former opinion to determine more than that 14 different persons, having respectively 14 separate causes of action, and being citizens of at least two different states, could not bring one suit against an alien, on the sole ground that he could be served with process. The opinion as filed seemed to decide that a joint cause of action against an alien, by the several owners thereof, if residents of different states, could not be maintained in the district where the alien could properly be served. The cases cited show the doubtfulness of the statement heretofore made.

It might be urged that, in order to avoid multiplicity of suits, a joinder would be advantageous, but can it be contended that inhabitants of different states, each having entered into a contract with the subject of some foreign government, and each contract having been

made within a different state of the United States, and therefore subject to different laws, could unite in one suit, because the defendant was an alien, and could be served in the district in which that suit was brought? If such joinder would be impossible, other than by motion, there would seem to be some doubt about the jurisdiction of an action, in which the 14 separate suits were joined under the guise of an assignment to one person, with the idea that that one person could obtain service upon the defendant. The spirit of the statute, "nor shall any Circuit or District Court have cognizance of any suit, * * * unless such suit might have been prosecuted * * * if no assignment * * * had been made," would seem to apply to a suit brought by the assignee of the 14 separate actions, even though the letter of the statute might be considered to apply separately to each of the 14 component parts of the assigned causes of action, with the idea of judging each by itself.

Following this latter idea, let us look at the situation involved in this motion: The plaintiff is the assignee of 14 people, each one of whom is alleged to have had a separate cause of action or right to bring suit against the defendant. It appears that one of these assignors resided in California, and that another is a corporation of the state of New York; but, disregarding the residence of the assignors, and assuming that they have assigned to the plaintiff, and that the plaintiff has brought suit against the defendant on all of the assignments, in the county of Kings and in the Supreme Court of New York, what rights did the defendant have before answering? He could have answered in the state court. If the jurisdictional facts of diversity of citizenship appeared upon the record, he could appear specially and remove into the United States court, and when there he could have moved to set aside the service of the summons, and for a dismissal of the action, upon the grounds which have been previously considered in this opinion; that is, that the summons and complaint had not been properly served in the district in which the Circuit Court was located, to which the action had been removed. If this course had been taken, a motion to remand by the plaintiff might not save the action if the service were defective; but the defendant did not pursue this course, nor attempt to set aside the service. He moved to remove the case, under the sections previously cited, into the United States court for this district, which is the district in which the Supreme Court for the county of Kings is located, and which is therefore the proper district for removal proceedings. He then proceeded to enter a general waiver of questions as to jurisdiction by filing a general answer in this court, but he did not do this until after the motion to remand had been made.

The defendant has taken the position that he wishes to try the action upon the merits in this court, and that he has attempted to waive any right to have the case brought in any other district before any other Circuit Court of the United States. His position has certainly had the effect of estopping him from now setting up any defect in the service for the purpose of asking that the service be set aside; and yet where it is apparent that the court has not jurisdiction, and where the waiver of jurisdiction did not occur until after the motion to remand

had, been made, it would seem that the alternative provided by section 6 of the statute above recited, to the effect that, when it shall appear to the satisfaction of the Circuit Court that such suit does not involve a dispute properly within the jurisdiction of said Circuit Court, the said Circuit Court shall proceed no further therein, "but shall dismiss the suit or remand it to the court from which it was removed, as justice may require," is the only remedy left open to the court.

The service by which this suit was brought (if such a suit is possible) does not seem to the court to have been sufficient to maintain an action in the Circuit Court of the United States for this district.

The motion to remand was made at a time when this defect appeared upon the record, and before any waiver of that defect, and in so far as there is any question as to the sufficiency of the service, or as to the maintenance of an action of this nature by the assignee of such a number of causes of action, it would seem that the proper course to pursue is to adhere to the original decision and remand the case to the Supreme Court of New York for the County of Kings, which apparently has acquired jurisdiction therein.

KUCHLER v. GREENE et al.

(Circuit Court, S. D. New York. June 9, 1908.)

1. TRUSTS—SUITS TO ENFORCE—EQUITABLE OWNERSHIP—SUFFICIENCY OF FACTS.

The bill alleges: That G. sold certain mining properties to M., agreeing to hold the titles in trust for M. or his assigns. M. sold to K. a certain percentage interest in said properties, and to others certain other percentage interests. M. subsequently formed the Cobre Company, to which he transferred his interests in said properties, with G.'s knowledge and consent. K. surrendered the evidence of her interest in said properties for a like proportionate part of the stock of the Cobre Company. G. subsequently formed the Cananea Company, to which he transferred the properties in question, in exchange for its capital stock, which, in turn, he transferred to the Greene Company in exchange for substantially all of its capital stock. Afterwards the Greene Company acquired a majority of the stock of the Cobre Company and complete control of that corporation, whereupon from that time G., the Greene Company, and the Cananea Company entirely ignored K., the Cobre Company, and all its minority stockholders. K., as a minority stockholder of the Cobre Company, files her bill against G., the Greene Company, and the Cananea Company for an accounting, making the Cobre Company a party defendant. K. is a citizen of California. G. is a citizen of the Southern district of New York. The Greene Company is a citizen of West Virginia. The Cananea Company is a citizen of Mexico. The Cobre Company is a citizen of Arizona. All the defendants have entered their general appearance. *Held:* (1) The bill states a good cause of action in K. to compel an accounting from G., the Greene Company, and the Cananea Company; and (2) the bill states a good cause of action in K. which antedates her rights as a stockholder of the Cobre Company, as under the facts alleged K. is at liberty to reassert her percentage ownership in said properties and to compel an accounting thereof from G., the Greene Company, and the Cananea Company.

2. COURTS—JURISDICTION OF FEDERAL COURT—INDISPENSABLE PARTIES ONLY TO BE CONSIDERED.

The general rule as to parties in chancery is that all ought to be made parties who are interested in the controversy, in order that there may be

an end of litigation. This rule, however, is subject to the following qualifications: (1) When a person will be directly affected by a decree, he is an indispensable party, unless the parties are too numerous to be brought before the court, when the case is subject to a special rule. (2) Where a person is interested in the controversy, but will not be directly affected by a decree made in his absence, he is not an indispensable party, but he should be made a party if possible, and the court will not proceed to a decree without him, if he can be reached. (3) Where he is not interested in the controversy between the immediate litigants, but has an interest in the subject-matter, which may be conveniently settled in the suit, and thereby prevent further litigation, he may be a party or not, at the option of the complainant. In a determination of the jurisdiction of the United States Circuit Courts, indispensable parties only should be considered, because all others may be dismissed or disregarded if their presence will oust or restrict the jurisdiction or the right. Where the real controversy is between citizens of different states, or a citizen and an alien, and the complainant is by some rule of law compelled to use the name of another party as defendant, such party will not deprive the federal courts of jurisdiction, although such party be a citizen of a territory or a citizen of the same state as the complainant. The Cobre Company is a proper party, but not an indispensable party, to this suit, because a decree which will do complete justice between the other parties to the controversy may be rendered without injuriously affecting its interests. As the Cobre Company is a citizen of a territory, and its joinder would oust the jurisdiction of the court as to the other parties before it, the suit may proceed without it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 837.]

In Equity. On demurrers to amended bill.

Samuel S. Watson, Walter B. Raymond, and Chester A. Jayne, for plaintiff.

F. W. M. Cutcheon, M. E. Harby, and Augustus L. Hunes, for defendants.

MARTIN, District Judge. The complainant alleges: That she is a stockholder of the Cobre Grande Copper Company and is a citizen of the state of California; that the defendant Cobre Grande Copper Company is a corporation organized under the laws of the territory of Arizona, and has its place of business in Phoenix, in said territory; that the defendant Cananea Copper Company is a corporation organized under the laws of the republic of Mexico; that the Greene Consolidated Copper Company is a corporation organized under the laws of the state of West Virginia; that the defendant Greene is a citizen of the state of New York; that the Cobre Grande Copper Company possessed the right to purchase and became the equitable owner of certain mines in said Mexico; that the said Greene was the legal holder of the mines and the president of said company; that he subsequently transferred said mines to the Cananea Company; that the said Greene Consolidated Copper Company acquired all the stock of the Cananea Company; that the complainant, some nine or ten years ago, paid to one George Mitchell of Arizona a sum of money for investment in the mining property in question in Mexico, and the sum was so invested, and a receipt taken therefor to the effect that she owned a certain fractional interest therein; that it was arranged between the owners of said mining properties that they would form a corporation and convey the property to the corporation and exchange

such receipts for stock; that pursuant to said arrangement the Cobre Grande Copper Company was incorporated April 25, 1899, and thereupon the complainant surrendered said receipt and became entitled to her fractional interest in the capital stock of said company; that about the 2d of August of the same year the complainant received a stock certificate for 67 shares of the capital stock of said corporation in exchange for said receipt, and then became, and ever since has been, a stockholder of record of said corporation; that on the 26th of November of the year previous the defendant Greene contracted to convey to said Mitchell the said mining properties for \$12,500 in cash, \$37,500 to be paid in one year, \$100,000 in two years, and \$100,000 in three years; that the said Greene thereupon executed and delivered deeds therefor and deposited them in escrow in the Phoenix National Bank in Phoenix, Ariz.; that on April 15, 1899, said Greene executed another agreement with said Mitchell that, upon the payment by the said Mitchell of the several sums of money above set forth, said Greene would continue to hold the title of the said properties in trust for the said Mitchell and until the said Mitchell or his assigns might demand of the said Greene the said deed, or that the said Greene should execute to said Mitchell, his assigns, or to such person as the said Mitchell might designate; that 10 days later, April 25, 1899, the said Cobre Grande Company was incorporated as above set forth; that on the 26th day of May following the said Mitchell delivered to said corporation an assignment of all his title in and to said properties; that on the 26th of April of the same year the said Greene delivered to the said corporation an agreement ratifying and confirming said agreement of the said Mitchell and transferred to said company other mines in Mexico; that on the 24th of July of the same year the said Greene sold to said corporation the "Elisa Mine," so called, in Mexico, and accepted in payment therefor four promissory notes of said corporation for the sum of \$100,000; that on the same day of said conveyance one Costello became director, president, and general manager of said corporation, and one Wood became director, secretary, and treasurer thereof, and one O'Keefe became manager of the mines; that soon thereafter the said Greene, Mitchell, and one Treadwell, then a director of said corporation, claimed that said Costello was not carrying out the arrangements made respecting the advance of funds, the working and developing of the mining properties, and thereupon said directors met in New York for the purpose of making arrangements to provide funds, and entered into negotiations with one Addicks and one Lawson for the purpose of securing funds; that pursuant to an understanding with Lawson, Addicks, Greene, Mitchell, and Treadwell, the election of said Costello and Wood was, by the directors declared to be void because of a defect in the notice of the meeting at which they claimed to have been elected, and thereupon, on the 6th of October, 1899, the said Greene and Treadwell took possession of said properties on behalf of said corporation; that during the same fall of 1899 the said Greene procured to be incorporated under the laws of Mexico the defendant Cananea Consolidated Copper Company, and thereupon the said Greene transferred to said Cananea Company, subject to the rights of said Mitchell and the Cobre Grande

Copper Company, all of said mining properties, and this without any authority from the Cobre Grande Company and without any compensation being paid to said company therefor; that the said Cananea Consolidated Company had full knowledge of the rights of the Cobre Grande Company at the time of receiving said transfer; that the Cananea Consolidated Copper Company entered into possession of said properties and has continued said possession from thence hitherto, has worked and operated the same, has received large incomes, and refused to account to the Cobre Grande Company; that at the time of the formation of the Cananea Company the said defendant Greene gave as a reason therefor that the Cobre Grande Company could not hold title to the property in question under the laws of the republic of Mexico, and it was necessary, in the interest of the Cobre Grande Company, that a corporation be formed under the laws of the republic of Mexico to take and hold the title to said mining properties, and work and operate the same for the benefit of the Cobre Grande Company; that the said Greene then declared that the said transfer was simply for the use and benefit of the said Cobre Grande Company; that on the 15th of September, 1899, the said Greene, Mitchell, and Treadwell organized the Greene Consolidated Copper Company under the laws of West Virginia; that all the capital stock of the Cananea Company, except what might be necessary for qualification of the directors, was turned over to the Greene Company with full knowledge of the rights of the Cobre Grande Company; that the mines were worked thereafter by the Greene Company and the Cananea Company; that the proceeds amounted to over \$4,000,000, distributed in dividends by the Greene Company; that the profits of said mines have been diverted and invested in other properties; that on January 12, 1901, the defendant Green Consolidated Company agreed that all the stockholders of the Cobre Grande Company should have the right to exchange their stock for stock in the Greene Company; that this agreement was ratified by the Greene Company and accepted by certain stockholders of the Cobre Grande Company; that when the defendant Greene and the Greene Consolidated Copper Company had obtained a majority of the shares of stock of the Cobre Grande Company, all offers to exchange were withdrawn, and the complainant and other minority stockholders of the Cobre Grande Company were denied the privilege of exchanging stocks and were also denied any portion of the earnings of said mining properties, or any share or part of the dividends paid from the earnings thereof; that on the 16th of October, 1899, the defendant Greene entered into an agreement with said Costello to purchase of him all of his stock in the Cobre Grand Company; that it was then agreed by the said Greene and Lawson that there should be organized under the laws of the state of Delaware the Greene Consolidated Copper Company, with a capital stock of \$6,000,000, to which should be transferred all the capital stock of the Cananea Company, and on the 24th of November, 1899, it was further agreed by said Lawson and said Addicks, on the one side, and the defendant Greene, the said Mitchell, Treadwell and one Logan, representing the Greene Consolidated Copper Company and the Cobre Grande Copper Company, that the Greene Consolidated Copper Company of West Virginia should be substituted

for the proposed Delaware corporation; that suits grew out of the ousting of Costello, Wood and O'Keefe, and out of said agreement to transfer the Cananea Company, and out of the action of the Cananea Company in entering into possession of the properties and concerning the disposition of products of the mines, all of which had been brought prior to December 12, 1900, and were undetermined at that time; that the defendant Greene and the Greene Consolidated Copper Company, after having secured a majority of said stock, caused said suit to be dismissed; that the contract under date of November 26, 1898, was fully performed on the part of said Mitchell to the satisfaction of the parties; that the said Greene Consolidated Copper Company is now the owner of about 117,000 shares of the stock of the Cobre Grande Company, which is a majority thereof; that it has refused to allow the orator, and the minority owners of upwards of 80,000 shares of the Cobre Grande Company, to receive any of the benefits which have accrued from the control of the property as aforesaid; that the said Greene and the Greene Consolidated Copper Company has complete control and dominion of said mines, and has received into its treasury and distributed among its stockholders the large amount of profits aforesaid; that the defendant Greene and the Greene Consolidated Copper Company control a majority of the capital stock of the Cobre Grande Company, elect its own directors and officers, dictating their acts; that they scheme to deprive and have deprived the minority stockholders of the Cobre Grande Company of all interest in the income, benefits, and profits arising from the properties aforesaid; that the said majority stockholders of the Cobre Grande Company have taken to themselves all of said profits, to the exclusion of the minority stockholders; that the officers of said Greene Consolidated Copper Company and the officers of the said Cananea Copper Company have conspired to defraud the minority stockholders of the Cobre Grande Company; and that the said Greene Consolidated Copper Company and the Cananea Copper Company are trustees in law, holding said properties for the benefit of all the stockholders, share and share alike, of the Cobre Grande Company.

The orator further alleges: That she is free from any laches; that she has not acquiesced in or ratified any acts charged against the defendants; that she is a bona fide stockholder of record of the defendant Cobre Grande Copper Company; that before the organization of said company she owned a fractional interest in the real estate from which said profits have been derived; that she has made demands upon the officers and directors of the Cobre Grand Copper Company and upon the defendant Greene for her interest in the earnings, income, and profits derived from the working of said property, and generally for the redress of the wrongs of which she complains in this bill of complaint; that all her demands have been refused; that she has been unable to obtain any relief whatsoever, or any accounting with any of the defendants; that she has no remedy through the officers, directors, or stockholders of any of the corporations aforesaid; that the officers of all of said corporations are opposed to the minority stockholders of the Cobre Grande Company and are hostile to their interests; that the defendant Greene, at the time of the transfer of the

properties in suit, to the Cananea Company, was the president of the Cobre Grande Company; that he was the first president of the Greene Consolidated Copper Company and has been the president and managing head of both the Greene Consolidated Copper Company and the Cananea Copper Company since their organization, and up to the time of the filing of the bill of complaint herein; that he is the person who planned and organized the defendant Cananea Consolidated Copper Company and the defendant Greene Consolidated Copper Company, and the prime factor in the management of said corporations whereby the complainant and the other minority stockholders of the Cobre Grande company have been deprived of their rightful share of the earnings of the properties aforesaid; and, further, that the complainant, as a stockholder of the Cobre Grande Company, has never received any notice of any of the meetings of the stockholders of said company.

The complainant further alleges that the agreement under and by virtue of which she and others, who are now minority stockholders in the Cobre Grande Company, made their original investment, while fully performed on her and their part, was never performed on the part of the defendant Greene or the defendant Cananea Copper Company or the defendant Greene Consolidated Copper Company.

These, in effect, are the allegations of the bill of complaint as amended.

The relief prayed for is:

First. That the Cananea Company be declared to be the holder in trust for the Cobre Grande Company of the properties that are the subject of suit, together with all the other properties which it was the intention of Greene to convey to Mitchell and the Cobre Grande Company.

Second. That the Cananea Company be declared to be the holder in trust for the Cobre Grande Company of the "Elisa Mine."

Third. That Greene, the Cananea Company, and the Greene Company be required, if it shall appear that there are profits which have arisen from the operation of said properties, to pay the same to the defendant Cobre Grande Copper Company.

Fourth. That if there are profits received by the Greene Company from said properties (of the Cobre Grande Company), it be required to pay to complainant, and to all other stockholders similarly situated, parts thereof in proportion to their respective stock holdings in the capital stock of the Cobre Grande Company.

Fifth. That the Cananea Company pay to complainant and to all other stockholders similarly situated parts of any benefits received by it from said properties (of the Cobre Grande Company) in proportion to his and their respective stock holdings in the Cobre Grande Company.

Sixth. That if any profits obtained by Greene, the Greene Company, or the Cananea Company from the properties in controversy, have been used for the purchase of other properties, that such properties be declared to be held in trust for the Cobre Grande Company, and that the defendants be required to account therefor.

Seventh. In the alternative that other relief be impracticable, that the value of complainant's interest and the interest of all other stock-

holders similarly situated in the properties of the Cobre Grande Company be determined, and that the complainant and all other stockholders similarly situated be declared to have a lien upon the assets and properties of Greene, the Greene Company, and the Cananea Company for the value of their interests so determined.

All of the defendants have appeared and have demurred to the bill of complaint. With the exception of the Cobre Grande Copper Company, the defendants, after appearing, first filed a plea of *res judicata*; but, the complainant having been permitted to amend her bill, leave was given the defendants to withdraw their plea, if they should so elect, and to demur. Advantage was taken of this permission. The demurrer of the Cobre Grande Copper Company is upon the ground that it appears upon the face of the bill that the complainant is a citizen and resident of the state of California, and the Cobre Grande Copper Company a corporation and resident of the territory of Arizona, and that therefore no jurisdiction exists over that defendant, and upon the further ground that no cause is stated in the bill entitling the complainant to any discovery or relief. The demurrers of the remaining defendants are upon the same grounds and also upon the ground that, inasmuch as the court is without jurisdiction over the Cobre Grande Copper Company, it is without jurisdiction of an indispensable party without whose presence the suit cannot proceed.

The defendant William C. Greene, the defendants Greene Consolidated Copper Company, and the Cananea Consolidated Copper Company are in court. The Cananea Consolidated Copper Company is organized under the laws of the republic of Mexico, an alien, while the Greene Consolidated Copper Company is organized under the laws of the state of West Virginia. If the Cobre Grande Copper Company, being organized under the laws of a territory, and having its principal place of business therein, is an indispensable party, the complainant can proceed no further in this cause. *Hepburn v. Ellzey*, 2 Cranch, 445, 2 L. Ed. 332; *Hooe v. Jamieson*, 166 U. S. 395, 17 Sup. Ct. 596, 41 L. Ed. 1049; *McClellan v. McKane* (C. C.) 154 Fed. 164. If, however, the Cobre Grande Copper Company is not an indispensable party, though joined as a party defendant in the bill of complaint, it will not oust the court's jurisdiction.

Section 737, Rev. St. (U. S. Comp. St. 1901, p. 587), provides as follows:

"When there are several defendants in any suit at law or in equity, and one or more of them are neither inhabitants of nor found within the district in which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction, and proceed to the trial and adjudication of the suit between the parties who are properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process nor voluntarily appearing to answer; and non joinder of parties who are not inhabitants of nor found within the district, as aforesaid, shall not constitute matter of abatement or objection to the suit."

Where the real controversy is between citizens of different states, or a citizen and an alien, and yet the plaintiff is by some rule of law compelled to use the name of another party who may not be a citizen of a different state to perform merely a ministerial act, the joinder of such ministerial party will not deprive the federal court of jurisdiction.

tion. *Walden v. Skinner*, 101 U. S. 577, 25 L. Ed. 963; *McNutt v. Bland*, 2 How. 9, 11 L. Ed. 159; *Browne v. Strode*, 5 Cranch, 303, 3 L. Ed. 108; *Coal Co. v. Blatchford*, 11 Wall. 172, 20 L. Ed. 179; *Wormly v. Wormly*, 8 Wheat. 421, 5 L. Ed. 651; *Russell v. Clark*, 7 Cranch, 69, 3 L. Ed. 271; *Wood v. Davis*, 18 How. 467, 15 L. Ed. 460.

The general rule upon this subject, as laid down by Justice Bradley, in *William v. Bankhead*, 19 Wall. 571, 22 L. Ed. 184, has been closely followed in the federal courts. I quote it:

"The general rule as to parties in chancery is that all ought to be made parties who are interested in the controversy, in order that there may be an end of litigation. But there are qualifications of this rule arising out of public policy and the necessities of particular cases. The true distinction appears to be as follows:

"First. When a person will be directly affected by a decree, he is an indispensable party, unless the parties are too numerous to be brought before the court, when the case is subject to a special rule.

"Second. Where a person is interested in the controversy, but will not be directly affected by a decree made in his absence, he is not an indispensable party, but he should be made a party if possible, and the court will not proceed to a decree without him, if he can be reached.

"Thirdly. Where he is not interested in the controversy between the immediate litigants, but has an interest in the subject-matter, which may be conveniently settled in the suit, and thereby prevent further litigation, he may be a party or not, at the option of the complainant."

In my opinion, these demurrers turn squarely upon the question as to whether or not the Cobre Grande Copper Company is an indispensable party. Will that company be directly affected to its detriment by a decree of this court that may afford relief to the complainant? Upon this point it is claimed by the defendants that, if upon accounting funds are found in the defendant's hands, the accounting must be to the Cobre Grande Company. In this I do not concur. The defendants own a majority of that stock. They have had all that belongs to them, and also all that belongs to this complainant and other minority stockholders. When this amount that belongs to the minority stockholders is ascertained by the accounting, equity and good conscience would require the majority stockholders to pay the minority stockholders their pro rata share, not to the corporation for redistribution, but to such party or person, and in such manner, as this court shall deem meet. It is simply affording relief on the part of the court, through equitable channels, to a party injured by the wrongful and dishonest acts of another party. The Cobre Grande Copper Company, as such, whether it voluntarily comes in as a party, or keeps as far away as possible, can neither be benefited nor harmed by any equitable mandate of this court. I hold that the Cobre Grande Copper Company is not an indispensable party.

I think there is another reason why these demurrers should be overruled. It appears from the bill of complaint: That the complainant paid over to Mitchell certain sums of money to be invested in these mining properties, which the said Mitchell held under contract of purchase with defendant Greene; that upon the payment of said money by Mitchell, the complainant became entitled to her fractional interest in said mining properties; that Mitchell, and every one acting under

him, performed, while the defendant Greene performed only far enough to organize the contemplated company and get control of a majority of its stock, and then turn over the property interests, in which the complainant owned her fractional rights, to another corporation, and then to still another corporation with the evident intent of defrauding the complainant, and others in like situation, of their interests in that property. Her rights, title, and interest in that property were surrendered to Greene, or the corporation of his creation, with the presumed understanding that the corporation was to be fairly and honestly organized and conducted by the other contracting party, the defendant Greene. In view of the fraud practiced by the said Greene, she is at liberty to reassert her percentage ownership in said mining property, and the court of equity should afford her relief upon that ground. *Rogers v. Penobscot Mining Co.*, 154 Fed. 606, 83 C. C. A. 380, and cases there cited.

The demurrers of Wm. C. Greene, Greene Consolidated Copper Company and Cananea Consolidated Copper Company are overruled, with leave to answer in 30 days; cost to be taxed by the clerk. The demurrer of Cobre Grande Copper Company is sustained; costs to be taxed by the clerk.

IN RE LASKY.

(District Court, N. D. Alabama, W. D. July 11, 1908.)

BANKRUPTCY—REFUSAL OF BANKRUPT TO SURRENDER PROPERTY—COMMITMENT FOR CONTEMPT.

The property of a bankrupt estate traced to the recent control or possession of the bankrupt is presumed to remain there until he satisfactorily accounts to the court for its disposition or disappearance, and where the court on ample evidence has found that it still remains in his possession or under his control, and that his testimony as to its disposition is incredible and untrue, and has ordered him to turn it over to his trustee, his mere denial under oath is not sufficient to purge him of contempt for refusal to obey such order.

In Bankruptcy. On motion to commit Joseph Lasky, a bankrupt, to jail for contempt of court in failing to pay into court the sum of \$1,800, previously decided by the court to have been withheld by him from his trustee.

Henry Fitts and Jere Murphy, for the motion.

C. B. Powell, opposed.

HUNDLEY, District Judge. On a former date, and upon a petition filed in this cause by the bankrupt, Joseph Lasky, asking this court to review an order of the referee in bankruptcy requiring said bankrupt to pay into court the sum of \$1,800, and after a full hearing upon that petition and the consideration of evidence produced both on behalf of the bankrupt and on behalf of the trustee, I confirmed the order of the referee, and held that, under the evidence produced, the bankrupt had within his possession the sum of \$1,800, which he was fraudulently withholding from and refusing to pay to his trustee in bankruptcy. This court, in a decree rendered at the

time, gave the bankrupt seven days in which to pay the money into court, and, this time having now expired, motion is made here to commit the bankrupt for contempt of court in failing to comply with that order of the court. The motion now pending is resisted by the bankrupt chiefly as matter of law, and no additional evidence is sought to be produced, except the bare affidavit of the bankrupt himself that he has no funds in his possession from which to pay the sum of \$1,800 adjudged to be in his possession.

Before considering the law bearing upon the question at issue, it is proper that I should rehearse, in this connection, the facts upon which I found that Lasky was holding in his possession the sum of \$1,800. Lasky was engaged in the mercantile business in the city of Tuscaloosa, Ala., with a partner by the name of Goldberg. The business was conducted under the name of Lasky & Goldberg. This firm succeeded in doing away with more than \$6,500 worth of goods bought in February and delivered early in March. These goods, or money procured from their sale, disappeared from the reach of creditors in a very short period of time, estimated at sixty days. In addition to this, the testimony shows that in January there was a very considerable stock of goods in the storehouse—approximately \$2,500 worth. Therefore between January and May, five months, \$9,000 worth of money and goods were withdrawn from the grasp of creditors, and two-thirds of this amount was spirited away in less than two months. Of all the goods purchased in the first five months of the calendar year 1908, not one dollar's worth is paid for.

Upon his examination the bankrupt, Lasky, attempted to account for this surprising condition of things by saying that he lost some \$2,000 of the money in gambling, and that these losses were sustained upon some 14 to 17 trips to Birmingham, one trip to Montgomery, and in night games at the McLester Hotel in Tuscaloosa. Upon his first examination he said that he could not tell the name of a single person with whom he played or a single person who ever saw him playing in Birmingham, Montgomery, or Tuscaloosa. He said upon that examination that all of his Birmingham games, except one played at the Gayety Hotel about the time of his adjudication, had been played either at the Florence or at the Birmingham Hotels. He said, also, that of the numerous trips he made to Birmingham—14 in all—on 12 of these trips he put up either at the Metropolitan or the Gayety Hotels, and that he registered some 3 or 4 times under an assumed name and upon all other occasions in his own name. He could not remember by whom he was invited into the games at the various hotels, and he could not remember the number of any of the hotel rooms in which he had played the various games. Under Lasky's testimony, all of these losses must have been sustained between March 1st and May 5th, 66 days. It appears from his own testimony that he was in Tuscaloosa a very considerable portion of the time attending to his business. About one-half of this time he was running the store alone, as his partner had decamped. The testimony of his young lady clerk shows that he was in Tuscaloosa four out of the nine weeks, with the exception of three days, during which time he was said to have been sick. He was there regularly, because he opened the store every

morning and was there awaiting her when she arrived for the day's work. With the four weeks accounted for by this clerk out of the reckoning, his testimony claims 17 trips to Birmingham, 1 trip to Montgomery, and numerous night games at the McLester Hotel in Tuscaloosa, that is to say, that out of the 35 days in which he was out of town he was engaged in gambling 18 days, and that during the 17 days he was at home he was doing heavy night gambling, and losing uniformly. This is remarkable, to say the least. But his claim is that numbers of the Birmingham trips lasted at least two days, so that, if his story is true, he was out of town substantially all of the time accounted for by his clerk, leaving him no opportunity to have attended to his business after Goldberg left, as he testified he did quite closely for some six months, and he is unable to remember the name of one single individual with whom he played at any time or to whom he lost so much money. To believe this story would tax my credulity beyond endurance. But Lasky is further discredited when the Metropolitan Hotel register is produced, covering the entire period from March 1st to May 5th, and it shows no registration of Joseph Lasky at all, and when the register is laid before him, and he is called upon to identify the registration under assumed names, he points out a few names entered on the register prior to March 26th, which he claims to believe were his registrations, but would not identify them positively as such. Further than this, the testimony shows that, upon the examination of Lasky as to his knowledge of the game of poker at which he claims to have lost his money, he seemed to have no real acquaintance with the game, but only knew the simpler hands which any tyro might know, and he fails to meet a test of knowledge which any player of his claimed experience ought certainly to be able to meet.

Such is the condition of the testimony upon which the referee made the order. After this order was made, Lasky appears to have employed new counsel and made application to have the order set aside, and upon the hearing had upon this application he weaves the web of deceit and improbability more firmly about him. First, the registration at the Gayety Hotel from March 17th to May 5th is brought into court, and further discredits his repeated registration at that hotel in his own name as well as assumed names; the showing by that register being that he never registered there between those dates in his own name, and that, if he registered there at all under an assumed name, it was only upon one occasion prior to May 5th. By a man named Gordon he appears to have proven a game and a state of intoxication at the Gayety Hotel; but this witness (Gordon) demonstrates the utter incredibility of the whole story when he says that Lasky's repeated trips to Birmingham averaged two days in length, and that he spent many nights in a character of dissipation different from card playing, and so worked out for Lasky a schedule of dissipation which was absolutely impossible of achievement within the time limit of Lasky's return from New York, in March, and his bankruptcy, in May, unless Lasky possessed, like Joshua of old, the power to arrest the passage of time to enable him to work out his peculiar program. Strange, indeed, that in his previous examinations, when

called upon for the name of some person to corroborate his story, Lasky could not once recall his familiar friend, Gordon. More than that, confronted with the necessity of corroboration, he finds that he has forgotten another witness to his dissipation, a Tuscaloosa townsman, one Ben Graubard, who tells a very vivid story of having seen Lasky in a game on the parlor floor of the McLester Hotel in the room of his old-time New York friend, one Joe Greenfield, on a Sunday night about the middle of April, losing heavily; but this new found corroboration, it seems, does not bear the test of the hotel register, it showing that Joe Greenfield was never at the hotel during the month of April, and that different and other people registered in that room on each Sunday night in April, and it further appears that no person by the name of Greenfield during the whole month of April registered at the only other hotel in Tuscaloosa. Indeed, so improbable is the story of Joe Greenfield, and so thoroughly does the inconsistency of the testimony of Gordon expose the whole scheme, and so much does the appearance of the Gayety Hotel register in the record discredit Lasky, that this court was amply justified in concluding that the additional examination held under the motion to nullify the order further discredits Lasky's explanation. From all the evidence presented before me, I found that Lasky was withholding at least \$1,800 of funds which should be turned over to his trustee, and upon a further consideration of the testimony I am still of the same opinion now. I cannot believe his improbable story and cannot permit him to use the bankrupt law to further his ignoble ends.

It is argued with great earnestness, by counsel for Lasky, that an order of commitment for contempt is improper, in the face of Lasky's oath that he has not the money, regardless of the finding of this court that he has this money. In other words, it is claimed that it is open to this bankrupt, as well as any other bankrupt, to avoid an order of this sort by deliberate perjury, and that such perjury dissolves all pecuniary responsibility and relegates the creditors to a prosecution for perjury. It is true that this contention does find some support in the opinion of Judge Caldwell in *Boyd v. Glucklich*, 116 Fed. 138, 53 C. C. A. 451, although I do not believe that he there intended what he said in respect of the "purging by oath" as an authoritative construction of the bankruptcy law. My reason for this conclusion is because the order made reversing the case and directing the taking of further testimony is wholly inconsistent with the proposition that the bankrupt's oath makes an end of the proceedings; but, however that may be, Judge Sanborn, in the same case, takes issue on the "purging by oath" proposition, and in a most forceful manner arrays the many opposing authorities in convincing number. He says, in part:

"The rule by which this issue is to be determined is that the property of the bankrupt's estate, traced to the recent possession or control of the bankrupt, is presumed to remain there until he satisfactorily accounts to the court for its disposition or disappearance. He cannot escape an order for its surrender by simply adding perjury to fraudulent concealment or misappropriation. It is still the duty of the referee and the court, notwithstanding his oath and his testimony, if satisfied beyond a reasonable doubt that he has property of the estate in his possession or under his control, to order him to surrender it to the trustee and to enforce that order by confinement as for contempt."

The Caldwell opinion has been expressly repudiated, and the Sanborn opinion has been expressly adopted in the Eighth circuit, wherein *Boyd v. Glucklich* was decided, in *Schweer v. Brown* (C. C. A. 8th Circuit) 130 Fed. 328, 64 C. C. A. 574, wherein Hook, Circuit Judge, speaking for the court, after citing a number of authorities, says:

"These cases also furnish a conclusive answer to the claim of the bankrupt that his mere denial under oath of the possession of assets is conclusive, and that in such cases the only remedy of the trustee and the creditors is by proceedings under the penal sections of the bankrupt act."

The Sanborn opinion is in line with the decisions previously rendered and has been generally followed in the federal courts. In the case *In re Gerstel* (D. C.) 123 Fed. 166, a case wherein efforts to account for dissipation of funds by extravagant living are discredited and an order to pay in \$1,500 is passed, Humphrey, Judge, says:

"Counsel for the respondent contend that the answer to the rule being under oath is conclusive upon the court. I cannot accept that view. The question seems to be settled in this circuit, having arisen in the *Salkey Case*, Fed. Cas. No. 12,253, 6 Biss. 269, before Judge Blodgett, under the bankruptcy act of 1867 (Act March 2, 1867, c. 176, 14 Stat. 517), and his decision confirmed on application for review by Drummond, Circuit Judge. The same rule is followed in the Ninth circuit in *Ripon Knitting Works v. Schreiber* (D. C.) 101 Fed. 810 (Hanford, District Judge), and approved by the Circuit Court of Appeals. 104 Fed. 1006, 43 C. C. A. 682. The rule in these cases is that the answer of the respondent is not conclusive on the court, that the court may proceed to inquire into the facts, and, where it has been shown that the property has come into the hands of the bankrupt shortly before the adjudication, that the schedules give no account either of this property or its proceeds, and that the bankrupt by an answer or by examination under oath fails to make any credible explanation, showing what became of such property, the court when so satisfied is authorized to consider the property or its proceeds as being still in the possession or under the control of the bankrupt, and to require by order that it be produced and delivered to the trustee, and upon failure to obey such order to punish by imprisonment for contempt. A consideration of all the cases upon the subject leads me to the conclusion that this is the law of the case. Many other cases could be cited. I have fully considered the case of *Boyd v. Glucklich*, 116 Fed. 131, 53 C. C. A. 451, together with all other cases cited by counsel for the bankrupt; but my mind adheres too strongly to the rule above announced."

Platt, Judge of the Second circuit, repudiates the "purging by oath" doctrine, and in *Re Leinweber* (D. C.) 128 Fed. 641, a case where the bankrupt claimed to have paid the money out to creditors, but could not produce them or evidence of such payment, says:

"I am fortified in respect of my action by the position which Judge Brown took in *Re Schlesinger* (D. C.) 97 Fed. 930, which was confirmed by the Court of Appeals for this circuit. 102 Fed. 117, 42 C. C. A. 207. The bankrupt relies upon *Boyd v. Glucklich*, 116 Fed. 131, 53 C. C. A. 451. I am not persuaded by the reasoning of the majority of the court in that case. Judge Sanborn in his opinion, while for obvious reasons concurring in the result, sets forth succinctly the principles which evidently controlled the court in the *Schlesinger Case* and cites several federal authorities in support thereof."

In re Kane (D. C.) 125 Fed. 984, is a case where the bankrupt swore positively that he had not the money, and Archbald, Judge (evidently having *Boyd v. Glucklich* in mind, for he cites it among other cases), says (where statement of bankrupt that he had given the mon-

ey to his wife and she had spent it held not to be sufficiently accounted for its disposition):

"It is not intended to punish the bankrupt for concealing assets from his trustee, for which the law otherwise provides, nor for frauds or delinquencies of which he may appear to be guilty. The sole purpose is to reach and compel the surrender to the trustee of property belonging to the estate in the actual control or possession of the bankrupt. Having regard to what is involved, it is to be exercised with caution; but, where a proper case is presented by the evidence, the court is not to allow itself to be deceived by evasions nor deterred by the consequences."

In *Moody v. Cole* (D. C.) 148 Fed. 295, the judge affirmed the finding of the referee by which the bankrupt, Mrs. Cole, was required to pay money into court, although in that case the following contention was made, which I quote from the opinion:

"It is claimed by her counsel, in his very able presentation of this cause to this court, that this denial of the bankrupt should be practically conclusive in the matter, and that in the face of such denial the court should not adjudge her to be in contempt."

The courts of bankruptcy have also held that the answer to the rule to show cause is not conclusive, but transversable, that weight should be given to the denial of the bankrupt, but that it is the duty of the court to examine all the evidence, both circumstantial and direct, relating to the matter to see whether there are any inconsistencies in the bankrupt's testimony or conduct which affected his testimony. In our own Fifth circuit, the "purging by oath" doctrine is, I think, plainly discredited by a decision of the majority of the court in *Re Purvine*, 96 Fed. 192, 37 C. C. A. 446. In the later case of *Samel v. Dodd*, 142 Fed. 68, 73 C. C. A. 254, an opinion of Judge Shelby yields assent to the trend and current of authority and recognizes (middle of page 73 of 142 Fed., middle of page 259 of 73 C. C. A.) that the order should be made where it does "appear clearly and affirmatively from the record, notwithstanding his denials, that he has power to comply with the decree." The following from the earlier cases decided under the present bankruptcy act fully support the contentions of the movant here: In *re Schlesinger* (D. C.) 97 Fed. 930: Big purchases, quick sales and spiriting away of money. Professed ignorance and forgetfulness of recent business. In *re Deuell*, 100 Fed. 633: Goods and money spirited away. What she could have reasonably expected is calculated and order given for residue. In *re Greenberg* (D. C.) 106 Fed. 496: Incredible story of having lost pocketbook. The former action of this court in discrediting the bankrupt's uncorroborated story of gambling losses is directly in line with *In re Henderson* (D. C.) 130 Fed. 385. See latter part of opinion in *Schweer v. Brown*, 130 Fed. 328-330, 64 C. C. A. 574.

From the above-cited cases it seems clear to my mind that the following principle of law is well settled, to wit: That the property of a bankrupt estate, traced to the recent control or possession of the bankrupt, is presumed to remain there until he satisfactorily accounts to the court for its disposition or disappearance. Now let us see what may be properly deduced from the evidence as showing the property to be in the bankrupt's possession during the five months next before his adjudication:

A stock of goods on hand worth at least.....	\$2,500 00
Goods purchased within the five months for which not a dollar was paid	6,500 00
	<hr/> \$9,000 00

How and for how much of this does he account? First: He says that all goods were sold and converted into cash. The evidence indicates that they brought about cost, but let us allow \$2,000 for his selling cheap and the little remnant left in the store, so we have:

Item 1. Discount to get quick sales.....	\$2,000 00
Item 2. (He gives in detail his cost of doing business, and under that evidence \$100 a month is a liberal allowance, so) expenses of running store were.....	500 00
Item 3. (His checks show exactly what he paid on old accounts, freight, and drayage in these five months.) Paid for goods, freight, and drayage about.....	1,300 00
Item 4. Goldberg's living expenses, \$200 per month.....	1,000 00
Item 5. Lasky's living expenses, \$200 per month.....	1,000 00
Item 6. Accident to sister.....	500 00
Item 7. Mother's and sister's trips.....	300 00
Item 8. Money which Mr. and Mrs. Goldberg took away for living expenses, about.....	300 00
Total.....	<hr/> \$9,000 00

This resolves every doubt in the bankrupt's favor and is more liberal to him than are the reported cases. It shows \$2,100 coming into his possession and wholly unaccounted for, and the estimate made by the court is certainly not overdrawn and, if anything, is rather below what may be sustained by the evidence. It is not attempted to state the exact amount of the bankrupt's frauds and concealments. The law does not require this, for, as is said in *Re Schlesinger* (D. C.) 97 Fed. 930:

"A debtor is not, however, to go scot-free because the exact amount of his frauds and concealments are not ascertainable, nor should the bankrupt act be suffered to be paralyzed as respects the creditors by such means."

A merchant should not be permitted to shut his eyes to the disappearance of his goods, and when called upon by the court to account therefor escape the penalty of the law by simply saying: "I have not the goods. I have no money." In a proceeding of this character, it is not within the province of the court to inflict punishment for dishonest conduct; but, in a careful effort to avoid such result, a court, when called upon to pass upon the weight of testimony and the credibility of witnesses, is not to be deprived of those faculties of judgment and discrimination as to what is true and probable, on the one hand, and untrue and improbable or absurd, upon the other, which are permitted to be exercised by juries in similar cases.

I am clearly of the opinion, from all the evidence in this cause, that Lasky has in his possession or under his control the sum of at least \$1,800, which he has failed to pay over to his trustee under a former order of this court.

For his refusal to comply with this order, he is in contempt of this court, and an order will now be entered committing him to jail until the further orders of this court.

WINTERS v. BALTIMORE & O. R. CO.

(Circuit Court, S. D. Ohio, E. D. July 8, 1908.)

No. 1,338.

1. CARRIERS—INJURY TO PASSENGER—DERAILMENT—NEGLIGENCE—RES IPSA LOQUITUR.

Proof that a passenger on a railroad train was injured by derailment is sufficient to establish a prima facie case of defendant's negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1288, 1307, 1311.]

2. SAME—PLACE OF TRANSPORTATION.

A passenger injured by derailment of the train, in order to recover, must show not only that he was a passenger, but that at the time of the accident he was also in a place where he had a right to be, or, at least, that the place where he was, if he was not in the right place, did not affect the result.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1390.]

3. SAME—DUTY OF PASSENGER.

It is the duty of a passenger, on boarding a train, to place himself in a safe position thereon, if he is able to find one, and it is no excuse for his placing himself in an unsafe position that the trainmen knew that it was unsafe and did not prevent his occupying it, if his danger was equally well known to him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1375.]

4. SAME.

The prima facie liability of a carrier for injuries to a passenger by derailment arising from the mere fact of the accident and the injury is conditioned on the exercise of reasonable care by the passenger.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1348.]

5. SAME—CONTRIBUTORY NEGLIGENCE.

Where the contributory negligence of a passenger injured by the derailment of a car of the train on which he was riding contributed to the injury, he was not entitled to recover, though his negligence did not contribute to the derailment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1346.]

6. SAME—EVIDENCE.

Plaintiff, a member of defendant's track repairing gang, was injured by the derailment of a car of the train on which plaintiff was being carried to his home by defendant after termination of the day's work. Defendant provided two box cars and a caboose in which to carry plaintiff and his fellow workmen, but plaintiff, in accordance with a prior custom, known to his foreman, climbed on top of one of the cars and rode there, and at the time of the derailment was either thrown or jumped to the ground, and sustained the injury complained of. No one else was injured, and if plaintiff had remained in the cars or caboose he would not have been injured. *Held*, that plaintiff was negligent as a matter of law, precluding a recovery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1375.]

On Motion for Rehearing.

The plaintiff was a member of the defendant's floating gang engaged in track repairing, and, with about 20 other laborers and a foreman, on the evening of the accident in question, was proceeding homeward on the defendant's main track on a work train used in transporting laborers to and from their work, and consisting of an engine, a caboose, and two box cars. For the purpose of picking up a gang of Italian laborers who were working on a track leading to a brick plant, the work train about dusk was switched to such

track, and while backing toward the brick plant the rear truck of the rear car (the truck most remote from the engine) was derailed at a point where a driveway crossed the track. No other wheels of the train were derailed. The defendant had been engaged for some time in raising the track, and the plaintiff himself for two weeks or more had been employed off and on in that work. The road or driveway had been in use by those living in the vicinity of the brick plant, or doing business with them, since the construction of the plant some five or six years ago. Between the steel rails where the road crossed the track were some loose ties, rails, and planks, which had been taken out and thrown back, as circumstances required in the raising of the track. One of the planks had, from some unknown cause, gotten across one of the rails, and it was this that caused the derailment. The plaintiff, who was riding on top of the car, about its middle, either jumped or was thrown from it, and his right leg was caught by the wheels of the front truck of such car (the wheels of the car nearest the engine), and so mangled as to require amputation. The petition states that the train had a movement of two miles an hour, and that the plaintiff was thrown from the top of the car. He testified that the train was traveling at the rate of five or six miles an hour, and that he thinks he jumped from the car when the brakeman, on first seeing the plank, directed him to do so. There was no appreciable time between the discovery of the obstruction and the car's encountering it. He and the brakeman were both looking toward the west, while the train was moving in a northerly or northwesterly direction.

The plaintiff's contradicted evidence shows that the two cars in the train were camp cars supplied by the defendant and used for transporting its laborers and their tools to and from their work. One of the cars was provided for the plaintiff and his co-laborers, and the other for the Italian workmen. The plaintiff had been riding in the caboose. At the switch he left the caboose, of his own accord, and voluntarily climbed on top of the car after the brakeman. His fellow laborers took their position in the car. There is no evidence that any one had ever directed him to ride on top of the car, but it had been his habit, when the foreman told the men to get aboard, to get on the train at any place, and he had previously, on different occasions, climbed upon and ridden on top of the car in the foreman's presence. Other laborers had also ridden on top of the cars. The conductor had seen him riding on top of the cars, and the brakeman was there with him at the time of the collision. He had no duty to perform there or in the operation of the train. It is not claimed that any other person on the train was injured, and in argument it was conceded that the plaintiff was the only one hurt. At the conclusion of plaintiff's evidence a verdict was directed for the defendant, and the case is now here on an application for rehearing. The shock of the collision was not great, as only the rear trucks of the one car left the rails. How far the train proceeded before stopping is not disclosed, but the plaintiff testified that it stopped when the trucks left the track.

F. S. Monnett and Geo. W. Bope, for plaintiff.

F. A. Durban and R. J. King, for defendant.

SATER, District Judge (after stating the facts as above). The defendant admits the derailment and the plaintiff's injury. These facts are prima facie proof of the defendant's negligence. *Feital v. Middlesex R. R. Co.*, 109 Mass. 398, 12 Am. Rep. 720; *Little Rock & Ft. Scott Ry. Co. v. Miles*, 40 Ark. 298, 48 Am. Rep. 10; *Stokes v. Saltonstall*, 13 Pet. 181, 10 L. Ed. 115. But notwithstanding this fact, the plaintiff, to recover, must show not only that he was a passenger, but that at the time of the accident he was also in a place where he had a right to be, or at least that the place where he was, if he was not in the right place, did not affect the result. It was his duty, in boarding the train, to place himself in a safe position thereon, if he was able to obtain such a position, and it was no excuse for his placing himself in

an unsafe position that the trainmen knew that it was unsafe and did not drive him therefrom, if his danger was equally well known to him. The prima facie liability of the defendant, arising from the mere fact of an accident and the plaintiff's injuries, is conditioned upon the exercise of reasonable care on his part. *Tuley v. Chicago, B. & Q. Ry. Co.*, 41 Mo. App. 432.

In *Little Rock & Ft. Scott Ry. Co. v. Miles*, supra, it was said:

"There are certain portions of every railroad train which are so obviously dangerous for a passenger to occupy, and so plainly not designed for his reception, that his presence there will constitute negligence as a matter of law and preclude him from claiming damages for injuries received while in such position. A passenger who voluntarily and unnecessarily rides upon the engine or tender, or upon the pilot or bumper of the locomotive, or upon the top of a car, or upon the platform, cannot be said to be in the exercise of that caution and discretion which the law requires of all persons who are of full age, of sound mind, and of ordinary intelligence."

In *Kimball v. Palmer*, 80 Fed. 240, 25 C. C. A. 394, the evidence was such as to justify sending the case to the jury; but the rule announced in the opinion is applicable to the case at bar, to wit:

"The effort of the plaintiff in attempting to get on the top of the box car next to the caboose, for the purpose of walking over the tops of the other cars to his car, was attended with manifest danger, especially as the train was in motion. *Railroad Co. v. Lindley*, 42 Kan. 714, 22 Pac. 703, 6 L. R. A. 646, 16 Am. St. Rep. 515. Nothing could justify the attempt except its necessity. It is the duty of the carrier to carry his passengers safely. It is equally the duty of the passenger (a reasonable being) to avoid all unnecessary risks. *Hickey v. Railroad Co.*, 14 Allen (Mass.) 429. 'A man is guilty of culpable negligence when he does or omits to do an act that an ordinarily prudent person in the same situation, and with equal experience, would not have done or omitted to do, or when he voluntarily exposes himself to a danger which there was no occasion for him to incur in the proper discharge of his duty.' *Railway Co. v. Carpenter*, 12 U. S. App. 398, 5 C. C. A. 554, and 56 Fed. 454. * * * Nothing would justify a person in getting upon and passing over the tops of the cars while in motion, unless it was the usual method (perhaps, the only method) by which the separate cars could be reached."

In *Atchison, Topeka & Santa Fé Ry. Co. v. Lindley*, 42 Kan. 714, 22 Pac. 703, 6 L. R. A. 646, 16 Am. St. Rep. 515, an instructive case, a shipper of stock on a freight train, to which was attached a caboose in which the shippers on the train were to ride, in response to a direction from the conductor to get on top of the train and help signal, voluntarily obeyed the order, got upon a backward moving train, and while on top of it near the end of the car, watching the brakeman trying to make a coupling, was severely injured by a sudden forward motion or jerk of the train without any signal being given. It was held that as he voluntarily placed himself in a position of known danger, and was not on top of the train to look after or care for his stock, the defendant was not liable in damages for his injury, in the absence of such gross negligence as amounted to wantonness on the part of the employees in charge of the train.

In *Ft. Scott, Wichita & Western Ry. Co. v. Sparks*, 55 Kan. 288, 39 Pac. 1032, it was held that standing or walking upon the top of a moving train is obviously dangerous; and *Elliott on Railroads*, § 1632, announces that "it would seem that to ride upon the cowcatcher or pilot of an engine is clearly contributory negligence, as a matter of

law," and then adds that the same rule applies to riding on top of a car. Other authorities in point are *Railroad Co. v. Green*, 60 Kan. 289, 294, 56 Pac. 477, and *Gross, Adm'r, v. South Chicago City Ry. Co.*, 73 Ill. App. 222.

Inasmuch as the plaintiff voluntarily and without necessity left the caboose, and instead of taking his place in the camp car, which had been provided for his transportation, without any occasion for so doing, climbed on top of the car, where the danger was obvious and greater than in either the caboose or the camp car, which greater danger he was not intended to assume, and of which he had knowledge, he should be held to have assumed whatever increased risk of injury he incurred by so doing, and cannot hold the defendant as a carrier liable for the injuries received by him while in such exposed condition. *Chicago, St. P., M. & O. Ry. Co. v. Myers*, 80 Fed. 361, 25 C. C. A. 486; *Elder Dempster Shipping Co. v. Pouppirt*, 125 Fed. 732, 60 C. C. A. 500; *Files v. Boston, etc., R. R. Co.*, 149 Mass. 204, 21 N. E. 311, 14 Am. St. Rep. 411; *Labatt on Master & Servant*, § 334. Had he remained inside the caboose in which he had been riding, or rode in the camp car, as did his fellow workmen, which had been provided for his transportation, he would not have been injured.

In *Peoria & Rock Island R. R. Co. v. Lane*, 83 Ill. 448, it appears that a passenger, without the direction of the company, left his seat in a passenger coach, and went into the baggage car, where he was killed by its being overturned on account of some defect in the construction, maintenance, or locking of a switch. Had he remained in the passenger car, where there was an abundance of room, he would not have been killed. Having of his own motion left the place intended for him for one of greater danger and not designed for him, he was held not to have exercised ordinary prudence, and to have been guilty of such a high degree of negligence as to exonerate the company from liability, in the absence of wanton or reckless conduct on its part.

Railroad Co. v. Jones, 95 U. S. 439, 24 L. Ed. 506, presents a case in which a laborer, like the plaintiff, engaged in constructing and repairing a roadway, was provided with a box car for transportation to and from the place where his services were required. On returning one evening from his labor, he rode on the pilot or bumper of the locomotive, although previously forbidden to do so and warned of the danger of so doing. While so riding he was injured by a collision with other cars standing upon the track. There was ample room for him in the box car, and no one therein was hurt. He was denied a recovery because he had not used ordinary care and caution, and the knowledge or assent or direction of the agents of the company as to what he did at the time in question was held immaterial. Mr. Justice Swayne, in deciding the case, said:

"The plaintiff had been warned against riding on the pilot, and forbidden to do so. It was next to the cowcatcher and obviously a place of peril, especially in case of collision. There was room for him in the box car. He should have taken his place there. He could have gone into the box car in as little, if not less, time than it took to climb to the pilot. The knowledge, assent, or direction of the company's agents as to what he did is immaterial. If told to get on anywhere, that the train was late, and that he must hurry,

this was no justification for taking such a risk. As well might he have obeyed a suggestion to ride on the cowcatcher, or put himself on the track before the advancing wheels of the locomotive. The company, though bound to a high degree of care, did not insure his safety. He was not an infant, nor non compos. The liability of the company was conditioned upon the exercise of reasonable and proper care and caution on his part. Without the latter, the former could not arise. He and another who rode beside him were the only persons hurt upon the train. All those in the box car, where he should have been, were uninjured. He would have escaped, also, if he had been there. His injury was due to his own recklessness and folly. He was himself the author of his misfortune. This is shown with as near an approach to demonstration as anything short of mathematics will permit."

In *Doggett, Adm'r, v. Illinois Central R. R. Co.*, 34 Iowa, 284, the plaintiff's decedent, a railroad employé not engaged in operating the train on which he was riding, voluntarily got upon the tender of the engine to ride, and while there the engine broke through a defective culvert or bridge, and he was killed. A caboose was attached to the train for the carriage of passengers and those not engaged in operating the train. It appeared that, if the deceased had been in the caboose, he would not have been injured. It was held he was guilty of contributory negligence, and that his administrator could not recover.

In *Little Rock & Ft. Scott R. Co. v. Miles*, supra, it was said:

"The test of contributory negligence is: Did that negligence contribute in any degree to produce the injury complained of? The jury found that a passenger car was attached to the train, in which plaintiff was at liberty, if he had chosen, to ride, and that he would not have been injured if he had taken a seat in it. This is conclusive against the right of recovery, unless the directions of the station agent for him to ride on the cattle car alters the case."

The same test, applied to the case at bar, necessitated the direction of a verdict for the defendant.

The plaintiff contends that he was not guilty of contributory negligence because no fault of his produced the derailment, and that his being on top of the car did not cause, or tend to cause, such derailment or negligent act of the defendant. The contention is based on a misconception of what constitutes contributory negligence. He was guilty of contributory negligence if he contributed, not to the derailment, but to the injury of which he complains. It is the concurrence or co-operation of the negligence of the plaintiff with the negligence of the defendant in producing his injury that defeats the plaintiff's right to a recovery. In *Plant Inv. Co. v. Cook*, 74 Fed. 503, 20 C. C. A. 625, the definition of "contributory negligence" announced in 1 Beach on Negligence, § 7, is adopted, as follows:

"Contributory negligence, in its legal signification, is such an act or omission on the part of a plaintiff, amounting to a want of ordinary care, as, concurring or co-operating with the negligent act of the defendant, is a proximate cause or occasion of the injury complained of. To constitute contributory negligence, there must be a want of ordinary care on the part of the plaintiff, and a proximate connection between that and the injury. Perhaps, besides these two, there are no other necessary elements. Certainly they are the two points of difficulty in the consideration of the question."

See, also, *Schweinfurth, Adm'r, v. Railway Co.*, 60 Ohio St. 215, 54 N. E. 89.

In *Coal Co. v. Estievenard*, 53 Ohio St. 43, 57, 40 N. E. 725, 728, it was said:

"To warrant a recovery, it must appear that the injury was caused by the want of ordinary care on the part of the employer, and the injury is not so caused, when it is caused by the want of ordinary care on the part of the employer combined with the want of ordinary care on the part of the employé. If it took the want of ordinary care of both the employer and the employé to produce the injury, both are at fault, and there can be no recovery by either. Where both parties are negligent, and the injury is caused by such combined negligence, there can be no recovery by either party."

The rule is well settled that, where a motion is made to direct a verdict, the court must take that view of the evidence most favorable to the party against whom the instruction is requested. The plaintiff was entitled to receive the benefit of all fair and reasonable inferences from the testimony. *Detroit Southern R. Co. v. Lambert*, 150 Fed. 555, 80 C. C. A. 357. There is no rule better established in the federal courts "than that which permits a presiding judge to direct a verdict in favor of one of the parties when the testimony and all the inferences which the jury could justifiably draw therefrom would be insufficient to support a different verdict. It is clear that, where the court would be bound to set aside a verdict for want of testimony to support it, it may direct a finding in the first instance, and not await the enforcement of its view by granting a new trial." *McGuire v. Blount*, 199 U. S. 142, 26 Sup. Ct. 1, 50 L. Ed. 125; *Empire State Cattle Co. v. Atchison Ry. Co.*, 210 U. S. 1, 28 Sup. Ct. 607, 52 L. Ed. 931.

Under the circumstances of this case, the verdict was, in my judgment, properly directed.

Motion for new trial overruled. Judgment on verdict.

UNITED STATES V. ATCHISON, T. & S. F. RY. CO.

(District Court, S. D. California, S. D. October 11, 1907.)

No. 2,520.

CARRIERS — INTERSTATE COMMERCE — PROSECUTION FOR GRANTING REBATES — DEFENSES.

It is no defense in a prosecution of a railroad company for granting concessions to a shipper from its published rates, in violation of Elkins Act Feb. 19, 1903, c. 708, § 1, 32 Stat. 847 (U. S. Comp. St. Supp. 1907, p. 880), that such concessions were granted in compromise of claims against the company for loss of property in transit.

On Motion of District Attorney to Strike Out All Evidence with Reference to Alleged Compromises.

Oscar Lawler, U. S. Atty., and A. I. McCormick, Asst. U. S. Atty. T. J. Norton, A. C. Van Cott, E. W. Camp, and U. T. Clatfeller, for defendant.

WELLBORN, District Judge. The Supreme Court of the United States has said:

"It cannot be challenged that the great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all and to destroy favoritism; these last being accomplished by requiring the publication of tariffs and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences, and all other forms of undue discrimination. To this extent and for these purposes the statute was remedial and is therefore entitled to receive that interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve." *New Haven R. R. Co. v. Interstate Commerce Commission*, 200 U. S. 391, 26 Sup. Ct. 277 (50 L. Ed. 515).

In an earlier case, involving the construction of an act of the Legislature of Colorado of the same nature as the interstate commerce act, the same high authority spoke as follows:

"This act was intended to apply to intrastate traffic the same wholesome rules and regulations which Congress two years thereafter applied to commerce between the states, and to cut up by the roots the entire system of rebates and discriminations in favor of particular localities, special enterprises, or favored corporations, and to put all shippers on an absolute equality, saving only a power, not in the railroad company itself, but in the Railroad Commissioner, to except 'special cases designed to promote the development of the resources of this state,' and not to prevent the commissioner 'from making a lower rate per ton per mile, in car load lots, than shall govern shipments in less quantities than car load lots, and from making lower rates for lots of less than five car loads than for single car load lots.' The statute recognizes the fact that it is no proper business of a common carrier to foster particular enterprises or to build up new industries, but, deriving its franchise from the Legislature, and depending upon the will of the people for its very existence, it is bound to deal fairly with the public, to extend them reasonable facilities for the transportation of their persons and property, and to put all its patrons upon an absolute equality. * * * So opposed is the policy of the act to secret rebates of this description that it requires a printed copy of the classification and schedules of rates to be posted conspicuously in each passenger station for the use of the patrons of the road, that every one may be apprised, not only of what the company will exact of him for a particular service, but what it exacts of every one else for the same service, so that in fixing his own prices he may know precisely, with what he has to compete. To hold a defense thus pleaded to be valid would open the door to the grossest frauds upon the law, and practically enable the railroad company to avail itself of any consideration for a rebate which it considers sufficient, and to agree with the favored customer upon some fabricated claim for damages, which it would be difficult, if not impossible, to disprove. For instance, under the defense made by this company, there is nothing to prevent a customer of the road, who has received a personal injury, from making a claim against the road for any amount he chooses, and in consideration thereof, and of shipping all his goods by that road, receiving a rebate for all goods he may ship over the road for an indefinite time in the future. It is almost needless to say that such a contract could not be supported. There is no doubt of the general proposition that the release of an unliquidated claim for damages is a good consideration for a promise, as between the parties, and, if no one else were interested in the transaction, that rule might apply here; but the Legislature, upon grounds of public policy, and for the protection of third parties, has made certain requirements with regard to equality of rates, which in their practical application would be rendered nugatory, if this rule were given full effect. For this reason we think the railroad company is in error in its assumption that 'if, in the honest judgment of the officers of the defendant company, who made the contract, the considerations which entered into it, and upon which alone it was made were sufficient to warrant the company to pay back to the Marshall Company 40 cents per ton for each ton it shipped for five years, that is enough.' This is but a restatement in different language of a comment made by the court below in its opinion, that 'the whole answer amounts only to this: That the Marshall Company is allowed less rates than other shippers are required to pay upon considerations which are satisfactory

to defendant. and it is obvious that this is no answer to a complaint of unlawful discrimination." *Union Pacific Railway v. Goodridge*, 149 U. S. 690, 13 Sup. Ct. 975 (37 L. Ed. 986).

Again, it has been said by an eminent jurist:

"It is written in every section and line of the law that the thing sought by Congress was a fixed rate, absolutely, unvaryingly uniform, to be adhered to until publicly changed in the manner provided by law. The thing prohibited was the departure from that rate by any means whatsoever, whether direct between the parties or indirect by the employment of the most deviously circuitous subterfuge." *United States v. Standard Oil Co.* (D. C.) 148 Fed. 721.

Again, the same jurist has said:

"The object of the statutes relating to interstate commerce is to secure the transportation of persons and property by common carriers for reasonable compensation. No rate can possibly be reasonable that is higher than anybody else has to pay. Recognizing this obvious truth, the law requires the carrier to adhere to the published rate as an absolute standard of uniformity. The requirement of publication is imposed in order that the man having freight to ship may ascertain by an inspection of the schedules exactly what will be the cost to him of the transportation of his property; and not only so, but the law gives him another and a very valuable right, namely, the right to know, by an inspection of the same schedule, exactly what will be the cost to his competitor of the transportation of his competitor's property." *United States v. Chicago & A. Ry. Co.* (D. C.) 148 Fed. 648.

These statutes, as said by the Supreme Court, should be reasonably construed, so as to promote their objects, and it is manifest that a construction which allows any deviation whatever from said standard would seriously impair the efficiency of said statutes, if not render them nugatory, and is therefore wholly inadmissible. A rate, to be uniform in its operation, must necessarily be expressed in dollars or cents, and when so expressed, as is the case with the rate here involved, the mode of payment is an essential part of the rate. To so interpret the law as to allow the carrier to disregard said mode, and to accept a part only of its compensation in money and the balance in a commodity, or by way of compromising a claim, would invite and open wide a door to the very discriminations which the statutes were designed to suppress. In order to exclude such an interpretation of the law, section 1 of the Elkins Act (Act Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1907, p. 880]) forbids in terms any concession by a carrier in respect of the transportation of property whereby such property "by any device whatever" is transported at a less rate than named in the legal tariff, and expressly declares that any departure from the legal tariff, or any offer to depart therefrom, "shall be deemed to be an offense under this section of this act," so that the construction of said act which I have just declared is clearly required by the letter as well as the spirit of the law.

I hold that the acceptance by the defendant of a less sum of money than that named in its tariff for the transportation of the property described in the indictment, if there has been such acceptance, was a departure from the legal rate, and that it is no justification for such a departure, nor is it any defense to a prosecution therefor, that the acts of the carrier were done in compromise of claims for loss of property in transit.

Plaintiff's motion will be allowed.

UNITED STATES v. CHICAGO, I. & L. RY. CO.

(Circuit Court, N. D. Illinois, E. D. July 15, 1908.)

No. 28,711.

CARRIERS—INTERSTATE COMMERCE—DISCRIMINATION IN RATES.

A contract by a railroad company to furnish to the publisher of a magazine, as called for, transportation amounting to a certain sum at schedule rates in payment for a stated amount of advertising, which has no fixed value, is in violation of the provision of section 6 of the interstate commerce act, Act March 2, 1889, c. 382, 25 Stat. 855 (U. S. Comp. St. 1901, p. 3156), as amended by Hepburn Act June 29, 1906, c. 3591, 34 Stat. 584 (U. S. Comp. St. Supp. 1907, p. 895), prohibiting any carrier from accepting "greater or less or different" compensation than that named in the published schedules.

Edwin W. Sims, U. S. Atty., James H. Wilkerson, Sp. Asst. U. S. Atty., and L. A. Shaver, Solicitor for Interstate Commerce Commission, for the United States.

E. C. Field, G. W. Kretzinger, and H. R. Kurrie, for defendant.

KOHLSAAT, Circuit Judge. The government files its petition herein under the provisions of section 3 of the act of February 19, 1903 (U. S. Comp. St. Supp. 1907, p. 882), creating a summary remedy in certain cases, and seeks thereby to prevent the defendant from giving transportation in exchange for advertising, in accordance with the terms of a contract entered into between defendant and Munsey's Magazine, which reads as follows:

"Agreement between the Monon Route (Chicago, Indianapolis & Louisville Railway Company) and Frank A. Munsey Co., publisher, entered into this 24th day of January, 1907.

"Whereas, the said publisher issues Munsey's Magazine, a publication published at New York City, N. Y. (Chicago office, 423 Marquette Bldg.), and which has a regular circulation of 643,000 each issue; and whereas, the said Monon Route desires to advertise in said publication, which advertising the said publisher agrees to do upon the following terms and conditions, which are mutually agreed upon:

"(1) The said publisher agrees to publish in said publication an advertisement of the Monon Route as follows: One page 'ad' (divided as desired), said advertisement to appear favorably and occupy a space of not less than one page, and to be published as desired issues of said publication.

"(2) In full consideration of the foregoing advertising, the Monon Route agrees to issue the following nontransferable transportation, based on the regular published rate: Trip tickets or mileage to the value of five hundred dollars (\$500.00), for the personal use of the publisher, his employés, or immediate members of his or their families, which said transportation shall be limited for use not later than December 31, 1907.

"(3) Under no circumstances must the transportation issued under this contract be sold or transferred to or used by any other than the person to whom issued, as such sale, transfer, or use would be a misdemeanor under the law.

"(4) It is understood and agreed that the transportation issued under this contract shall read to points on the Monon Route, and not to points on any other road.

"(5) No extension of time on any transportation issued under this contract shall be given by the Monon Route or requested by the publisher beyond the date of the expiration of this contract.

"(6) In case said publisher severs connection with said publication, or sells or transfers his interest therein, then said transportation shall at

once be surrendered to the Monon Route, and no new transportation shall be issued on account of said publication until after that originally issued has been returned to the Monon Route. Should any person holding transportation issued hereunder sever connection with the publication, or should the publication suspend, or if the transportation should be presented by any person other than to the one named thereon, then the Monon Route will refuse to honor the same for passage, and take the same up and collect full fare, and such presentation shall be taken and considered as a breach of contract; and it is hereby agreed that the suspension of said publication before the expiration of this contract, or the presentation of non-transferable transportation by any other than the person named thereon shall cause this contract to be void and operate as an offset to all transportation which might be considered as due to said publisher. Further, should said publisher or any person named on said tickets allow any other person to use same, or offer to sell, sell, or transfer the same, then said publisher agrees to pay the said Monon Route as a penalty the full rate of fare which would have been paid for regular tickets.

"(7) The said publisher further agrees to deliver to said Monon Route, at its general office in Chicago, one copy of each issue of said publication in which said advertisement appears, free of charge, during the life of this contract.

"(8) This contract expires December 31, 1907, unless otherwise stipulated."

The petition charges that the action of the defendant in issuing such transportation constitutes a violation of the statute, which prohibits a carrier from accepting in payment for transportation any compensation greater or less or different from that named in the published rates. Defendant insists that it receives full money value for what it grants, at regular schedule rates, and denies that the transaction comes within the act. It also sets up the Indiana act authorizing such exchange. This latter defense cannot be availed of in this proceeding. The matters in issue are concededly interstate commerce transactions, as to which, it is well settled, a state statute is ineffectual. The federal law alone applies.

Practically the question submitted is whether transportation supplied in accordance with the terms of the contract constitutes a rate greater or less than, or different from, that given the general public. The question as to the value of the advertising is a contested one. Manifestly, there can be no fixed price placed upon it. The number of copies issued, the character of its subscribers, and very many other questions, enter into the estimate of its worth. It is, therefore, impossible to say what its cash or market value is, except by comparison with other advertising rates. It cannot be said that the evidence is conclusive, or even convincing, on the point. Indeed, if it is taken at its cash value, why should the transportation be limited as specified in the contract? If the magazine is paying \$500 to the defendant, why does it accept transportation both of less and different value than it would accept if it bought its tickets with money? Why embarrass itself with menacing pains and penalties for failure to observe all the conditions of the special contract, when by the use of cash it may travel and give no concern to technical limitations?

It seems fair to conclude that either the advertising is of less than cash value, or the advertisers are grossly imposed upon by the railroad. It does not follow, however, that the transportation furnished under the contract set out is not furnished under substantially similar circumstances and conditions as any other contemporaneous service. It

is the same service, the same act of transportation, as that furnished the public. It is insisted by counsel for complainant that railroad tickets may not, in any case under the interstate commerce act as it now stands, be bartered as so much cash in payment of indebtedness of the railroad. By rule made effective September 15, 1906, the Interstate Commerce Commission has ordered that:

"Nothing but money can be lawfully received or accepted in payment for transportation subject to the act, whether of passengers or property, or for any service in connection therewith, it being the opinion of the commission that the prohibition against charging or collecting a greater or less or different compensation than the established rates in effect at the time precludes the acceptance of services, property, or other payment in lieu of the amount of money specified in the published schedules."

In *United States v. A., T. & S. F. R. R. Co.*, decided by Judge Wellborn, of the Southern District of California, recently (162 Fed. 111), it is said:

"A rate, to be uniform in its operation, must necessarily be expressed in dollars or cents. * * * So to interpret the law as to allow the carrier to disregard said mode, and to accept a part only of its compensation in money and the balance in a commodity, or by way of compromising a claim, would invite and open wide a door to the very discrimination which the statutes were designed to suppress."

In *Union Pacific Ry. Co. v. Goodridge*, 149 U. S. 680, 13 Sup. Ct. 970, 37 L. Ed. 986, the court had under consideration a demurrer to an answer setting up the satisfaction of what the court terms "an unexplained, indefinite, and unadjusted claim for damages," in regard to which it says: -

"While we do not undertake to say that a railroad company may not justify a fixed rebate in favor of a particular shipper by showing a liquidated indebtedness to such shipper, which the allowance of the rebate was intended to settle, it would practically emasculate the law of its most healthful feature to permit an unexplained, indefinite, and unadjusted claim for damages arising from a tort, which, though litigated for some time, never seems to have been prosecuted to a final determination in the courts, to be put forward as an excuse for a clear discrimination in rates."

And further on:

"To hold a defense thus pleaded to be valid would open the door to the grossest frauds upon the law, and practically enable the railroad company to avail itself of any consideration for a rebate which it considers sufficient, and to agree with the favored customer upon some fabricated claim for damages which it would be difficult, if not impossible, to disprove. There is no doubt," says the court, "of the general proposition that a release of an unliquidated claim for damages is a good consideration for a promise as between the parties, and, if no one else were interested in the transaction, that rule might apply here; but the Legislature, upon grounds of public policy and for the protection of third parties, had made certain requirements with regard to equality of rates, which in their practical application would be rendered nugatory, if this rule were given full effect."

It will be noted that the contract does not require that the advertising must have been furnished before the transportation is given. There is no restriction upon the advertiser to call for his railroad tickets only so far as earned. He could, under the contract, demand them all at once if he chooses, and at the beginning of the term, before

anything is earned. In the mere matter of interest, the rate would be less and different from that which is published.

In the case of *Mottley et al. v. Louisville & New Orleans R. R. Co.* (C. C.) 150 Fed. 406, Judge Evans sustained an agreement made on October 2, 1871, by the road with Mottley and wife for the granting of passes for each of their lives in consideration of their release of their several claims for damages growing out of personal injury. In the course of his opinion (page 409) he says:

"Did Congress intend to abrogate such previously made contracts, founded upon valuable and legitimate consideration? Certainly it did not say so. Was the abrogation of such pre-existing contracts within the policy of the legislation referred to? There is nothing to indicate that it was, although it is obvious that contracts of a similar nature could not be made after the act became effective."

It is of interest, in this connection, to note, as bearing upon the trend of congressional legislation, that on January 14, 1908, a bill was introduced in the United States Senate to amend the law so as to permit public carriers to issue transportation in exchange for advertising, and that the bill was, by unanimous vote of the committee having it in charge, reported upon adversely.

Transactions such as those under consideration may not be open to the specific objection condemned in the *Goodridge Case*; but they would seem to present just as convenient a device for evading the statute as the one there stated. So far as the record discloses, the particular matters here involved might not be open to this objection; but there is more included than the mere question of advertising. As said by Mr. Justice Brown in the *Goodridge Case*, supra:

"It [the railroad] is bound to deal fairly with the public, to extend them reasonable facilities for the transportation of their persons and property, and to put all its patrons upon an absolute equality."

This case does not come within the terms of the *Goodridge Case*. The suggestion of the court with reference to liquidated liabilities does not apply to a situation where the indebtedness is by contract made payable only in transportation. In other words, here the railroad is not settling a liquidated liability, but is agreeing to settle a future liability with transportation.

There is no mistaking the trend of the law making and construing powers. Every new step is tending toward a most rigid enforcement of the rule that requires exact equality in the matter of rates. When by the Hepburn act the word "different" was added to the words "greater or less," it is not unfair to assume that Congress intended to make the law more explicit and more difficult to evade. As was said in *Armour Packing Company v. United States*, 209 U. S. 56, 28 Sup. Ct. 428, 52 L. Ed. 681:

"The Elkins act proceeded upon broad lines, and was evidently intended to effectuate the purpose of Congress to require that all shippers should be treated alike, and that the only rate charged to any shipper for the same service under the same conditions should be the one established, published, and posted as required by law."

This purpose is even more apparent in the Hepburn act, Act June 29, 1906, c. 3591, 34 Stat. 584 (U. S. Comp. St. Supp. 1907, p. 892). The plain intention is to close every avenue against discrimination. Bearing this in mind, the courts have not been, and will not be, disposed to hesitate in giving significance to changes in the language of the statutes as they occur from time to time. "The interstate commerce act," says the Supreme Court in the *Armour Case*, "is not only to be read in the light of the previous legislation, but the purpose which Congress evidently had in mind in the passage of the law is also to be considered."

It is conceivable that a case may arise in which, from the nature of the facts involved, it might be difficult, if not impossible, to say whether the rate is greater or less than the published rate, which would, nevertheless, be covered by the term "different," within the meaning of the whole act. It is essential to the spirit of the statute that the value of transportation be fixed and certain. In no other way can it be held to be exactly the same to all. If one person may purchase it with advertising, another with labor, and another with produce, the value of which is a matter of agreement between the parties, how can it be said the schedule rate is always maintained? Would not the rate rest in the whim of the carrier? Such is not the intent of the law. To say to one man, "You must pay cash," and to his competitor, "You may pay in service or merchandise at prices we may agree on," be it more or less than the market prices, would seem clearly to constitute such a difference in transportation as is condemned by the act.

Some claim is made by defendant that the government's contention would exclude the use of checks and drafts and bills of exchange. This is without weight. In practical business usage, these instruments pass as cash. They are utterly free from the objections which attach to trade and barter, and are clearly without the ban of the statute. If the foregoing be correct, it follows that, both upon the particular record in this case and upon broad principles of law, the action of the defendant in the premises is in dissonance with the letter and spirit of the interstate commerce act.

The injunction is granted as prayed.

In re HALSEY ELECTRIC GENERATOR CO.

(District Court, D. New Jersey. July 8, 1908.)

1. BANKRUPTCY—CREDITORS—ASSIGNED CLAIMANTS—SPLITTING CLAIMS.

A creditor of a bankrupt may not split up his claim and assign some of the parts to other persons for the purpose of qualifying them as joint petitioners in an involuntary bankruptcy proceeding.

2. SAME—TRUSTEES OF ASSIGNORS.

Where separate creditors of a bankrupt assigned their claims to assignees who had no financial interest in the claims, but held the same merely as trustees for their respective assignors, they were nevertheless entitled to the rights of creditors.

3. TRUSTS—CONTRACT—CONSTRUCTION.

W. executed a receipt reciting that he had received from H. 23,000 shares of the capital stock of a corporation to be used, together with a like number of shares to be contributed by W. and another as W. in his sound discretion should deem best, in procuring a paid-in surplus fund for the corporation of not less than \$225,000, and the sum of \$25,000 to be paid by W. to H. without any responsibility or obligation on W.'s part to account for the manner of disposing or holding the same. *Held*, that such agreement was unambiguous and could not be regarded as a bill of sale of any of the stock to W., but a trust agreement on his part to hold and use such stock for the purpose specified.

4. BANKRUPTCY—CLAIMS—EVIDENCE.

Evidence *held* insufficient to authorize the rejection of a master's finding establishing a claim for money alleged to have been loaned to a bankrupt.

5. SAME—LIQUIDATED CLAIMS.

A claim against a bankrupt for money loaned must be regarded as liquidated.

In Bankruptcy. On exceptions to master's report.

Riker & Riker and Howard H. Williams, for creditors.

McCarter & English and A. J. Dittenhoefer, for bankrupt.

LANNING, District Judge. This case comes before the court on exceptions to the report of the master to whom a reference was made to take testimony and report to the court on the issues made by the petitions and the answer of the alleged bankrupt. The issues are: (1) Whether the petitioners are creditors of the alleged bankrupt, (2) whether the alleged bankrupt is insolvent, and (3) whether the alleged bankrupt committed the act of bankruptcy charged. The master has reported against the alleged bankrupt on all these issues and finds that it should be adjudged bankrupt.

The petitioners are James P. Murray, Charles H. Williams, Howard H. Williams, George F. Van Slyck, and William M. Clark. The claim of Howard H. Williams was assigned to him by his father, Charles H. Williams, and constitutes but a part of the original claim of the father. Charles H. Williams is a petitioner for the unassigned part of his original claim. It is contrary to the policy of the bankruptcy act to permit a creditor to split up his claim against his debtor and assign some of the parts to other persons for the purpose of qualifying them as joint petitioners in a bankruptcy proceeding. In *re* Tribelhorn, 137 Fed. 3, 69 C. C. A. 601; *Leighton v. Kennedy*, 129 Fed. 737, 64 C. C. A. 265; In *re* Independent Thread Co. (D. C.) 113 Fed. 998. It follows that Howard H. Williams cannot be counted as a petitioning creditor.

It also appears that Murray and Van Slyck each hold an assigned claim, that neither of them has any financial interest in the claim held by him, and that each of them holds his claim solely for the benefit of his assignor. This fact, however, does not disqualify either of them as a petitioning creditor. The assignments were made by persons who originally claimed to be separate creditors of the alleged bankrupt for the respective amounts of the claims assigned. Murray and Van Slyck are trustees for their respective assignors, and, as they hold the legal title to the claims assigned, they are the owners of those claims,

and, if they be valid claims, are creditors. There is no dispute as to the validity of any of the claims, except that of Murray. His claim was assigned to him by Clemuel R. Woodin and is for \$25,050. It is agreed by counsel that, if this be not a valid claim the Halsey Electric Generator Company is solvent, and, if it be a valid claim, that the company is insolvent and did commit the act of bankruptcy charged by the petitioners. The preliminary questions above mentioned having been disposed of, the validity or invalidity of Murray's claim is the only remaining one to be considered.

The Halsey Electric Generator Company was organized November 24, 1902, with a capital stock of \$100,000, divided into 1,000 shares of the par value of \$100 each. On May 13, 1903, the capital stock was increased to \$10,000,000; the additional shares (99,000) being issued to Woodin for certain patents and by him divided equally among himself, James C. Haydon, and Henry Halsey. Of the 33,000 additional shares which each of these three gentlemen received, they agreed that Woodin should use 23,000 shares (or 69,000 shares in all) for the purpose of raising a surplus fund. Accordingly, Haydon and Halsey each transferred to Woodin certificates for 23,000 shares, and Woodin thereupon gave to Halsey the following written instrument:

"Received from Henry Halsey twenty-three thousand (23,000) shares of the capital stock of the Halsey Electric Generator Company to be used, together with a like number of shares to be contributed by each James C. Haydon and myself, by me as in my sound discretion I deem best in procuring a paid-in surplus fund for said company of not less than two hundred and twenty-five thousand dollars (\$225,000), and the sum of twenty-five thousand dollars (\$25,000) to be paid by me to said Halsey, and without any responsibility or obligation on my part to account for the manner of holding or disposing of the same. New York, May 13, 1903. [Signed] C. R. Woodin."

Woodin made efforts to raise the desired surplus fund by operating through the Guaranty Trust Company of New York. The generator company's books show that between May 13, 1903, and April 18, 1905, he succeeded, with the aid of the trust company, in securing subscriptions for a part of the capital stock of the generator company and in raising for the surplus fund the aggregate amount of \$75,187.50. The cash book entries as to this fund are as follows:

May 14, 1903. Surplus, C. R. Woodin.....	\$25,000 00
Feb. 5, 1904. Surplus, C. R. Woodin.....	25,000 00
Nov. 15, 1904. Paid-in surplus.....	5,000 00
Dec. 1, 1904. Paid-in surplus, Guaranty Trust Co.....	10,000 00
Mar. 24, 1905. Paid-in surplus.....	10,187 50

Each of these items was posted from the cash book into the ledger book and therein credited to the account denominated the "Paid-in Surplus Account." Between May 13, 1903, and April 18, 1905, other cash receipts were entered in the cash book as follows:

May 13, 1903. C. R. Woodin.....	\$2,000 00
Nov. 5, 1903. C. R. Woodin.....	11 85
Jan. 12, 1904. C. R. Woodin.....	2,261 68
Feb. 21, 1905. C. R. Woodin.....	1,000 00
Apr. 18, 1905. C. R. Woodin.....	25 07

Each of these latter items was posted from the cash book into the ledger book and therein credited to the separate account of C. R.

Woodin. This account also shows cash credits to the amount of several thousand dollars previous to May 13, 1903. All these credits down to and including the one of April 18, 1905, being for \$25.07, were settled long before the commencement of these bankruptcy proceedings. The account is here referred to only for the purpose of showing that before May 13, 1903, Woodin had been loaning money to the generator company which it repaid, and that after May 13, 1903, indeed beginning on that very day, other cash items were credited to him in his personal account, evidently as loans, and running along parallel with the paid-in surplus account, which was opened on May 14, 1903. This makes it clear that, so far as the books show, these two accounts were treated as wholly separate and independent. It may also be noted that the bills payable account shows that on November 30, 1904, while the two accounts above-mentioned were active accounts, the generator company gave its promissory note payable to the order of Woodin, which was by him indorsed for the accommodation of the generator company, discounted by the Guaranty Trust Company, and paid by the latter company on December 2, 1904, evidently out of the \$10,000 paid into the surplus account on December 1st.

In the early part of 1905, the previous expectations of business success by the generator company had become so much impaired that no more of its capital stock could be disposed of and, consequently, that nothing more could be raised by Woodin for the surplus fund. As shown by the paid-in surplus account, the Guaranty Trust Company ceased to give its aid after March 24, 1905. Between April 18, 1905, and December 12, 1906, Woodin, however, personally paid to the generator company sundry sums aggregating \$25,050. These sums he claims were loans. They constitute the basis of the claim assigned by him to Murray. The generator company contends, on the other hand, that these sums were paid to it by Woodin under the personal obligations imposed on him by the instrument of May 13, 1903. The master to whom the case was referred interprets this instrument as:

"(1) An acknowledgment of the receipt of 46,000 shares of stock of the Halsey Electric Generator Company; (2) a declaration of trust upon which the stock was received by him, 'to be used together with a like number of shares contributed by him, as in my sound discretion I deem best in procuring a paid-in surplus fund for the said company'; and (3) a disclaimer of responsibility in the following words: 'without any responsibility or obligation on my part to account for the manner of holding or disposing of the same.'"

The language of the instrument supports this construction. Plainly, it was not a bill of sale to Woodin, for it was signed only by Woodin, and related not only to stock transferred to him by Haydon and Halsey, but to stock originally issued to him by the generator company. He declared he held all the 69,000 shares of stock for a certain use, namely, for procuring a surplus fund of not less than \$225,000 for the generator company and \$25,000 for Halsey. Evidently, these sums were to be secured by sales of the stock. The natural and fair meaning of the instrument was that Woodin agreed to hold 23,000 shares of the stock issued to him and the 46,000 shares transferred to him by Haydon and Halsey in trust for the benefit of the generator company and Halsey. The last clause of the in-

strument, by which he declared that he would not be responsible "for the manner of holding or disposing" of the stock, must be read in connection with the previous declaration that he was to use the stock as he in his "sound discretion" should deem best for procuring the desired sums for the generator company and Halsey. When so read, that clause did not protect him against fraudulent conduct affecting injuriously the interests of the beneficiaries of the trust. It simply exempted him from liability to account to either of the beneficiaries for errors of judgment in his manner of holding or disposing of the stock. If, however, he failed to dispose of any part of the 69,000 shares, he was bound to account to his beneficiaries for the part not disposed of. To my mind the instrument is neither obscure nor ambiguous. If I am right in this conclusion, parol testimony to explain it was not admissible. It is a perfectly plain and clear trust agreement and speaks for itself.

The \$75,187.50 paid into the surplus fund of the company did not pass directly through Woodin's hands, but was credited by the trust company on its books to the generator company. The \$25,050 was paid to the generator company directly by Woodin and credited to his personal account on its books as the payments aggregating that sum were made. Between May 13, 1903, and April 18, 1905, as we have seen, he had advanced sundry other sums aggregating several thousand dollars which had been refunded. These advances unquestionably were treated as loans. It is not suggested by any one that they belonged to the surplus fund account. On September 13, 1905, nearly six months after the Guaranty Trust Company had ceased to render any further aid in selling the company's stock or in raising money for the surplus fund, and when the financial needs of the company had become very urgent, Woodin began from time to time to make additional payments to the company. In September he made three payments of \$500 each, in October one payment of \$500 and one of \$200, and in November three payments of \$500 each. By December 12, 1906, they had amounted to \$25,050. The treasurer of the company sent to each director, including Halsey, who is the only witness disputing the claim, on the first of each month between March and December, 1905, a statement showing the company's receipts and disbursements for the preceding month. Halsey has produced the statements for March, May, June, July, August, and November, 1905, which he received. In the statement for March is an item amongst the receipts of \$10,187.50 paid to the surplus fund account. It will be remembered that this is the month in which the Guaranty Trust Company ceased to give further aid to the enterprise. In none of the subsequent monthly statements produced by Halsey does anything appear as a credit to the surplus fund account. The statements for September and October are not produced. Had they been they very probably would have shown amongst the receipts from Woodin for September the sum of \$1,500 and for October the sum of \$700. However that may be, the statement for November does show that, amongst the receipts, the sum of \$1,500 had been paid in by Woodin. It was not designated as paid in surplus, like the item of \$10,187.50 in the March statement. Notwithstanding Halsey's present contention that that \$1,500 was paid

by Woodin under the terms of the instrument of May 13, 1903, and therefore belonged to the surplus fund account, he admits that he saw the item, but made no inquiry about it. He further admits that, though he frequently applied to Woodin in 1905 and 1906 for money, he never referred, either in his letters to Woodin or in his conversations with him, to the instrument of May 13, 1903, as a contract under which Woodin was personally bound to furnish at least \$225,000 to the surplus fund account of the generator company. Several of his letters to Woodin are in evidence. Those of August 5, 17, and 18, and September 6, 1905, particularly show, I think, that he had not yet abandoned the hope of reviving the interest of the Guaranty Trust Company in such manner that, through its agency, further payments to the surplus fund account would be made. I find no satisfactory evidence in the case to sustain the contention that the payments by Woodin to the generator company, amounting to \$25,050, should be classed with the money credited to the company by the Guaranty Trust Company. The weight of the testimony seems to me to be in favor of Woodin's claim. In any event, the master's report is not so obviously erroneous that I can, under the authorities, overturn his findings of fact.

I have not overlooked the objection that Woodin's claim is unliquidated, and that, for this reason, his assignee, Murray, cannot be a petitioning creditor. I cannot agree with this view. The amount claimed is fixed and certain. It is for moneys loaned. It is clearly a liquidated, and not an unliquidated, claim.

The exceptions will be overruled, the report confirmed, and the generator company adjudged bankrupt.

It may be added that, since this cause was argued, Woodin has presented a petition praying that he may be joined as a petitioning creditor for \$1,000, being the amount which he says he paid to the generator company as an additional loan on December 12, 1906, when a general release was executed by Haydon and Halsey to Woodin releasing Woodin from all actions, claims, demands, etc. It is not necessary to consider the effect of this release, to which the company was not a party, or what connection, if any, the payment of the \$1,000 had with the execution of the release. Assuming that it had none, and that it was an additional loan and not included in the claim of \$25,050 assigned by Woodin to Murray, the petition must be denied for the reason, already stated, that a creditor cannot assign a part of his claim for the purpose of qualifying his assignee as a petitioning creditor, and at the same time retain the right to act as a petitioning creditor for the part not assigned.

FULCO v. SCHUYLKILL STONE CO.

(Circuit Court, E. D. Pennsylvania. July 30, 1908.)

No. 47, October Term, 1907.

1. DEATH—ACTION FOR WRONGFUL DEATH—PENNSYLVANIA STATUTE—ACTION BY NONRESIDENT ALIEN.

Act Pa. April 15, 1851, § 19 (P. L. 674), as amended by Act April 26, 1855, § 1 (P. L. 309), giving a right of action for wrongful death to certain relatives of the deceased, as construed by the Supreme Court of the state, which construction is binding on the federal courts, does not give such right to nonresident aliens.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, § 37.

What law governs actions, see note to *Burrell v. Fleming*, 47 C. C. A. 606.]

2. TREATIES—CONSTRUCTION.

The treaty between Italy and the United States of February 26, 1871 (17 Stat. 845), which guarantees to the citizens of each country in the states and territories of the other the most constant protection and security for their persons and property as to which they are to enjoy the same rights and privileges as natives and the right to resort to the courts to maintain and defend their rights without other conditions or restrictions than are imposed on natives, does not give to a subject of the King of Italy, who has never been in the United States and has no property here, the right to maintain an action under a state statute which gives a right of action for wrongful death only to citizens or inhabitants of the state.

At Law. On demurrer to statement of claim.

Thomas Leaming, for demurrer.

Marcel A. Viti, for plaintiffs.

ARCHBALD, District Judge.* The plaintiffs are citizens and residents of Italy and the subject of its King, and bring suit for damages for the death of their son, who was killed, as they allege, by the negligence of the defendant company by whom he was employed. The accident by which he lost his life occurred in Pennsylvania, and suit is brought on the statutes of that state, giving a right of action to the parents of the deceased in such cases. Act April 15, 1851, § 19 (P. L. 674); Act April 26, 1855, § 1 (P. L. 309). It is contended by the defendants that the plaintiffs, being nonresident aliens, have no right to sue, and it is upon this that the demurrer proceeds. It was decided by the Supreme Court of Pennsylvania, in *Deni v. Pennsylvania Railroad*, 181 Pa. 525, 37 Atl. 558, 59 Am. St. Rep. 676, and again in *Maiorano v. Baltimore & Ohio R. R.*, 216 Pa. 402, 65 Atl. 1077, 116 Am. St. Rep. 778, that nonresident aliens are not entitled to the benefit of this legislation, not being within its purview, and have no standing in consequence to maintain an action founded upon it. The same construction is put upon similar statutes in other jurisdictions. *Brannigan v. Union Gold Mining Co.* (C. C.) 93 Fed. 164; *McMillan v. Spider Lake Co.*, 115 Wis. 332, 91 N. W. 979, 60 L. R. A. 589, 95 Am. St. Rep. 947; *Roberts v. Great Northern Railway* (C. C.) 161 Fed. 239; *Adams v. British Steamship Co.*, 2 Q. B.

*Specially assigned.

(1898) 430. Although the weight of the authority is the other way. *Davidsson v. Hill*, 2 K. B. (1901) 606; *Mulhall v. Fallon*, 176 Mass. 266, 57 N. E. 386, 54 L. R. A. 934, 79 Am. St. Rep. 309; *Alfson v. Bush*, 182 N. Y. 396, 75 N. E. 230, 108 Am. St. Rep. 815; *Kelleyville Coal Co. v. Petraytis*, 195 Ill. 215, 63 N. E. 94, 88 Am. St. Rep. 191; *Romano v. Capitol State Brick Co.*, 125 Iowa, 591, 101 N. W. 437, 68 L. R. A. 132, 106 Am. St. Rep. 323; *Railroad v. Naylor*, 73 Ohio St. 115, 76 N. E. 505, 3 L. R. A. (N. S.) 473, 112 Am. St. Rep. 701; *Renlund v. Commodore Mining Co.*, 89 Minn 41, 93 N. W. 1057, 99 Am. St. Rep. 534; *Vetaloro v. Perkins* (C. C.) 101 Fed. 393; *Hirschkovitz v. Pennsylvania Railroad* (C. C.) 138 Fed. 439; *Baltimore & Ohio R. R. v. Baldwin*, 144 Fed. 53, 75 C. C. A. 211. But the construction put upon the Pennsylvania statutes, by the courts of that state, is binding here, without regard to how the law may be elsewhere (*Zeiger v. Pennsylvania Railroad* [C. C.] 151 Fed. 348; *Id.* [C. C. A.] 158 Fed. 809), unless of course, it is found to be in contravention of the federal law.

It is contended as to this that the plaintiffs are protected by the existing treaty between the United States and Italy of February 26, 1871 (17 Stat. 845), which provides:

"Art. 3. The citizens of each of the high contracting parties shall receive, in the states and territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or shall be granted to the natives, on their submitting themselves to the conditions imposed upon the natives."

"Art. 23. The citizens of either party shall have free access to the courts of justice, in order to maintain and defend their own rights, without any other conditions, restrictions, or taxes than such as are imposed upon the natives. They shall, therefore, be free to employ in defense of their rights, such advocates, solicitors, notaries, agents and factors as they judge proper, in all their trials at law; and such citizens or agents shall have free opportunity to be present at the decisions and sentences of the tribunals in all cases which may concern them, and likewise at the taking of all examinations and evidences which may be exhibited in the said trials."

There was no reference to this treaty in the *Deni* or the *Zeiger* Case; although there was in the *Maiorano*, where it was decided to have no effect; the court holding that, while the treaty may in terms include the entire citizenship of Italy, it obviously is available only to those who, either with respect to their persons or property, are within the jurisdiction of the United States. This is a federal question, and the decision of the state court is not controlling; but upon an independent consideration of it, the same conclusion is to be reached.

The rights guaranteed to the citizens of Italy by the one article (3) are constant protection and security for their persons and property, as to which they are to enjoy the same rights and privileges as are or shall be guaranteed to natives. The other article (23) merely preserves the right to resort to the courts to maintain and defend their rights, without other conditions or restrictions than are imposed on natives. But in so guaranteeing protection and security to the persons and property of citizens of Italy, it is manifest that this can only refer to the persons and property of such citizens when within the states and territories of this country. There certainly is no in-

tended guaranty of their persons elsewhere, and neither is there of their property. What property or right of property, then, under the laws of Pennsylvania, do the plaintiffs show which is not accorded them? Certainly they had none in the person or the earnings of their son, for whose death they sue; it not being alleged that he was a minor—if that makes any difference—but merely that he contributed to their support. The continued expectation of this, no doubt, may measure the loss sustained by the parents by the death of a child, but in no sense is it property, *North Penn Railroad v. Robinson*, 44 Pa. 175, to the contrary, notwithstanding. *Moe v. Smiley*, 125 Pa. 136, 141, 17 Atl. 228, 3 L. R. A. 341. Nor, apart from the statute, did the defendant company owe the plaintiffs any duty to see that their son had a reasonably safe place to work in, the lack of which is the negligence charged, however much they may have owed it to the son himself; this action not being for the enforcement of any obligation to the party killed, which has been transmitted to his parents, through him, but for a distinct cause of their own, if they have any. The whole contention then is brought down to this: That, a right of action being given by the laws of Pennsylvania to its own citizens, under similar circumstances citizens of Italy are entitled to the same, regardless of anything else, because the treaty guarantees the same rights and privileges, as to their persons and property, as are enjoyed by natives. The treaty, in other words, is invoked to raise, or force a right, where none exists without it; but that is not the way it reads. A right existing, it provides that it shall be respected in the same manner and to the same extent in the case of a native of Italy as of a native of this country. It by no means undertakes to put them both in all respects and under all conditions, on an absolute par, to which the doctrine contended for necessarily leads. The state of Pennsylvania, had it so chosen, was at perfect liberty to provide in so many words, in favor of its own citizens only, that in case of death by negligence a right of action should accrue to certain specified relatives, declining to extend it to residents of other countries; but, by the construction put upon the statute by the Supreme Court of the state, that in effect is just what has been done, it being the same as though this proviso was written into it, which the treaty cannot be made to override. It was for the state, in other words, to give or to withhold the right, as well as to define the extent of it and the parties who were to be benefited, and, having withheld it in such a case as we have here, that is the end of the matter.

There are authorities, no doubt, which hold otherwise as to the effect of such a treaty (*Railroad v. Naylor*, 73 Ohio St. 115, 76 N. E. 505, 3 L. R. A. [N. S.] 473, 112 Am. St. Rep. 701; *Bahaud v. Bize* [C. C.] 105 Fed. 485; and possibly *New Orleans v. Abbagnato*, 62 Fed. 240, 10 C. C. A. 361, 26 L. R. A. 329). But not, as it seems to me, with reason.

Judgment is therefore directed to be entered on the demurrer in favor of the defendants, with costs.

In re E. MATTHEWS & SONS.

(District Court, E. D. New York. April 30, 1908.)

BANKRUPTCY—LIENS—RECEIVERSHIP UNDER NEW YORK STATUTE.

Several months before the bankruptcy of a debtor a judgment creditor had an execution issued and placed in the hands of a sheriff, which was later and within four months prior to the bankruptcy returned nulla bona, and shortly thereafter a receiver was appointed in supplementary proceedings under the New York statute, who sold certain property and had the proceeds in his possession at the time of the bankruptcy. *Held*, that conceding that the judgment creditor had an equitable lien under Code Civ. Proc. N. Y. § 1405, while the execution was in the hands of the sheriff, it was lost when the execution was returned, and the state court receiver's lien did not relate thereto, nor back of his appointment, and that, if the debtor was then insolvent, such lien was avoided by the bankruptcy proceedings under Bankr. Act July 1, 1898, § 67f, c. 541, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3450), and the property passed to the trustee.

In Bankruptcy.

Lincoln B. Haskin, for judgment creditor.

Harry W. Moore, for petitioning creditors and trustee.

Maxson & Jones, for bankrupts.

CHATFIELD, District Judge. During the year 1906 the petitioner obtained judgments against each of the bankrupts herein, and in January, 1907, another creditor obtained a third judgment against the bankrupts jointly in the courts of Nassau county, in this state. Execution was issued to the sheriff of Nassau county upon one of these judgments in the month of January, 1907, but no levy was made, and during the month of November this execution was returned nulla bona. Some two days after the return of the execution an order was made, after an examination in supplementary proceedings, appointing a receiver. Subsequently an order was made extending this receivership to the first of the three judgments, and then to the third. The receiver thus appointed by the state court obtained authority in the three cases during the month of December, 1907, and levied upon certain property of the judgment debtor, some of which he still holds, and some of which he has sold, obtaining therefor about \$1,400, which is now in his possession. On the 8th day of January, 1908, a voluntary petition in bankruptcy was filed in this district, and upon adjudication a trustee was elected who obtained an order directing the receiver in the state court proceedings to turn over the property in his hands.

The present application, on an order to show cause with an accompanying stay, is to vacate the order previously made, directing the turning over of this property to the trustee, and two grounds are urged in behalf of the application. The judgment creditor claims, first, that the lien obtained by the receiver, under which the sale of the property was had, was not acquired within four months of the filing of the petition in bankruptcy, even if it be assumed that the bankrupt was insolvent throughout the entire four months. The determination of this proposition involves a decision not only as to the character of the lien, if any, which the receiver had after his appointment, but also the effect of the executions while in the hands of the sheriff. If the

creditor did not obtain a lien until the appointment of a receiver, then this lien would be invalidated by the filing of the petition in bankruptcy, under the provisions of section 67f of the bankruptcy law. Act July 1, 1898, c. 541, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3450). If, on the other hand, the lien was in existence, either equitably or legally, prior to that time and before the period of four months antecedent to the filing of the petition, and if the appointment of the receiver and his taking possession were merely incidents of enforcing that lien, then the situation would be similar to that in the case of *Metcalf v. Barker*, 187 U. S. 165, 23 Sup. 67, 47 L. Ed. 122. The application of this doctrine is plainly set forth in the case of *In re Blair* (D. C.) 108 Fed. 529, and a number of cases therein cited, but the doctrine depends entirely upon a determination that a legal or equitable lien had actually been acquired more than four months previous to the bankruptcy, and that this lien had continued in existence so that the title under the lien of the person claiming the property would have existed more than four months before the petition was filed. The cases of *In re Lengert Wagon Co.* (D. C.) 110 Fed. 927, and *In re Knight* (D. C.) 125 Fed. 35, more nearly apply to the present situation. It is unnecessary to make an exhaustive examination of the title conferred under the bankruptcy statute, as the *Knight* Case contains a reasonably complete discussion of the question, and cites many of the cases bearing thereon.

It may be admitted that under the provisions of the New York Code of Civil Procedure (section 1405) the creditor had an equitable lien while an execution was in the hands of the sheriff, and it may also be admitted that the title of the receiver relates back to the date of filing the order under which he was appointed (section 2468, Code N. Y.) to the extent of giving him an equitable lien, later perfected into a legal lien by the taking possession of the property. But in between the return of the execution on the part of the sheriff and the appointment of a receiver a space of time existed in which the judgment creditors had no lien upon the personal property of the judgment debtor. And, inasmuch as the re-establishment of any lien by means of the order appointing the receiver was within the period of four months prior to the bankruptcy, the provisions of section 67f of the bankruptcy law will apply, and the title of the trustee in bankruptcy is paramount, if insolvency existed on the day on which the receiver in supplementary proceedings was appointed. It is apparent from the affidavits used upon this motion that the bankrupts for a year or more prior to the filing of the petition in bankruptcy had been owing the creditors who obtained the various judgments. The only property shown by the papers is that in the hands of the state court receiver from a portion of which he has released the sum of \$1,400.

It is admitted that the bankrupts were insolvent at the time of the filing of the petition, but no statement is made in any of the affidavits claiming or admitting insolvency at any time within four months prior to the filing of the petition, except such inference as can be drawn from the return of the execution. It may be assumed that if the receiver in the state court, or any other party to this proceeding, claims title to the property in his possession by raising an issue of fact, such

as the question of insolvency, at any particular time, this issue cannot be disposed of upon a motion, and it is unnecessary to determine whether suit could be brought by the trustee in any other forum than in the state court, if such an issue were raised. But the receiver in the state court having come into this jurisdiction, and raised a question of law upon admitted facts and upon the objections urged upon this motion, the trustee in bankruptcy is entitled to an order directing the receiver in the state court to turn over to him the property of the bankrupt estate.

The motion for a stay will accordingly be denied.

UNITED STATES v. TSOKAS et al.

(Circuit Court, S. D. New York. March 27, 1908.)

CONSPIRACY—CONSPIRACY TO COMMIT AN OFFENSE AGAINST THE UNITED STATES
—VIOLATION OF IMMIGRATION LAW.

Immigration Act Feb. 20, 1907, c. 1134, § 4, 34 Stat. 900 (U. S. Comp. St. Supp. 1907, p. 393), provides that "it shall be a misdemeanor" for any person to prepay the transportation or in any way to assist or encourage the importation of any contract laborer into the United States. Section 5 provides that for every violation of section 4 the persons knowingly violating the same "shall forfeit and pay for every such offense the sum of \$1,000, which may be sued for and recovered by the United States or by any person who shall first bring his action therefor," etc. *Held*, that section 4 defines a criminal offense, and that, although the act provides no criminal punishment therefor, an indictment will lie under Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3676), for a conspiracy to commit such offense.

On Demurrer to Indictment.

Henry L. Stimson, U. S. Atty., and Winifred T. Denison, Asst. U. S. Atty.

Hugh Gordon Miller, for defendants.

CHATFIELD, District Judge. The defendants herein have been indicted for conspiring to commit an offense, under section 4 of the immigration act (Act Feb. 20, 1907, c. 1134, 34 Stat. 900 [U. S. Comp. St. Supp. 1907, p. 393]). This section provides that it shall be a misdemeanor to prepay the transportation or assist or encourage the importation of contract laborers into the United States. Section 5 of the same act provides that for every violation of the provisions of section 4 the person, partnership, company, or corporation violating the same "shall forfeit and pay for every such offense the sum of one thousand dollars, which may be sued for and recovered, as debts of like amount are now recovered in the courts of the United States."

It will be apparent from an examination of these sections that no punishment in the way of fine or imprisonment is provided for a violation of section 4. It is therefore argued that no offense against the United States is defined by section 4 upon which an indictment can be found under the provisions of section 5440, Rev. St. (U. S. Comp. St. 1901, p. 3676), which forbids a conspiracy to commit an offense against the United States. The provisions of section 5440 specify a

punishment of imprisonment for not more than two years or a fine of not more than \$10,000, or both.

Further objection is raised that, if sections 4 and 5 provide for nothing more than a civil penalty, it is impossible to cover the omission of punishment in a criminal sense by calling the conspiracy section to the assistance of the prosecution.

The history of section 4 is as follows: In the former immigration law, which was repealed by Act Feb. 20, 1907, § 2, excluded from admission into the United States any person whose ticket or passage is paid for with the money of another, or who is assisted by others to come, etc., with a proviso that skilled labor might be imported under certain conditions, and that the provisions of the law applicable to contract labor should not be held to exclude certain professional individuals and domestic servants.

Section 4 of the same act (Act March 3, 1903, c. 1012, § 4, 32 Stat. 1214) was as follows:

"Sec. 4. That it shall be unlawful for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation or in any way to assist or encourage the importation or migration of any alien into the United States, in pursuance of any offer, solicitation, promise, or agreement, parole or special, expressed or implied, made previous to the importation of such alien to perform labor or service of any kind, skilled or unskilled, in the United States."

Section 5 provided for forfeiture and payment by any person or corporation violating the provisions of section 4, "for every such offense the sum of one thousand dollars, which may be sued for and recovered by the United States, or by any person," etc. When the present law was adopted, section 5 was practically left intact, and it will be noted that under the former law the unlawful act specified in section 4 of that law was called an offense in section 5; but in the present law section 4 was changed to read as follows (the italicized words being used to indicate the changes from the former statute):

"Sec. 4. That it shall be a *misdemeanor* for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation or in any way to assist or encourage the importation or migration of any *contract laborer or contract laborers* into the United States, *unless such contract laborer or contract laborers are exempted under the terms of the last two provisos contained in section two of this act.*"

It will thus be seen that the principal change, so far as the present question is concerned, was to substitute the word "misdemeanor" for the word "unlawful."

It is useless to attempt to decide this particular question from the various interpretations of the words "offense" and "penalty," inasmuch as many so-called offenses and penalties have been held to be merely definitions of a civil liability. In fact, section 5 of the present act is a patent illustration of an "offense" for which a civil "penalty" may be collected. On the other hand, penalties have been held to be fines, and capable of collection by indictment or presentment, as well as by civil suit. *United States v. Moore* (C. C.) 11 Fed. 248.

The use of the word "misdemeanor," however, in section 4, would seem

to plainly indicate the intent of Congress to treat a violation of the section as a criminal matter, for in no body of law and in no system of statutes has a misdemeanor ever been; so far as it is known to this court, considered anything but a branch of the criminal law. The United States statutes have repeatedly recognized felonies, and some of the states by statutes make any crime, not a felony, a misdemeanor. The statutes of the United States have repeatedly denominated certain criminal offenses as misdemeanors, even with respect to crimes for which an imprisonment of several years at hard labor is provided. It is impossible to understand what intent Congress could have had in the use of the word "misdemeanor," if the law was intended to be left in its former condition, and to provide for no remedy except the judgment of a civil suit. It is impossible to determine whether the framers of the law were acting under the supposition that there was a general provision defining punishment for a misdemeanor, or whether the omission of any penalty for the crime was through oversight. But, in any event, the act has defined a crime, and has provided no punishment within the limits of the act itself. This is not fatal. *U. S. v. Van Schaick* (C. C.) 134 Fed. 602. As in *U. S. v. Kellum* (C. C.) 7 Fed. 843, a civil suit may be the only remedy; but an offense, of itself a crime, is clearly defined.

Under such circumstances, a conspiracy to commit the crime can be alleged, and it is no objection to say that a punishment is provided by the conspiracy statute but not by section 4. Such objection would apply as well in any case where the punishment provided by section 5440 is different from that contained in the particular statute defining the crime, to commit which a conspiracy might be alleged.

The demurrer will be overruled.

In re LAWRENCE.

(District Court, N. D. Alabama, S. D. June 15, 1908.)

BANKRUPTCY—ACTIONS AGAINST BANKRUPT—STAY.

Under Bankr. Act July 1, 1898, c. 541, § 17a (2), 30 Stat. 550 (*U. S. Comp. St.* 1901, p. 3428), as amended by Act Feb. 5, 1903, c. 487, § 5, 32 Stat. 798 (*U. S. Comp. St. Supp.* 1907, p. 1026), which excepts liabilities for obtaining property by false pretenses from debts released by a discharge, a bankrupt is not entitled to the stay of an action against him in a state court, where it appears that it is based upon such a liability asserted in good faith.

In Bankruptcy. Petition for review of order of referee on petition to stay suit against bankrupt in state court.

On September 5, 1907, Lawrence filed a petition in bankruptcy, and was duly adjudicated a bankrupt. He scheduled as a creditor the respondent in this proceeding. Thereafter, on November 5, 1907, the respondent, filed a suit in the inferior court of Birmingham, Ala., against the bankrupt, claiming \$100 damages for an alleged deceit practiced upon it by the bankrupt in obtaining from respondent \$95 in money. The alleged deceit consisted in a statement that his indebtedness at that time did not exceed \$50. The plaintiff in the state court waived its action on the contract and sued for the tort. Thereafter in December, 1907, the bankrupt obtained a rule nisi against the plain-

tiff in the state court from Hon. N. L. Steele, referee in bankruptcy, seeking to stay the suit in the state court. Upon the hearing of the rule the respondent set up in its answer that the suit pending in the state court was upon a cause of action which is nondischargeable in bankruptcy. Upon the evidence adduced the referee discharged the rule. The bankrupt thereupon filed a petition for a review of the order made by the referee discharging the rule.

D. D. Trimble, for petitioner.

M. M. Ullman, for respondent.

HUNDLEY, District Judge (after stating the facts as above). This matter is heard upon a certificate of review, taken by the bankrupt from an order made by the referee, permitting the Max J. Winkler Brokerage Company to proceed with the prosecution of a certain suit against the bankrupt in the inferior court of Birmingham. Counsel for the bankrupt cites the case of *Tindle v. Birkett*, 205 U. S. 183, 27 Sup. Ct. 493, 51 L. Ed. 762, opinion by Chief Justice Fuller of the Supreme Court of the United States, to the effect that, in an action to recover damages arising out of a false and fraudulent representation inducing the sale of merchandise, the defendant's discharge in bankruptcy before an action on such fraud would be a complete defense. That case is not controlling in the case at bar, since it arose under the bankruptcy law (Act July 1, 1898, c. 541, § 17, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428]), before the same was amended in 1903 (Act Feb. 5, 1903, c. 487, § 5, 32 Stat. 798 [U. S. Comp. St. Supp. 1907, p. 1026]). The statute in force at the time that decision was made was as follows:

"Sec. 17. A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as * * * (2) are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or the property of another; * * * or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."

The statute, as amended, which must control in the decision of this case, is as follows:

"Sec. 17. Debts Not Affected by a Discharge.—(a) A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as * * * (2) are liabilities for obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for criminal conversation; * * * or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."

Upon comparing the two statutes, it will be noted that the former act excepted from the operation of a discharge "judgments" for fraud or obtaining money by false pretenses or false representations, whereas by the amendment of 1903 it is provided that "liabilities" for obtaining money under false pretenses are excepted from the operation of a discharge. The change in the statute above noted makes the opinion of Mr. Chief Justice Fuller in the case above cited inapplicable in this case.

It appears by the record that the respondent is proceeding against the bankrupt upon a cause of action which, if proven, would be non-dischargeable, and, the referee having found from the evidence that the respondent's claim was not merely colorable, I am unwilling to say that he was not justified in reaching that conclusion from the evidence before him. When it is sought to stay a suit pending in the state court, it is the duty of the referee, when the matter is before him and he has jurisdiction, to inquire into the nature of the cause of action pending in the state court, and to satisfy his conscience that the plaintiff in the state court is proceeding upon a claim which he asserts bona fide is not dischargeable. If the referee comes to the conclusion, from his investigation, that such claim is not merely colorable, but is bona fide, he has no jurisdiction to try the merits of the suit, but must remand the parties to the state court, and permit that court to pass upon the merits of the contention as to whether it is barred by the discharge in bankruptcy.

From what has been said, it follows that the decree of the referee in this cause must be affirmed. So ordered.

ISENBURGER V. ROXBURY DISTILLING CO.

(Circuit Court, E. D. New York. May 20, 1908.)

1. ATTACHMENT—BOND—ADDITIONAL SECURITY.

Where, in an action against a foreign corporation for damages amounting to \$9,240, with interest from November 22, 1907, certain certificates representing whiskey of the estimated value of \$175,000, together with \$925.84 in cash and bonds of the par value of \$140,000, subject only to a debt of \$100,000, were attached, and a bond given in the sum of \$250, plaintiff should be required to give additional security not only because of the serious consequences of tying up such an amount of property, but in anticipation of the amount of litigation and the expenses consequent on the trial of the issue.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Attachment, § 382.]

2. PLEADING—COMPLAINT—MOTION TO MAKE SPECIFIC.

Where a complaint in attachment was uncertain as to whether it was based on certain notes or was to recover damages for fraud with reference to collateral security, and was not specific as to the particular warehouse receipts intended to be referred to in certain paragraphs, defendant was entitled to have the complaint made more definite and certain in those respects.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 1174.]

Maurice D. Abrams, for plaintiff.
King & Booth, for defendant.

CHATFIELD, District Judge. There are two motions before the court: One on the part of the defendant to compel the plaintiff to give additional security upon an attachment of certain warehouse certificates, which attachment was obtained on the ground that the defendant is a foreign corporation; and the other, a motion on behalf of the defendant to compel the plaintiff to make its complaint more

definite and certain, in certain respects which will be referred to later.

As to the first motion, it need only be said that the complaint in this suit is based upon certain claims for damages, amounting to \$9,240, with interest from November 22, 1907, and the property attached consists of certificates, representing whisky of the estimated value of \$175,000 or over, together with some \$925.84 in cash, and also certain bonds of the par value of \$140,000, making a total of over \$315,000. The certificates attached have been pledged to secure a loan for the sum of \$100,000, which loan will mature in the month of June, 1908, and the attachment has been levied upon the equity of this property over the amount of said loan. The value of the property attached being apparently so greatly in excess of the amount of the claim in this suit, it would appear that it should not be difficult to bond the attachment in the suit at bar, or to arrange for setting aside a sufficient number of the receipts to amply guarantee this claim, and thus to secure the release of the balance of the certificates and bonds; but this is a matter that cannot be determined upon this motion, and will, to a certain extent, depend upon the arrangements which can be made with reference to the loan maturing in June of this year.

As the matter stands at the present time, the plaintiff should be required to give further security upon the attachment, not only on account of the serious consequences of tying up such an amount of property, but in anticipation of the amount of litigation and the expenses consequent upon the trial of the issue in the present action; but it is impossible to determine this question at present. The defendant may later make such motion as it may be advised, either for the release of the property attached, to the extent to which it exceeds reasonable security for the claim in suit, or for a release of the entire property upon the giving of a bond to take the place of the things attached, and the question of additional security will be considered then.

As to the second motion, to make the complaint more definite and certain, the defendant asks for three specific things: First, in effect, that the complaint be so amended as to specifically indicate the manner in which the action sounds in tort, if the plaintiff alleges fraud; second, that the plaintiff indicate which of the 28 receipts mentioned in paragraph 3 of the complaint are referred to with respect to the fraudulent acts alleged; and, third, that the plaintiff specify whether the 3 receipts designated in paragraph 2 of the complaint are a part of the 28 warehouse receipts mentioned in paragraph 3, whether they are the same ones referred to in paragraph 8, and whether they are the same ones as to which fraudulent acts are alleged.

This motion, on all three grounds, should be granted. It may be spelled out from the complaint that the action sounds in tort. In fact, the papers upon the attachment proceedings indicate that the complaint is based upon a charge of fraud; but the allegation of damage apparently depends upon the fact that certain promissory notes, with reference to which the fraud is alleged, were not paid, and the plaintiff should make it clear whether he is suing for the recovery of the amount loaned on the promissory notes, or whether he is suing for

the injury done him by the alleged fraud with reference to some portion of the receipts transferred as collateral for these notes.

As to the other grounds of the motion, it is apparent from the face of the complaint that the allegations are not specific, and that these motions should be granted, so that the issue may be clearly raised by an answer.

The time of the defendant may be extended until 20 days after service of the amended complaint herein.

In re FINK.

(District Court, E. D. Pennsylvania. August 3, 1903.)

No. 2,794.

BANKRUPTCY — DEBTS ENTITLED TO PRIORITY — "WAGES" — COMMISSIONS OF TRAVELING SALESMAN.

Commissions paid a traveling salesman for his services are "wages," within the meaning of Bankr. Act July 1, 1898, c. 541, § 64b (4), 30 Stat. 563 (U. S. Comp. St. 1901, p. 3447), and a claim for such commissions earned within three months prior to the bankruptcy of the employer is entitled to priority thereunder.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, pp. 7369-7373, 7831.]

In Bankruptcy. On certificate of referee concerning claim of Samuel E. Daniels.

Hepburn, Carr & Krauss, for trustee.

Frederick A. Sobernheimer and N. W. Talbot, for claimant.

J. B. McPHERSON, District Judge. The question for decision is whether the referee, Edward F. Hoffman, Esq., erred in deciding that the claimant, who was a traveling salesman employed by the bankrupt and was paid solely by commission on his sales, was entitled to priority for the amount thus earned during the three months preceding the filing of the petition. Or, to state the question in other words: Was the claimant's compensation "wages," within the meaning of section 64b (4) of the bankruptcy act (Act July 1, 1898, c. 341, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447]). The Supreme Court of Pennsylvania, in Hamberger v. Marcus, 157 Pa. 133, 27 Atl. 681, 37 Am. St. Rep. 719, has in effect replied in the affirmative; for in my opinion the decision is pertinent, although the precise point decided is that a commission on sales was protected from attachment by a statute that exempted from such process "the wages of any laborer or the salary of any person in public or private employment." The ground upon which the decision rests will appear by the following quotation from the opinion delivered by Mr. Justice McCollum:

"It was the obvious purpose of this act to enable laborers and persons in public or private employment to receive from their employers compensation for their personal services without hindrance from their creditors. The miner who is paid by the ton, the mechanic who is paid by the piece, and the clerk or salesman who is paid by commissions on his sales, are as much within its protection as if they were paid by the day, week, month, or year. A wholesale

merchant employs two persons to travel over the country and obtain from the retail dealers orders for his goods. To one of them he pays a certain sum per month, and to the other he pays commissions on the amount of orders taken. These commissions are as clearly compensation of the employé for personal services in the interest and for the benefit of the employer as the monthly stipend is. It is a narrow construction of the statute which allows the creditors of one employé to attach in the hands of the employer the commissions which constitute his compensation for personal services and exempts from attachment in the hands of the same employer the compensation of another employé for like services. A construction which admits of such results is not warranted by a mere difference in the method of compensation. In *Wentroth's Appeal*, 3 Wkly. Notes Cas. 248, the question was whether the claimant was a laborer within the meaning of the act of April 9, 1872 (P. L. 47), and this court said: 'If he was a laborer, it must be conceded that it does not matter in what manner his services were to be compensated—whether by daily wages or by the quantity of lumber delivered.' In *Selders' Appeal*, 46 Pa. 57, it was decided that, 'under the act of April 2, 1849 (P. L. 337; *Purdon's Dig.* 835), all laborers employed by the persons or companies referred to in the act are entitled to its benefits, whether the wages agreed to be paid them are measured by time or by the ton, or by the piece, or any other standard.'

'It is what the employer owes his employé for personal services rendered in that relation which is exempt from attachment in the hands of the employer, and it matters not whether it is called wages or salary. In *Commonwealth ex rel. Wolfe v. Butler*, 99 Pa. 535, Chief Justice Sharswood, speaking for the court, said: "The truth is, and this the lexicographers seem to hold, that if there is any difference in the popular sense between salary and wages, it is only in the application of them to more or less honorable services. A farmer pays his farm hands, in common speech, wages, whether by the day, the week, the harvest, or the year. If for any reason he has occasion to employ an overseer, his compensation, no matter how measured, is called salary. An iron master pays his workmen wages; his manager receives a salary. A merchant pays wages to his servant who sweeps the floor, makes the fire, and runs his errands, but he compensates his salesman or clerk by a salary. How can it make any difference in what way the compensation is ascertained?" In *Hutchinson v. Gormley*, 48 Pa. 270, it was held that an attachment would not lie for the fees due a gauger of oils because it would interfere with his compensation and obstruct him in the execution of his duties. In delivering the opinion of the court, Mr. Justice Reed, after stating the grounds of the decision, said: "This makes it unnecessary to consider whether his compensation is covered by the word "salary" in the proviso to the fifth section of the act of April 15, 1845 (P. L. 490), although it is clearly within the spirit." It is true that the cases referred to do not decide the precise question raised by the answers to the interrogatories, but they shed light upon it and are corroborative of the view that the attached commissions constitute the compensation of an employé for personal services rendered to his employer, and are within the protection of the act of April 15, 1845."

Moreover, since the ruling of the learned referee was made, the question has been decided in accordance with his view by the Court of Appeals for the First Circuit. The case is *In re New England Thread Co.*, reported in 20 Am. Bankr. Rep. page 47, 158 Fed. 788, and the decision is precisely upon the point that the commission on sales of a traveling salesman constitutes wages within the meaning of section 64b (4) of the act, and that a claim therefor to the extent of \$3,000 is entitled to priority of payment when the commissions have been earned within the three months period.

The order of the referee is affirmed.

In re LEWIS.

(District Court, E. D. New York. April 24, 1906.)

1. BANKRUPTCY—DISCHARGE—SUFFICIENCY OF OBJECTIONS.

An objection to the discharge of a bankrupt, which charges in the language of the statute that he failed to keep books of account from which his financial condition might be ascertained, with intent to conceal such condition, is subject to objection as being indefinite, but may be accepted as sufficient where the bankrupt has testified that he kept no books of account.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 714.]

2. SAME.

An objection to the discharge of a bankrupt on the ground of his having obtained property by false pretenses is insufficient, under Bankr. Act, July 1, 1898, c. 541, § 14b, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427), as amended by Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 (U. S. Comp. St. Supp. 1907, p. 1026), unless it charges that the false statements were made in writing.

In Bankruptcy. On demurrer to objections to discharge.

Louis Ehrenberg, for bankrupt.

Martin Byrne, for creditor.

CHATFIELD, District Judge. Objection to discharge is made upon two grounds:

First, that the bankrupt is engaged in business and rents a home, but has failed to keep books of account or records from which his true condition might be ascertained, "with intent to conceal his true financial condition and in contemplation of bankruptcy." This form of objection follows the language of the statute, and may be criticised, in that it is impossible to tell whether an utter failure to keep books is intended to be charged, or whether the books that were kept are insufficient to show the true condition of the bankrupt's property. Under ordinary circumstances the objecting creditor should make his objections more specific; but, as the record in the case shows the bankrupt to have testified that he kept no books of account, further amendment is unnecessary, and the objection will be held sufficient to be referred.

A second ground of objection is stated to be that the bankrupt has scheduled a debt contracted by him under such circumstances as to render him liable to arrest upon the charge of obtaining money by false statements of fact, within the prohibition of the statutes of the state of New York. This debt is within the provisions of section 17 of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428]), and of such a character that a discharge in bankruptcy would not effect a release. The debt, however, is provable in this proceeding, and, inasmuch as the creditor has filed his claim, he is entitled to object to the discharge of the bankrupt, if his objections are sufficient under the statute. But the false statements alleged do not appear to have been made in writing, and the act charged is no offense against the provisions of section 29 of the

bankruptcy law. The second objection, therefore, is not within the provisions of section 14, specifying the grounds upon which a discharge shall be refused.

The issue raised by the charge that the bankrupt failed to keep books from which his financial condition could be ascertained, with intent to defraud his creditors, or in contemplation of bankruptcy, will be referred, upon the presentation of an order. The demurrer to the other ground of objection will be sustained.

In re SEIDER et al.

(District Court, E. D. New York. April 24, 1908.)

BANKRUPTCY—TRUSTEE—EFFECT OF CHANGE OF RESIDENCE.

A trustee in bankruptcy, who at the time of his appointment resided in the district of appointment, and who then had and still has an office therein, is not subject to removal because he has changed his legal residence to another district, provided such change does not interfere with the performance of his duties, nor render it difficult for persons interested to communicate with or serve notices upon him.

In Bankruptcy. On petition for removal of trustee.

Malcolm Sundheimer, for petitioner.

Leon Lauterstein, for trustee.

CHATFIELD, District Judge. Act July 1, 1898, c. 541, § 45, 30 Stat. 55 (U. S. Comp. St. 1901, p. 3438), provides that:

"Trustees may be (1) individuals who are respectively competent * * * and reside or have an office in the judicial district within which they are appointed, or (2) corporations * * * having an office in the judicial district," etc.

In the present case the trustee, when appointed, was living in the county of Suffolk, within this district, and (as claimed by his affidavits) had and still has an office in the borough of Brooklyn, which he uses for the transaction of business when convenient so to do. But it also appears that the trustee resides for the greater portion of the year, and votes, in the borough of Manhattan, where he maintains an office for the practice of the law. The trustee was elected, has qualified, and is in the performance of his duties; considerable proceedings having been begun on his part as trustee. Objection is now made that this trustee has not a legal residence nor an office within this district, and his removal is asked upon these grounds.

It may be assumed that the provisions of section 45 are mandatory, and that the word "may" is equivalent to "shall," in the sense that the section allows a trustee to be chosen from but two classes, viz., persons of a certain sort or corporations. It may likewise be assumed that the provisions of section 44, giving the court authority to appoint a trustee if the creditors do not make the necessary choice, are governed by the language of section 45. It is necessary, therefore, to determine the meaning of the words "reside or have an office," contained in section 45, inasmuch as the entire scheme of the bankruptcy

law is aimed at the convenience of the parties, and the advantage of those, including the bankrupt, who are interested in the bankrupt estate. It seems to be evident, therefore, that actual presence is intended, rather than a legal or voting residence. The Standard Dictionary gives as the meaning of the word "reside":

"(1) To make an abode for a considerable time; to live; to dwell; (2) to be in official residence."

Certain rights and duties may follow habitation in a certain place under certain conditions. The payment of taxes is an illustration of the obligations, and the right to vote or to hold elective or appointive office one of the privileges; but the bankruptcy law is not creating a public officer when it provides for the election of a trustee, nor do the necessities of the situation require more than responsibility and availability. The having of a fixed place of abode meets these requirements, and would seem to be what is intended by the statute. This makes it unnecessary to determine the political or civil rights which may or may not follow from the having of such fixed place of abode. A person might be domiciled or reside the greater portion of the year, and perhaps pay taxes, in the county of Kings and in the Eastern district of New York, and vote at a legal residence in another portion of the state, or even in a different state altogether. So with reference to the question of an office. A lawyer might have an office at his home in Brooklyn, and an office in one of the downtown buildings in the borough of Manhattan, and a third office in Jersey City, in the state of New Jersey, and any one of the three might be sufficient to meet the requirements of section 45.

It is evident that the responsibility of the trustee and his availability for the purposes of the bankrupt estate are the requirements considered in framing this statute, and it is evident, from the entire statute, that a desire was present in the minds of those framing the law to prevent some coterie of creditors attempting to secure the appointment of a trustee, perhaps from a different state, who could not be reached or served with papers in the district where the proceedings were located. As shown by the affidavits, the present trustee, when he was appointed and gave his bond, was residing, in the sense of being domiciled at that time, in this district. He then had, and since has had, an office which could have been used to meet the requirements of the statute; but actually the convenience of all parties is served by dealing with the trustee at his office in the borough of Manhattan, and it would be inequitable and not within the spirit of the statute to hold that a trustee may become disqualified and should be removed by reason of a change of residence or office, provided this change does not make it impossible for the trustee to perform his duties, nor difficult for the creditors to locate and communicate with the trustee. In the present case the papers show that the trustee has been faithfully performing his duties, is accessible, and is acting advantageously for the estate.

The motion will be denied.

In re SOLOMON & CARVEL

(District Court, E. D. New York. April 30, 1908.)

BANKRUPTCY—PARTNERSHIP—SOLVENT PARTNER.

The fact that one of the members of a partnership is solvent is no defense to a proceeding in involuntary bankruptcy against the partnership and the remaining partner, under Bankr. Act, July 1, 1898, c. 541, § 5, 30 Stat. 547 (U. S. Comp. St. 1901, p. 3424), and under subdivision "h" and General Order 8 (89 Fed. vi, 32 C. C. A. xi), in case an adjudication is made, the solvent partner may be required to file schedules, and may at his election administer the partnership property.

In Bankruptcy. Involuntary proceedings.

Samuel Meyers, for petitioning creditors.

Maurice M. Greenstein, for Solomon.

CHATFIELD, District Judge. The alleged bankrupts were partners, and this proceeding was brought against them individually and as composing a firm. The present bankruptcy statute recognizes a copartnership as an entity, to the extent that a petition in bankruptcy can be filed against the partnership, and the partnership or any of its members may be adjudicated bankrupts, while one or more of the partners individually may be entirely solvent. Section 5, subd. "h" (Act July 1, 1898, c. 541, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3424]), recognizes the liability of solvent partners for firm debts, and provides for a method of administration, while General Order 8 (89 Fed. vi, 32 C. C. A. xi) provides for the filing of schedules on the part of such solvent partner.

In the present case one Solomon, after drawing out practically all of the money in the bank belonging to the partnership, which money was used by him to pay a debt in a manner which substantially created a preference, withdrew from the firm and left the city of New York. The remaining partner made an assignment, on behalf of the firm and of himself, of the partnership property and accounts. This assignment was not drawn nor filed in the manner required by the laws of the state of New York, and a short time afterward an involuntary petition in bankruptcy was filed and subpoenas served upon the alleged bankrupts. The partner, Solomon, filed an answer denying his insolvency, or the commission of any act of bankruptcy upon his part, and further denying that he was a partner at the time of the filing of the petition in bankruptcy, alleging that he had withdrawn from the firm, as before mentioned. It is needless to consider this last denial, as it is unnecessary to discuss the responsibility of a partner to the creditors of a firm, where no dissolution agreement is had, and where the partnership was general, as in this case.

The testimony taken has apparently been aimed at an estimation of the assets and liabilities of the firm, and not those of the individual partner, Solomon. So far as appears from the testimony, the affidavits, and exhibits in this case, the partner, Solomon, is solvent. The special commissioner has reported that the firm is insolvent,

and his report is borne out by the testimony, and should be confirmed.

The firm and Carvel should be adjudicated bankrupts, if this has not been done before, and the partner, Solomon, should be required to file schedules as to his assets and liabilities, and as a solvent partner will be compelled to take care of the liabilities of the bankrupt firm, and may administer the estate under the bankruptcy law, if he so desires. The rights and duties of the parties are explained at length in the case of *In re Bertenshaw* (C. C. A.) 157 Fed. 363, 19 Am. Bankr. R. 577, and the cases therein cited.

In re ARKANSAS R. RATES.

(Circuit Court, E. D. Arkansas. September 3, 1908.)

1. CARRIERS—STATE REGULATION—REASONABLENESS OF RATES.

In determining the reasonableness of freight and passenger rates established by a state on intrastate traffic, as applied to railroads doing both interstate and intrastate business, the difference in the cost of handling each kind of business as related to the earnings from each should be taken into account, and a company is entitled to earn a fair percentage of profit from its intrastate business on the capital employed therein after deducting the portion of the total operating expenses properly chargeable thereto, without regard to its interstate earnings.

2. SAME—RESTRAINING ENFORCEMENT OF RATES—TEMPORARY INJUNCTION.

A court of equity may by a temporary injunction change the status quo where necessary to do so to avoid irreparable injury, and, where railroad companies have put into effect rates established by a state, and continued them in force for a sufficient length of time to determine their reasonableness, a court may properly grant a temporary injunction to restrain their further enforcement, if it is shown that they are unreasonable and confiscatory.

3. SAME.

A preliminary injunction granted to restrain the enforcement of rates established by the state of Arkansas on intrastate freight and passenger traffic handled by railroads on a showing that on actual trial for a reasonable length of time such rates have proven nonremunerative and confiscatory, depriving the complainant railroad companies of their property without just compensation, in violation of their constitutional rights.

In Equity. On motion for preliminary injunctions.

John M. Moore, for complainants.

William F. Kirby, Atty. Gen., George B. Rose, and Morris M. Cohn, for defendants.

VAN DEVANTER, Circuit Judge. The matter now under consideration is an application in each of four suits against the Railroad Commissioners of the state of Arkansas and others for a temporary injunction restraining the enforcement of the prescribed rates for the transportation of freight and passengers in intrastate commerce in that state; it being contended on the part of the complainants that these rates are unreasonable, noncompensatory, and therefore confiscatory. The matter was first brought on for hearing on July 28th last, when, at the request of the defendants, the hearing was post-

poned until August 31st that they might be better prepared to meet the contention of the complainants. On the latter date the parties appeared, and three days were consumed in the presentation of proofs and in the arguments of the counsel. Each of the four railroad companies is operating an interstate railroad, and is engaged in the transportation over such railroad of freight and passengers, both intrastate and interstate, in the state of Arkansas, and each has made a practical and extended application or test of the rates in question. The freight rates were prescribed by the Railroad Commissioners while acting under the state statutes, and the passenger rate, which is two cents per mile, was prescribed by statute. The proofs disclose the revenues actually derived by each railroad, upon the application of these rates, from its business in the state, the revenues from each class of traffic being stated so as to show separately the earnings from intrastate freight, interstate freight, intrastate passengers, and interstate passengers, and also disclose the value of the property employed by each road in the traffic within the state, the taxes paid thereon, the actual cost of conducting the freight traffic, and the actual cost of conducting the passenger traffic.

The first question for consideration is: How shall this cost be apportioned between the intrastate and interstate traffic? The proofs make it quite plain that the production of a given amount of revenue is attended with greater cost in intrastate business than in interstate business; and that this is a generally recognized fact is attested by the decisions in other cases where the reasons which make it so are fully stated. *Chicago, etc., Co. v. Tompkins*, 176 U. S. 167, 178, 20 Sup. Ct. 336, 44 L. Ed. 417; *Minneapolis, etc., Co. v. Minnesota*, 186 U. S. 257, 262, 22 Sup. Ct. 900, 46 L. Ed. 1151; *Northern Pacific Ry. Co. v. Keyes* (C. C.) 91 Fed. 51, 53. Here the additional cost is shown to be at least 100 per cent. in freight traffic and at least 15 per cent. in passenger traffic, and this is not more than what has been shown in other cases. Undoubtedly these differences furnish a standard by which to apportion the total cost between the traffic which is intrastate and that which is interstate. Other standards are suggested, but the proofs indicate that none of them is as satisfactory or accurate as is the difference in cost in its relation to the revenue. That standard must, therefore, be applied, and this may be done in this way, taking the freight and passenger traffic separately: Increase the intrastate earnings by the ascertained percentage representing the difference in cost, thereby ascertaining what would have been earned by the same actual expenditure in conducting the intrastate traffic, had it been attended with the same relative cost as the interstate traffic. Then add the intrastate earnings, as so increased, to the interstate earnings, thereby ascertaining what would have been earned by the actual expenditure in conducting both the intrastate and the interstate traffic, had the former been attended with the same relative cost as the latter. Then ascertain what proportion of this total represents the intrastate earnings, as so increased, and what proportion represents the interstate earnings, and then ascertain the corresponding proportions of the total cost of the intrastate and the interstate traffic. When this mode of apportionment is applied in these cases, the result shows

that the earnings of each road from its intrastate freight traffic is much less than the proportion of the operating expenses and taxes properly attributable to it, and that the earnings of two of them from intrastate passenger traffic is a little less than the proportion of the operating expenses and taxes properly attributable to it. As to the other two roads, the earnings from the traffic last named are somewhat in excess of the proper proportion of the operating expenses and taxes, but not enough so to yield a return of 1 per centum per annum upon that proportion of the value of the property rightly attributable to such traffic. So the conclusion necessarily follows that the rates in question, both freight and passenger, are noncompensatory and unreasonable, and that their enforcement, although not so intended, is nothing other than a using or taking of the property of these railroad companies without due compensation, which is confiscation. This the Constitution of the United States does not permit, for, as was said in *Smyth v. Ames*, 169 U. S. 466, 526, 18 Sup. Ct. 418, 42 L. Ed. 819:

"(1) A railroad corporation is a person within the meaning of the fourteenth amendment, declaring that no state shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

"(2) A state enactment, or regulations made under the authority of a state enactment, establishing rates for the transportation of persons or property by railroad that will not admit of the carrier earning such compensation as under all the circumstances is just to it and to the public, would deprive such carrier of its property without due process of law and deny to it the equal protection of the laws, and would therefore be repugnant to the fourteenth amendment of the Constitution of the United States.

"(3) While rates for the transportation of persons and property within the limits of a state are primarily for its determination, the question whether they are so unreasonably low as to deprive the carrier of its property without such compensation as the Constitution secures, and therefore without due process of law, cannot be so conclusively determined by the Legislature of the state or by regulations adopted under its authority that the matter may not become the subject of judicial inquiry."

It is pertinent in this connection to observe that in that case it was also said (page 541 of 169 U. S., page 432 of 18 Sup. Ct. [42 L. Ed. 819]):

"So far as rates of transportation are concerned, domestic business should not be made to bear the losses on interstate business, nor the latter the losses on domestic business. It is only rates for the transportation of persons and property between points within the state that the state can prescribe; and, when it undertakes to prescribe rates not to be exceeded by the carrier, it must do so with reference exclusively to what is just and reasonable, as between the carrier and the public, in respect of domestic business. The argument that a railroad line is an entirety, that its income goes into, and its expenses are provided for, out of a common fund, and that its capitalization is on its entire line, within and without the state, can have no application where the state is without authority over rates on the entire line, and can only deal with local rates and make such regulations as are necessary to give just compensation on local business."

But it is urged that a temporary injunction ought not to be granted because these railroads have heretofore applied and given effect to the rates in question; the contention being that a temporary injunction may be employed to preserve the status quo pending the suit, but not to change it. It may be conceded that such an injunction is generally

employed as stated, and that the courts are generally reluctant to employ it otherwise, but this does not mean that they may not or ought not to employ it otherwise, when the exigencies of the case justly require it; for, as has been often held, courts of equity are not thus limited in their powers, but may by a temporary injunction effect a change in the status quo, if it be necessary to do so, as here, to avoid irreparable injury from what is plainly a continuing wrong. In *re Lennon*, 166 U. S. 548, 556, 17 Sup. Ct. 658, 41 L. Ed. 1110; *Chicago, etc., Co. v. Winnett* (C. C. A.) 162 Fed. 242, 249; *Pokegama Co. v. Klamath Co.* (C. C.) 86 Fed. 528, 533, 535. It would hardly do to say to a railroad company that, by resorting to the very best method of testing the adequacy of a prescribed rate—that is, by putting it into actual practice for a reasonable period—all right to a temporary injunction, which might otherwise exist, will be lost; and yet that would be the result if the narrow view of the use of such an injunction here contended for were to prevail. True, some of the rates in question have been in force substantially in their present form for a much longer time than was necessary to make a practical test of them, but enough of influence is accorded to this fact when it is made a reason for requiring stronger and more persuasive proof of inadequacy than otherwise would be required, and that influence has been accorded to it here.

A temporary injunction will be granted as prayed for, but it will be required, for the protection of shippers and passengers, that a proper bond be executed in the sum of \$200,000 conditioned that during the continuance of the injunction the railroad company shall keep a correct account showing, as respects every carriage of freight or passengers, the difference between the tariff actually charged and what would have been charged had the restrained rates been applied, and showing the particular carriage in question, the stations between which it occurred, and the name of the person affected, such record to be kept and held subject to the further order of the court; and also conditioned that the excess charged, with lawful interest and damages, shall be returned in each instance to the party entitled thereto within a reasonable date to be fixed by the court, if it shall be eventually determined that the temporary injunction ought not to have been granted.

COOPERSVILLE CO-OPERATIVE CREAMERY CO. v. LEMON, Internal Revenue Collector.

(Circuit Court of Appeals, Sixth Circuit. May 25, 1908.)

No. 1,762.

1. CONSTITUTIONAL LAW—REGULATIONS OF COMMISSIONER UNDER OLEOMARGARINE ACT—VALIDITY—"ADULTERATED BUTTER."

Oleomargarine Act May 9, 1902, c. 784, § 4, 32 Stat. 194 (U. S. Comp. St. Supp. 1907, p. 637), inter alia, imposes an internal revenue tax of 10 cents per pound on adulterated butter. It provides that "any butter in the manufacture or manipulation of which any process or material is used with intent or effect of causing the absorption of abnormal quantities of water, milk or cream," shall be deemed "adulterated butter," and authorizes the Commissioner of Internal Revenue to decide what substances are taxable thereunder. It also authorizes him, with the approval of the Secretary of the Treasury, to make all needful regulations for carrying the act into effect. *Held*, that such a regulation, providing that butter containing 16 per cent. or more of water, milk, or cream should be classified as "adulterated butter" under the act, was within the authority so granted, and was valid, being neither an exercise of legislative or judicial power, but merely a determination as a question of fact of what constitutes an "abnormal" quantity of water, etc., upon which the application of the statute is made to depend.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 1, p. 211.]

2. APPEAL AND ERROR—ACTION TO RECOVER TAXES PAID—SUBMISSION OF ISSUES—HARMLESS ERROR.

Whether or not such regulation has the force of law as a conclusive determination of the fact, it furnishes a working rule for the guidance of officers and the information of manufacturers, and on the trial of an action by a manufacturer to recover taxes exacted on butter claimed to contain more than 16 per cent. of water the submission to the jury of the question whether such a percentage of water was "abnormal" was not an error of which the plaintiff could complain.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4212-4218.]

3. INTERNAL REVENUE—CONSTRUCTION OF STATUTE—"ABSORPTION" DEFINED.

In the provision of Oleomargarine Act May 9, 1902, c. 784, § 4, 32 Stat. 194 (U. S. Comp. St. Supp. 1907, p. 637), defining adulterated butter as including "any butter in the manufacture or manipulation of which any process or material is used with intent or effect of causing the absorption of abnormal quantities of water, milk or cream," the word "absorption" is not used in the sense of chemical absorption, and any butter is within the definition which contains an abnormal quantity of water, whether by chemical absorption or by incorporation.

4. SAME—ADULTERATED BUTTER SUBJECT TO TAX—INTENT OF MANUFACTURER.

Butter containing an abnormal quantity of water is subject to the tax imposed by Act May 9, 1902, c. 784, § 4, 32 Stat. 194 (U. S. Comp. St. Supp. 1907, p. 637); the intent of the manufacturer being immaterial.

In Error to the Circuit Court of the United States for the Western District of Michigan.

W. R. Keeney and L. H. Osterhouse, for plaintiff in error.

W. K. Clute, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge. The plaintiff in error, as its corporate name implies, was engaged at Coopersville, Mich., in the manufacture

of creamery butter. It did not profess to be engaged in making or selling adulterated butter, and so took out no license and paid no tax as a maker of such butter. Upon the contrary, it claimed to be making the ordinary creamery butter of commerce, and not subject to the regulations or tax imposed upon makers of adulterated butter. Two car loads of butter made by it were examined by an agent of the Commissioner of Internal Revenue, and a very large proportion found to contain an abnormal percentage of water, which was therefore classified as "adulterated butter," as defined by the act of 1902. The Commissioner thereupon assessed taxes and penalties aggregating \$1,620. This was paid under protest, and this action brought against the defendant in error, as collector, to recover the same. There was a jury and a verdict for the defendant.

The act of May 9, 1902 (32 Stat. 194, c. 784 [U. S. Comp. St. Supp. 1907, p. 637]), is an act which amends the act of August 2, 1886, known as the "Oleomargarine Act,"¹ and also imposes a tax and provides for the inspection and regulation of the manufacture and sale of certain dairy products. Section 4 adopts the definition of butter contained in the oleomargarine act, wherein butter is defined as the "food product usually known as butter and which is made exclusively from milk or cream, or both, with or without common salt, and with or without additional coloring matter." The same section then proceeds to define what shall be deemed "adulterated butter." One class of such butter is thus defined:

"Or any butter in the manufacture or manipulation of which any process or material is used with intent or effect of causing the absorption of abnormal quantities of water, milk or cream."

Every person who engages in the production of "adulterated butter as a business" is declared to be a manufacturer, and required to pay a tax of \$600 per year, and to pay a tax of 10 cents a pound when sold or removed for sale or consumption. Every manufacturer is required to give bond, put up signs, keep such books, and render such returns of material and product, "and to conduct his business under such surveillance of officers and agents as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may by regulation require." The mode of packing and marking such butter is also defined and the packages required "to be stamped and branded as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe." By one paragraph of the same section it is provided that the provisions of sections 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, and 21 of the oleomargarine act "shall apply to the manufacturers of adulterated butter to an extent necessary to enforce the marking, branding, identification, and regulation of the exportation and importation of adulterated butter." Most of the sections referred to from the oleomargarine act deal with penalties for selling or receiving or removing the product without compliance with law as to stamping, branding, marking, etc. Section 14 provides for the employment of chemists and microscopists by the Commissioner to aid him in his duties, and that he shall be authorized to decide what substances, extracts, mixtures, or compounds which may be submitted

¹ Act Aug. 2, 1886, c. 840, 24 Stat. 209 (U. S. Comp. St. 1901, p. 2228).

for his inspection in contested cases are to be taxed under this act, and provides that his determination in matters of taxation "under this act shall be final." Section 20 provides:

"That the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may make all needful regulations for carrying into effect this act."

In addition to these provisions found in the act itself there are certain other provisions in the general law which bear upon the subject. They are found in sections 161, 251, and 3447, Rev. St. (U. S. Comp. St. 1901, pp. 80, 138, 2277). Section 251 is peculiarly in point, inasmuch as that authorizes the Secretary of the Interior "to make rules and regulations, not inconsistent with law, to be used under and in the enforcement of the various provisions of the internal revenue laws." In view of these provisions of law the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, promulgated a regulation that butter containing 16 per cent. or more of water, milk, or cream should be classified as adulterated butter under the act. Looking to the character of duties imposed upon the Commissioner of Internal Revenue, and the various provisions of law authorizing the promulgation of regulations for carrying out the plain purpose of the law, we entertain no serious doubt that this regulation was authorized.

The contention that the delegation of authority to promulgate such a regulation is to delegate either legislative or judicial power to an executive officer is founded upon a misapprehension of the character of the authority delegated. That Congress cannot delegate legislative authority or power to any executive official or board of officials is elementary. To do so would be destructive of our whole system and scheme of government. *Field v. Clark*, 143 U. S. 649, 691, 12 Sup. Ct. 495, 36 L. Ed. 294. That the delegation of authority to add to or take from a law would be to delegate legislative power must also be conceded. But that Congress may enact a law and delegate the power of finding some fact or state of things upon which the operation of the law is made to depend is equally clear. *Field v. Clark*, 143 U. S. 649, 12 Sup. Ct. 495, 36 L. Ed. 294; *In re Kollock*, 165 U. S. 526, 17 Sup. Ct. 444, 41 L. Ed. 813; *Buttfield v. Stranahan*, 192 U. S. 470, 24 Sup. Ct. 349, 48 L. Ed. 525; *Union Bridge Co. v. United States*, 204 U. S. 364, 386, 27 Sup. Ct. 367, 51 L. Ed. 523. The authority to make all needful regulations not inconsistent with law is not a delegation of power to add something to an incomplete law nor a grant of judicial power. It is only an authority to determine the fact upon which the operation of the law is made to depend. Congress might have made the necessary tests and might have acquired the knowledge of the butter-making art to enable it to have enacted that adulterated butter should consist of butter having a moisture content of 16 per cent. or more. But that would have been an unnecessary detail, for it was altogether competent to declare that butter which contained an abnormal quantity of water, milk, or cream should be classified as adulterated butter, and that the fact as to what was, in dairy butter, an abnormal proportion of water, milk, or cream should

be determined by a regulation of the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury.

The cases cited above of *Field v. Clark*, 143 U. S. 649, 12 Sup. Ct. 495, 36 L. Ed. 294, *In re Kollock*, 165 U. S. 526, 17 Sup. Ct. 444, 41 L. Ed. 813, *Buttfield v. Stranahan*, 192 U. S. 470, 24 Sup. Ct. 349, 48 L. Ed. 525, and *Union Bridge Co. v. United States*, 204 U. S. 364, 27 Sup. Ct. 367, 51 L. Ed. 523, are all cases in which authority to determine a fact or the happening of a contingency upon which the operation of a law was made to depend was delegated by Congress to executive officials and the validity of the legislation supported. The case of *Field v. Clark* involved the constitutionality of an act of Congress which provided for the admission of certain articles free of duty and the imposition of a duty upon the specified articles upon the happening of a contingency to be determined by the President and announced by his proclamation. The act was sustained as one not delegating legislative power. Upon this aspect of the case the court said:

"Legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. What the President was required to do was simply in the execution of the act of Congress. It was not the making of the law. He was the mere agent of the lawmaking department to ascertain and declare the event upon which its expressed will was to take effect."

Another instructive case is that of *Buttfield v. Stranahan*, 192 U. S. 470, 24 Sup. Ct. 349, 48 L. Ed. 525, where was involved the validity of an act which made it unlawful for any person to bring into the United States any tea inferior in purity, quality, or fitness for consumption below the standards to be fixed and determined by a board of experts provided for by the act. The act was held valid as not vesting in the Secretary of the Treasury or the board of experts any real power of legislation. "Congress," said Justice White, speaking for the court, "legislated upon the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave the executive officials the duty of bringing about the result pointed out by the statute. To deny the power to Congress to delegate such a duty would, in effect, amount to declaring that the plenary power vested in Congress to regulate foreign commerce could not be efficiently executed."

The whole subject of the authority of Congress to authorize administrative officials to make rules and regulations for the enforcement of a law was again most fully and ably considered in the case of the *Union Bridge Co. v. United States*, 204 U. S. 364, 386, 27 Sup. Ct. 367, 51 L. Ed. 523. That case involved section 18 of the rivers and harbors act of 1899 (30 Stat. 1121, c. 425), providing for the removal or alteration of bridges which are unreasonable obstructions to navigation, after the Secretary of War shall have ascertained, after following the procedure laid down in the act, that they are such obstructions. The contention was that Congress could not delegate the power of deciding the fact as to whether a particular bridge was an obstruction to navigation. It was held that the act did not delegate either judicial or legislative power to the Secretary of War. Mr. Justice Harlan, for the court, among other things said:

"Beyond question, if it had so elected, Congress, in some effective mode and without previous investigation through executive officers, could have determined for itself primarily the fact whether the bridge here in question was an unreasonable obstruction to navigation, and, if it was found to be of that character, could by direct legislation have required the defendant to make such alterations of its bridge as were requisite for the protection of navigation and commerce over the waterway in question. But investigations by Congress as to each particular bridge alleged to constitute an unreasonable obstruction to free navigation, and direct legislation covering each case separately, would be impracticable in view of the vast and varied interests which require national legislation from time to time. By the statute in question Congress declared in effect that navigation should be freed from unreasonable obstructions arising from bridges of insufficient height, width of span, or other defects. It stopped, however, with this declaration of a general rule, and imposed upon the Secretary of War the duty of ascertaining what particular cases come within the rule prescribed by Congress, as well as the duty of enforcing the rule in such cases."

The case of *United States v. Eaton*, 144 U. S. 677, 12 Sup. Ct. 764, 36 L. Ed. 591, is not in point. *Eaton* was indicted for violating a regulation made by the Commissioner of Internal Revenue requiring certain books to be kept by wholesale dealers in oleomargarine. The case arose under the eighteenth section of the oleomargarine act of 1886, prior to its amendment by the act of October 1, 1890. That section imposed certain penalties upon manufacturers and dealers who should knowingly and willfully "neglect or refuse to do, or cause to be done, anything required by law in the carrying on or conducting of his business, or shall do anything by this act prohibited." The court held that, while the regulation might be an entirely proper one under section 20 of the oleomargarine act of August, 1886, yet the question to be determined was whether a wholesale dealer in oleomargarine, who knowingly and willfully fails and omits to keep the book and make the monthly return prescribed in the regulation of the Commissioner of Internal Revenue, thereby fails and omits, within the meaning of section 18 of the act, to do a thing "required by law in the carrying on or conducting of his business," so as to be liable to the penalty prescribed by that section. After considering the sections of the act which deal with the things required from a manufacturer, but which impose no penalty for neglect to keep books and make returns, the court said:

"It would be a very dangerous principle to hold that a thing prescribed by the Commissioner of Internal Revenue as a needful regulation under the oleomargarine act for carrying it into effect could be considered a thing 'required by law' in the carrying on or conducting of the business of a wholesale dealer in oleomargarine, in such manner as to become a criminal offense punishable under section 18 of the act, particularly when the same act in section 5 requires the manufacturer of the article to keep such books and render such returns as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may by regulation require, and does not impose, in that section or elsewhere in the act, the duty of keeping such books and rendering such returns upon a wholesale dealer in the article. It is necessary that a sufficient statutory authority should exist for declaring any act or omission a criminal offense; and we do not think the statutory authority in the present case is sufficient. If Congress intended to make it an offense for wholesale dealers in oleomargarine to omit to keep books and render returns as required by regulations to be made by the Commissioner of Internal Revenue, it would have done so distinctly, in connection with an enactment

such as that above recited, made in section 41 of the act of October 1, 1890 (26 Stat. 62, c. 1244 [U. S. Comp. St. 1901, p. 2235]). Regulations prescribed by the President and by the heads of departments, under authority granted by Congress, may be regulations prescribed by law, so as lawfully to support acts done under them and in accordance with them, and may thus have, in a proper sense, the force of law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offense in a citizen, where a statute does not distinctly make the neglect in question a criminal offense."

This Eaton Case was explained and distinguished in both *Caha v. United States*, 152 U. S. 211, 14 Sup. Ct. 513, 38 L. Ed. 415, and *re Kollock*, cited above, as a case in which the wrong was simply "in the violation of the duty imposed only by regulation of the treasury department." While it must be conceded that none of the provisions of the butter act, nor of the general law, in express terms confers authority to determine the per cent. of moisture in dairy butter which shall constitute adulterated or taxable butter, yet it is not easy to escape the conclusion, in view of the general character of the law and of the broad language in which the power to make needful rules to carry the law into execution is conferred, that there is an implied power to determine the fact as to what is an undue, unusual, or, in the words of the act, an "abnormal," incorporation of moisture. An express power to make departmental regulations involving the determination of facts upon which the operation of a law is made to depend is not essential. That which is plainly implied is as much the law as that which is expressed in plain terms. For the practical operation of the law it was deemed necessary that the department charged with its execution should have authority to make regulations not inconsistent with law, and this power was accordingly conferred in general terms. The regulation in question is reasonable, is not inconsistent with law, and we see no sufficient ground for saying that it is not within the fair scope and purview of the authority conferred. The cases of *United States v. Bailey*, 9 Pet. 238, 9 L. Ed. 113, and *Caha v. United States*, 152 U. S. 211, 14 Sup. Ct. 513, 38 L. Ed. 415, afford illustrations of regulations made under implied authority arising out of the nature of the duties imposed upon those charged with the execution of the law.

The conclusiveness of the determination of the fact upon which this law is made to depend would seem to follow from the authority under which it was made. The fact is one which Congress might have determined for itself. Obviously, if it did, that would be an end of the matter, and all butter which contained the moisture content so fixed, or more, would have been subject to the tax. In referring the determination of the fact to the administrative officials it has equally manifested its intent that the standard of excessive water content should be, when so determined, as conclusive as if named in the law itself. If in fixing the standard the Commissioner does not legislate by amending the law or altering it, nor act judicially by deciding a fact which was one which in its intrinsic nature required judicial determination, it is difficult to see, in the absence of fraud or bad faith, neither of which is here alleged, upon what theory a fact which Congress has submitted to his determination can be subject to review. The power of Congress to tax all butter, or only certain qualities of butter, is not

disputable, and is only qualified by the requirement of geographical uniformity. Wishing to tax certain grades of butter only, it delegated to an administrative board the determination of the question of fact as to what was an abnormal moisture content, and made that fact so settled the line between taxable and nontaxable butter. It is true that in *McCray v. United States*, 195 U. S. 27, 46, 24 Sup. Ct. 769, 49 L. Ed. 78, the court declined to determine the conclusiveness of the determination of the Commissioner as to what compounds or mixtures were subject to tax imposed upon oleomargarine, because not raised by any assignment of error. But the question has been more than once substantially decided in other cases. In *Miller v. Mayor of New York*, 109 U. S. 385, 3 Sup. Ct. 228, 27 L. Ed. 971, it was held that the determination by the Secretary of War that a bridge authorized by Congress, provided it should be constructed in such a way as not to be an obstruction to navigation, the fact to be determined by the Secretary of War upon plans submitted to him, was a conclusive determination of the fact so decided. It was urged that Congress could not give the determination of such a fact by an executive official any conclusive character as that involved the delegation of judicial power. To this the court replied:

"There is in this position a misapprehension of the purport of the act. By submitting the matter to the Secretary, Congress did not abdicate any of its authority to determine what should or should not be deemed an obstruction to the navigation of the river. It simply declared that, upon a certain fact being established, the bridge should be deemed a lawful structure, and employed the Secretary of War as an agent to ascertain that fact. Having power to regulate commerce with foreign nations and among the several states, and navigation being a branch of that commerce, it has control of all navigable waters between the states, or connecting with the ocean, so as to protect and preserve their free navigation. Its power, therefore, to determine what shall not be deemed, so far as that commerce is concerned, an obstruction, is necessarily paramount and conclusive. It may in direct terms declare absolutely, or on conditions, that a bridge of a particular height shall not be deemed such an obstruction, and in the latter case make its declaration take effect when those conditions are complied with. The act in question, in requiring the approval of the Secretary before the construction of the bridge was permitted, was not essentially different from a great mass of legislation directing certain measures to be taken upon the happening of particular contingencies or the ascertainment of particular information. The execution of a vast number of measures authorized by Congress and carried out under the direction of heads of departments would be defeated if such were not the case. The efficiency of an act as a declaration of legislative will must, of course, come from Congress; but the ascertainment of the contingency upon which the act shall take effect may be left to such agencies as it may designate. *South Carolina v. Georgia*, 93 U. S. 13, 23 L. Ed. 782."

Congress forbade the importation of teas which should not conform in quality and purity to standards of admissible teas to be determined by the Secretary of the Treasury upon the advice of a board of experts. The act was upheld as not involving anything more than the delegation of authority to the Secretary of the Treasury to determine the fact upon which the operation of the law was made to depend. *Buttfield v. Stranahan*, 192 U. S. 470, 497, 24 Sup. Ct. 349, 48 L. Ed. 525. The effect of fraud, bad faith, or malice in the adoption of the standard of admissible tea the court said they were not called upon

to consider, as no allegation of bad faith in fixing the standards had been made.

In *Union Bridge Co. v. United States*, 204 U. S. 364, 27 Sup. Ct. 367, 51 L. Ed. 523, the Secretary of War had determined upon evidence submitted to him that a particular bridge was an obstruction to navigation and required its destruction in accordance with an act of Congress which forbade the maintenance of any bridge which was an obstruction. The court held that his action did not involve either the exercise of legislative or judicial power. The court in that case said:

"In performing that duty the Secretary of War will only execute the clearly expressed will of Congress, and will not, in any true sense, exert legislative or judicial power. He could not be said to exercise strictly legislative or judicial power any more, for instance, than it could be said that executive officers exercise such power when, upon investigation, they ascertain whether a particular applicant for a pension belongs to a class of persons who, under the general rules prescribed by Congress, are entitled to pensions. If the principle for which the defendant contends received our approval, the conclusion could not be avoided that executive officers, in all the departments, in carrying out the will of Congress as expressed in statutes enacted by it, have from the foundation of the national government exercised and are now exercising powers, as to mere details, that are strictly legislative or judicial in their nature. This will be apparent upon an examination of the various statutes that confer authority upon executive departments in respect of the enforcement of the laws of the United States. Indeed, it is not too much to say that a denial to Congress of the right, under the Constitution, to delegate the power to determine some fact or the state of things upon which the enforcement of its enactment depends would be 'to stop the wheels of government' and bring about confusion, if not paralysis, in the conduct of the public business."

But, if not conclusive in a contested case, the regulation was at least a working regulation and guide, enabling the officials charged with the enforcement of the law to act with impartiality and uniformity in exacting the tax imposed. Its promulgation was at least an assurance to people engaged in butter making that the administrative officials charged with the collection of this tax would not subject them to the tax or a departmental regulation of their business if their butter did not contain as much as 16 per cent. of moisture, and a warning against any greater percentage. This much must be conceded. Assuming, then, that it may not have the force of law as a conclusive determination of the question, does it follow, if the tentative or prima facie determination of the Commissioner by such a regulation is challenged by a manufacturer from whom the tax is exacted, that the act is to fail because in such circumstances there can be no final determination of the fact of what is abnormal moisture in butter? It may be that such a question, involving as it does more or less of scientific knowledge and a wide acquaintance with the moisture content of standard butter, could be more satisfactorily determined by a commission of experts or by the action of Congress itself. But does it follow that such a question could not be submitted to a jury when the enforcement of the tax is involved and the maker of the butter contests the fact of an abnormal moisture content? That juries might disagree with one another as to a normal water content, and so some would be compelled to pay and others escape, may be conceded. But is not this so with respect to many questions which for centuries have gone to the jury? By

what standard is a question of fraud to be tried? What is the definite fixed standard of care by which juries are to determine negligence? We tell them the care of the average prudent man is the standard. But can that be said to afford an identical idea to the mind of every juror? Questions of motive and intent are questions for the jury. Questions involving scientific knowledge far beyond that of the best class of jurymen are submitted, although the verdict may afford no standard for another case and questions depending on science are peculiarly capable of an exact and uniform answer. Manifestly this objection is not maintainable, unless it be that as an excise tax it will lack that uniformity of operation required by the Constitution, because the verdict of one jury will afford no standard for another. But it is the peculiar province of a jury to determine disputed questions of fact. The question as to what is an abnormal moisture content in dairy butter is nothing more or less than a question of fact. If the fact exist by confession or by the determination of a jury, the butter is subject to the tax. If the fact is not in some way established, the butter is not taxable. To reply that, because all juries may not agree that a particular moisture content is essential to constitute abnormal moisture, therefore the law will lack in that uniformity essential to an excise tax, is to say that constitutional uniformity in a tax is dependent upon its intrinsic uniformity—upon its genuine equality of burden. But the provision requiring uniformity in respect to duties, imports, and excises does not mean that the burden of the duty or tax shall rest with uniformity upon all individuals or states. A tax is uniform which falls upon the same article in all parts of the country. In *Knowlton v. Moore*, 178 U. S. 42, 106, 20 Sup. Ct. 747, 44 L. Ed. 969, Justice White, after an interesting historical consideration of the meaning of the clause requiring uniformity, speaking for the court, said:

"By the result of an analysis of the history of the adoption of the Constitution it becomes plain that the words 'uniform throughout the United States' do not signify an intrinsic, but simply a geographical, uniformity."

The objection arising out of the possibility of contradictory judgments upon like evidence as to what water content is normal, and the fact that one might be taxed and another escape, does not affect this matter of geographical uniformity. As observed by Mr. Justice Miller in the *Head Money Cases*, 112 U. S. 581, 595, 5 Sup. Ct. 247, 252, 28 L. Ed. 798:

"Perfect uniformity and perfect equality of taxation, in all the aspects in which the human mind can view it, is a baseless dream, as this court has said more than once."

If therefore, we err in holding the determination of the fact upon which the operation of the law was made by Congress to depend as conclusive when determined by the Commissioner of Internal Revenue, we think there was no error in submitting the matter to the jury. That the court instructed the jury that the regulation of the department was not conclusive cannot be complained of by the plaintiff in error. That he told the jury that the regulation was evidence of a "high character," which might be looked to along with all the other evidence, is not excepted to or assigned as error. The error relied upon as raising

the questions we have discussed is for the refusal of the court to charge the second request by the plaintiff in error, being the seventh assignment of error. That request required the court to instruct the jury, not only that the commissioner had not the authority to fix the per cent. of moisture which would subject butter to taxation, but that they must find for the plaintiff because the act did not itself fix such abnormal moisture content. By direction of the court the jury specially found, upon all of the evidence, that butter having 16 per cent. or more of moisture was butter with an abnormal water content, and that the butter of the plaintiff in error, here involved, had 16 per cent. or more of water, and was adulterated butter under the act, and liable to the tax and penalties imposed. This state of the record relieves the case of some of its difficulties; for, if the regulation of the department be conclusive as a matter of law, the submission of the question to the jury as one of fact was without harm. If, upon the other hand, the question of fact as to what is an abnormal quantity of water, milk, or cream in butter is one of fact for the jury, the plaintiff in error cannot complain, unless there was some error in the submission or rejection of evidence or in the charge of the court, duly excepted to and duly assigned as error.

Counsel have assigned as error that the court declined to instruct as requested by their fourth request, the subject of the ninth assignment of error, which request was as follows:

"I also charge you, gentlemen of the jury, that the word 'absorption,' used in the definition of adulterated butter I have given you, does not mean incorporation; and if you find from the evidence in this case that butter fat will not absorb 15.99 per cent. of water, and does not absorb to exceed 1 per cent. of moisture, and that all the other water content is held by incorporation, then I charge you that your verdict will be for the plaintiff."

The charge upon this subject meets with our approval. It is as follows:

"Now you will notice that there has been a great deal of discussion throughout the case as to the meaning of certain terms. Among the terms in question is the word 'absorption,' and it has been contended that that word must apply only to the water taken into the butter by the chemical process of absorption, as distinguished from incorporation. It has appeared by the testimony of one of the witnesses that less than one-half of 1 per cent. of water can be taken by what is chemically called absorption. That is not the only definition of the word 'absorb.' A very proper definition as given by the dictionaries, the standard dictionaries, is to 'draw in as a constituent part.' It is inconceivable that the government would have passed a statute against adulteration where less than one-half of 1 per cent. of water could have been absorbed and treated as absorption in a chemical sense, and you are instructed as the law of this case that it is the intent of this statute to make adulterated butter, which by any process is made to contain an abnormal amount of water, whether that is obtained by what is called chemical absorption, or by incorporation, or any other method of that kind. If, by the process of making that butter, there is left in it more than a normal amount of water, it is adulterated within the meaning of the statute."

Upon the subject of the intent of the plaintiff, the court charged the jury as follows:

"Then the expression 'any process' used: Now, that does not mean necessarily that there has to be some special fraudulent process of making the

butter, but if the process of making, whether by too little washing or too much washing, or too little churning or too much churning, or whatever it is that has the effect of leaving an abnormal quantity of water in the butter, it is within the statute, and within the prohibition of the statute. And again as to the intent: In this case, it is not material what the intent of the Coopersville Co-operative Creamery Company was—whether the Coopersville Co-operative Creamery Company intended to have an undue amount of water left in its butter. If the process as employed did have that effect, the company was just as much liable for that tax as if it did it intentionally, because it is the object of the law to prevent that thing being done."

The plaintiff's request, made the subject of its eighth assignment of error, was in conflict with this, and was rightly denied.

The other assignments have been considered. None of these are well taken.

Judgment affirmed.

OHIO VALLEY BANK CO. v. MACK et al.

(Circuit Court of Appeals, Sixth Circuit. April 10, 1906.)

No. 1,467.

1. BANKRUPTCY—APPEAL FROM ORDER ALLOWING CLAIM—APPEAL BY CREDITOR.

Where a trustee in bankruptcy refuses to appeal from an order of the District Court allowing claims, such court may in its discretion allow an appeal to be taken by a creditor, although the better practice is to order the trustee to appeal or to allow the dissatisfied creditor to appeal in his name; he being in either case indemnified against liability for costs.

2. SAME—CLAIMS—EFFECT OF RELATIONSHIP OF CLAIMANT TO BANKRUPT.

The fact that one presenting a claim against a bankrupt is closely related to him justifies a more rigid scrutiny of the claim than would otherwise be required, but does not alone warrant its rejection.

3. SAME—FINDINGS OF REFEREE—REVIEW.

The position and duties of a referee in bankruptcy in hearings before him are analogous to those of a special master in chancery directed to take evidence and report his conclusions, and the rule applicable to a review of a referee's findings of fact must be substantially that applicable to a master's report. In either case much must depend upon the character of the finding. If it be a deduction from established facts, it does not carry any great weight, but, if based in conflicting evidence and involves the question of the credibility of witnesses examined before the referee or master, the finding should not be disturbed, except on most cogent evidence of mistake or miscarriage of justice, and, when it has been affirmed by the court, it should not be overturned by an appellate court on anything less than a demonstration of plain mistake.

[Ed. Note.—Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 C. C. A. 9.]

4. SAME—PROVABLE CLAIMS—MONEY BORROWED TO MAKE PREFERENTIAL PAYMENT.

Where a bankrupt within four months prior to his bankruptcy, and while insolvent, borrowed money on a mortgage, and paid the same on an indebtedness to his father with intent to prefer the latter, the fact of such preference does not invalidate the debt or mortgage of the lender who had no knowledge of the purpose for which the loan was made, and where the father has been required to restore the preference to the trustee.

5. SAME.

The fact that one who lent money to an insolvent within four months prior to his bankruptcy himself borrowed the money from a bank, pledging the note and security given by the bankrupt as collateral, will not affect his right to prove the debt in his own name; and whether it is in fact owned by him or the bank is immaterial.

Appeal from the District Court of the United States for the Southern District of Ohio.

A. L. Roadarmour and A. R. Johnson, for appellant.

E. D. Davis, H. C. Johnston, R. A. Mack, and J. P. Bradbury, for appellees.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge. This is an appeal from the allowance of a number of separate claims against the estate of C. C. Mack, an involuntary bankrupt.

These claims are as follows: (1) A claim in favor of Charles Stockhoff for \$6,300, secured by mortgage upon real estate of the bankrupt. (2) A claim in favor of Charles Mack, Sr., for \$14,877.72, subject to the surrender of \$6,377.20, being a preference received by him. (3) A claim in favor of Rudolph A. Mack for \$1,082, upon condition that he surrender a preference of \$344.70 received by him. (4) A claim in favor of G. A. Mack for \$2,539. (5) A claim in favor of Mrs. Wilhelmina Mack for \$2,968. (6) A claim in favor of Charles Mack, Jr., for \$1,706.91. (7) A claim in favor of the Charles Mack Company, a corporation, for \$652.90. These claims were each the subject of a bitter contest before the referee and were allowed by him. The order allowing each of them was duly reviewed by the district judge, who confirmed the orders of the referee after requiring Charles Mack, Sr., and R. A. Mack, to surrender certain preferences indicated above. This appeal is by a creditor who was, upon application, allowed to appeal; the trustee refusing to appeal, though requested to do so.

This practice seems admissible in the sound discretion of the district judge when the trustee refuses to appeal, though the better practice would be to order the trustee to appeal or to allow the dissatisfied creditor to appeal in his name, being indemnified in either case against costs by such creditors. *Loveland on Bankruptcy*, § 317; *In re Joseph*, 2 Woods, 390, 13 Fed. Cas. 1124; *Chatfield v. O'Dwyer et al.*, 101 Fed. 797, 42 C. C. A. 30; *In re Roche*, 101 Fed. 956, 42 C. C. A. 115; *Foreman v. Burleigh*, 109 Fed. 313, 48 C. C. A. 376; *McDaniel v. Stroud*, 106 Fed. 486, 45 C. C. A. 446. The cases cited present somewhat divergent views as to whether a creditor may as of right appeal from the allowance of a debt which affects him, but a concurrence in the matter of allowing an appeal upon good cause shown by such creditors when the trustee refuses to appeal himself. The six contested claims last mentioned are presented by members of the bankrupt's family or by a corporation owned and controlled by his father, Charles Mack, Sr., and this circumstance has been much pushed as indicating their fraudulent character. The fact that the bankrupt is closely related to a creditor is a circumstance which justifies a more rigid scruti-

ny than would be the case if no such relation existed. Nevertheless the honest or dishonest character of a debt is not to be determined by any mere question of relationship. *Davis v. Schwartz*, 155 U. S. 631, 638, 15 Sup. Ct. 237, 39 L. Ed. 289; *Estes v. Gunter*, 122 U. S. 450, 456, 7 Sup. Ct. 1275, 30 L. Ed. 1228. Neither are the six claims in question to be treated en masse. Each claim must stand upon its own bottom, and is to be judged by the evidence which tends to prove or disprove it.

The largest of these claims is that allowed in favor of Charles Mack, Sr., the father of the bankrupt. The bona fides of this large claim has been assailed mainly upon the ground of relationship, and because it does not appear from the books of either the creditor or the debtor. But its justice has been testified to by both the bankrupt and his creditor. The character of neither is assailed; upon the contrary, both seem to have stood well in the regard of the community. Charles Mack, Sr., was a merchant of long standing and prosperous. The bankrupt owned and operated a tannery, and this debt to his father consisted substantially of money advanced through a series of years by the father to support the son's business. The course of business, as they say, was for the son to give orders upon the father from time to time. These orders were taken up at the end of the month and a note given, and at the end of the year these small notes were run into a large note. Three of the earliest of these notes were taken up and paid off by the bankrupt with money borrowed from the appellee Charles Stockhoff, for which money he has been allowed a judgment. But, as this payment was made by the bankrupt when insolvent and within four months of bankruptcy, Charles Mack, Sr., has been compelled to surrender same as a preference. The notes thus paid off were destroyed by the bankrupt, and could not be produced. For substantially the remainder of his debt the promissory notes of the bankrupt were filed. Aside from these transactions, the bankrupt had an open store account with his father. This the mercantile books showed, but did not show the money paid on account of his son's tannery business, which, as stated, was kept by filed orders until run into promissory notes. The bankrupt, though having the character of a frugal, diligent business man, seems never to have kept anything like a regular or full set of books, and to have relied upon memorandums and memory. The moneys he obtained from his father aggregated a large sum. Yet it is no more remarkable that his father should credit him for so considerable a sum than that the Ohio Valley Banking Company, the appellant here, should extend him a credit of \$16,000 without security, within less than one year prior to his bankruptcy. The undeniable fact is that the bankrupt bore a good character for integrity and frugality, and this gave him credit with all. That he should have used in his tannery business from \$30,000 to \$40,000 of borrowed money in the course of a few years and have so small a result to show for it is a proper subject of criticism, especially as he has kept no accounts. If we, for these reasons, ignore his admissions as to his debt to his father, and to his other relatives, there remains the uncontradicted evidence of his father as to the bona fides of his own claim. But both of these wit-

nesses, the creditor and the bankrupt, were seen and heard by the referee, and he has credited their evidence and allowed this debt. No arbitrary rule can be laid down for determining the weight which should be attached to a finding of fact by a bankrupt referee. His position and duties are analogous, however, to those of a special master directed to take evidence and report his conclusions, and the rule applicable to a review of a referee's finding of fact must be substantially that applicable to a master's report. *Tilghman v. Proctor*, 125 U. S. 137, 8 Sup. Ct. 894, 31 L. Ed. 664; *Davis v. Schwartz*, 155 U. S. 631, 15 Sup. Ct. 237, 39 L. Ed. 289; *Emil Kiewert & Co. v. Juneau*, 78 Fed. 708, 24 C. C. A. 294; *Tug River Co. v. Brigel*, 86 Fed. 818, 30 C. C. A. 415. Much in both cases must depend upon the character of the finding. If it be a deduction from established fact, the finding would not carry any great weight, for the judge, having the same facts, may as well draw inferences or deduce a conclusion as the referee. But, if the finding is based upon conflicting evidence involving questions of credibility and the referee has heard the witnesses, much greater weight naturally attaches to his conclusion, and the weight of authority is that the district judge, while scrutinizing with care his conclusions upon a review, should not disturb his finding unless there is most cogent evidence of a mistake and miscarriage of justice. *Loveland on Bankruptcy*, § 32a; *In re Swift* (D. C.) 118 Fed. 348; *In re Rider* (D. C.) 96 Fed. 811; *In re Waxelbaum* (D. C.) 101 Fed. 228; *In re Stout* (D. C.) 109 Fed. 794; *In re Miner* (D. C.) 117 Fed. 953. In this case the conclusions of the referee necessarily involved the credibility of the witnesses who testified to the bona fides of the claim preferred by Charles Mack, Sr. The conclusion he reached in favor of the validity of his debt has also passed the scrutiny of the district judge. Under such circumstances this court is not warranted in overturning the conclusions of two courts upon anything less than a demonstration of plain mistake. The preference received by Charles Mack, Sr., was a merely voidable preference; and, upon the surrender by him of the preference received, he was properly allowed to prove his debt. *Keppel v. Tiffin Savings Bank*, 197 U. S. 356, 25 Sup. Ct. 443, 49 L. Ed. 750. The assignments of error against this claim must be overruled.

Mrs. Mack was the mother of C. C. Mack, the bankrupt. She filed the notes of the bankrupt evidencing her debt. She had some means of her own, managed for her by her husband, Charles Mack, Sr. The bona fides of her claim is testified to by her husband and by the bankrupt, and there is nothing to throw serious doubt upon the matter aside from the suspicion which arises out of relationship.

Substantially the same state of facts was shown in respect of the claims preferred by the three brothers of the bankrupt. It may, however, be said of each of them that their ability to make loans to their brother was much more doubtful. This fact, however, went at last to their credibility and that of the bankrupt. The referee heard them. He was in the atmosphere which surrounded the case and must have believed them.

No better case is made against the claim of the Charles Mack Company. No plain mistake of fact or law has been pointed out.

The error assigned against each of the debts mentioned must be overruled.

The claim of Charles Stockhoff remains to be considered. It stands upon a somewhat different and less suspicious footing than the claims we have already passed upon. He was not a member of the Mack family. That he actually let C. C. Mack, the bankrupt, have \$6,300 a few days before the involuntary petition in bankruptcy was filed against him, and took a mortgage upon real estate to secure him, is not disputed. Neither is it disputable that C. C. Mack was in fact insolvent at date of this transaction, nor that he paid the money so obtained to his father, Charles Mack, Sr., in payment of part of the large debt which Charles Mack, Sr., then held against his son, the bankrupt. Neither is it seriously disputable that the bankrupt's object in borrowing this money was to prefer his father over his other creditors. That Charles Mack, Sr., did thereby obtain a preference, has been adjudicated, and he has been required to surrender to the trustee the \$6,300 so received.

There remains, then, the single question as to whether Stockhoff was chargeable with notice of C. C. Mack's insolvency and of his purpose to use the money so obtained from him for the purpose of preferring his father. That neither C. C. Mack nor Charles Stockhoff had any purpose of defrauding the former's creditors, in the sense of actual common-law fraud, is plain. The most that can be claimed is that he intended to prefer his father in an honest debt over his other creditors having equally as honest claims upon him. This was a preference voidable only under the bankrupt law. Under that law the payment to Charles Mack, Sr., has been avoided and the Stockhoff money paid to the trustee for general administration and Mack's general creditors have suffered no loss. The question as to whether Stockhoff knew C. C. Mack's insolvent condition and his purpose to prefer his father with the money borrowed was one of fact, about which different opinions might be entertained by a tribunal of first instance. The finding of the referee is general and not specific, but the district judge upon review said:

"The evidence does not warrant a finding that Stockhoff knowingly abetted the bankrupt in, or Charles Mack, Sr., in receiving the \$6,300 as a preference; and the finding of the referee as to Stockhoff's claim will be sustained."

It is enough to say that the state of the evidence does not, under the principles effecting appeals upon questions of fact determined by a referee who heard the witnesses and confirmed by the district judge, warrant a refusal to accept the conclusion of the courts below that Stockhoff did not knowingly abet the bankrupt in giving a preference to Charles Mack, Sr. He stands, therefore, in the attitude of one who took a security for money advanced at the time in good faith. This saves his mortgage.

It is also objected to this debt that the real creditor is not Charles Stockhoff, but the First National Bank of Gallipolis, Ohio, and that the claim should be rejected upon this account. Stockhoff borrowed the money to make this loan from the bank, and gave his own note. To secure it he placed C. C. Mack's note and mortgage as collateral

security. C. C. Mack's note was made to Stockhoff for \$6,300, bearing interest at rate of 8 per cent. Stockhoff's note to the bank bears only 6 per cent. interest. That the bank agreed to lend the money upon Stockhoff's note with Mack's note and mortgage as collateral does not make the claim which Stockhoff here presents the claim of the bank. The debt is Mack's debt to Stockhoff. Mack is not debtor to the bank, except in so far as his note stands as a collateral to Stockhoff's debt to the bank. But whether there is some secret agreement between Stockhoff and the bank by which the bank is the real lender is of little moment. Whether Stockhoff owns the debt in his own right or as trustee for the bank he is entitled to prove it, for it stands as a debt and mortgage to him and his relation as trustee for the bank is of no significance as an objection to the allowance of the claim.

The orders and judgments appealed from must be affirmed.

NOTE.—The following is the opinion of Thompson, District Judge, on overruling the motion for a new trial:

THOMPSON, District Judge. Two petitions have been filed, one for a review of the findings and orders of the referee allowing the claims of Charles Mack, Sr., Charles Mack, Jr., the Charles Mack Company, R. A. Mack, G. A. Mack, Wilhelmina Mack, Charles F. Stockhoff, and M. B. Davis; and the other for the review of his order allowing attorney's fees.

The questions presented are: (1) Was the bankrupt indebted to the persons the allowance of whose claims is complained of? (2) Were preferences given by the bankrupt to Charles Mack, Sr., and to R. A. Mack? (3) Did Stockhoff knowingly aid Charles Mack, Sr., in obtaining a preference by a mortgage on the bankrupt's real estate? (4) Were the allowances made to attorneys reasonable?

First. The claims of the father and mother and brothers and sisters and brothers-in-law of the bankrupt aggregate \$27,866.53. He claims that he began to borrow money from them and incur indebtedness to them in other ways as early as 1888, and continued to do so until January, 1903. The greater part of the indebtedness was evidenced by promissory notes bearing interest at the rate of 8 per cent. per annum and the remainder thereof, as claimed, by book accounts and written orders for merchandise, etc. The orders were not produced because they had been destroyed. The books of Charles Mack, Jr., were destroyed by fire before the bankruptcy, and various excuses were given for the nonproduction of the books of most of the others. Some books were produced, but furnished little or no pertinent information. One of the books produced by Charles Mack, Sr., has a line cut out immediately beneath the name of G. A. Mack, and pages 327 and 328 of the same book are missing. The bankrupt, although doing a large business, kept no books, and it was his practice to destroy all notes and other evidences of indebtedness as soon as the debts were paid or settled. The petitioning creditors are members of the family. The answer given to a majority of the questions put to the bankrupt while under examination, was, "I don't remember"; and the testimony of the other members of the family who were witnesses was not much more satisfactory. Each one denied any knowledge of the claims of the others, except R. A. Mack and one other, who stated that they understood or knew that the father and mother had some claim against the bankrupt, but could give no definite information as to the amount or the character of it. It is claimed that Charles Mack, Sr., in the summer of 1903 asked the bankrupt for some money; but, with that exception, all testify that they never asked or received any payment upon their claims, and that the bankrupt never paid anything upon either the interest or the principal of their claims. They charged 8 per cent. interest on their loans to the bankrupt, and the doctor and the lawyer, G. A. Mack and R. A. Mack, charged him large fees for their professional services, but, as no member of the family except the father ever demanded payment of either the principal or the interest on their claims, their course of dealing with him may be regarded as liberal, and the

circumstances present a strong suggestion that they might never have demanded payment of their claims but for his bankruptcy. There are some circumstances in the course of the dealings between the bankrupt and his father which tend to sustain the claim that he was indebted to his father to some extent—for instance, the delivery of goods, etc., to his workmen upon orders sent to his father—but substantially the only evidence introduced in support of their claims is the testimony of the claimants themselves and the decision of the question under consideration turns upon their credibility as witnesses. The referee saw and heard and believed them. He had an opportunity to observe their manner and bearing while testifying, and to measure their intelligence and memory and test their truthfulness, and without his means of knowledge, and in the absence of testimony impeaching their general reputation for truthfulness, this court would not be justified in setting aside his findings that the bankrupt was indebted to them when the petition was filed.

Second. The bankrupt was insolvent, and he knew he was insolvent when he mortgaged his real estate for the loan of \$6,300, and the payment of those moneys to his father, Charles Mack, Sr., in part payment of his indebtedness to him, was a preference within the meaning of the bankrupt law, as was also the transfer of leather to Charles Mack, Sr., about January 19, 1903, to the extent the leather exceeded the value of \$290, the sum then advanced to the bankrupt, and the referee should have conditioned the allowance of the claim of Charles Mack, Sr., for \$8,577.72, upon the surrender of these preferences. The evidence tends to show that Charles Mack, Sr., had reasonable grounds to believe that the bankrupt in paying him the \$6,300 and in transferring the leather to him intended thereby to give him a preference, and the trustee will be directed to consider the matter further, with a view to the bringing of a suit in this court for the recovery of said moneys and of the value of said leather. See section 60b of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445] as amended in 1903).¹ The transfer of leather to R. A. Mack on or about the 19th of January, 1903, was also a preference within the meaning of the bankrupt law, and his claim against the bankrupt should not be allowed until the preference is surrendered. He knew that the bankrupt was insolvent when the leather was delivered to him, and the trustee will be directed to consider the matter further with a view to the recovery of the value of the leather.

Third. The evidence does not warrant a finding that Stockhoff knowingly abetted the bankrupt in giving, or Charles Mack, Sr., in receiving, the \$6,300 as a preference; and the finding of the referee as to Stockhoff's claim will be sustained.

Fourth. The allowance of attorney's fees made by the reference are unreasonable and in violation of the spirit of the bankrupt law. R. A. Mack should be allowed a reasonable fee for preparing the bankrupt's schedules, etc., but is not entitled to compensation for services rendered at the hearing before the referee upon the question of the allowance of the family claims. It was the duty of the bankrupt to submit himself to the referee and the creditors for examination and to tell the truth, but he was not called upon to employ attorneys to defend claims presented against his estate. R. A. Mack will be allowed \$25 for his services, and no more. The attorneys for the petitioning creditors are entitled to a reasonable fee for filing the petition, procuring the adjudication thereon, the appointment of the receiver, and for services rendered the receiver. The receiver is a lawyer and an able one, and I cannot conceive of great need on his part for the services of attorneys. The attorneys for the petitioning creditors, Hollis C. Johnston and Ewan D. Davis, will be allowed for their services the total sum of \$150, and no more. The trustee is a lawyer and an able one, and should not employ lawyers to do any work which the law requires him to do, and he certainly should not employ lawyers to procure the allowance of claims against the estate; but, if needed, he should employ them to prevent the allowance of claims against the estate, when any doubt of their validity exists. The ground upon which the attorneys claim \$400 for services rendered to the trustee has not been brought to the attention of the court either by the attorneys or the referee, and the court cannot therefore approve the allowance of that amount or of any amount until more full

¹ Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799 (U. S. Comp. St. Supp. 1907, p. 1031).

advised. Upon the matter, as now presented, the allowance made by the referee appears to the court to be unreasonable. The record in this matter shows that at the hearing before the referee things were said and done which a due regard for orderly procedure and the dignity of the court makes it the duty of the court to notice and condemn. R. A. Mack, who appeared before the referee in the threefold character of witness, creditor, and attorney for the bankrupt, and whose behavior throughout the hearing was unseemly and offensive, while on the witness stand, when asked if he could give the names of the directors of the Ohio Valley Banking Company, without provocation and with utter irrelevancy to the question put to him, denounced one of the directors of the bank and its attorney, both reputable men, then present, in coarse and insulting language, and persisted in it when rebuked by the attorney who was conducting the examination, and, strange to say, was permitted to do so by the referee. The referee should not only have rebuked him for his misbehavior, but in accordance with the provisions of section 41 of the bankruptcy act should have certified the facts showing his misbehavior to this court for its consideration and action. The allowance of the claims of Charles Mack, Sr., and of R. A. Mack by the referee will be set aside, and all findings and orders of the referee inconsistent with this opinion will be set aside and vacated.

COWETA FERTILIZER CO. v. BROWN.

(Circuit Court of Appeals, Sixth Circuit. June 16, 1908.)

No. 1,784.

1. SALES—SALE OR BAILMENT—RESERVATION OF TITLE OR LIEN.

Complainant entered into a contract by which it agreed to furnish fertilizer to defendant to be paid for by him by a certain date at a stated price. The contract provided that the fertilizer should remain the property of complainant until sold by defendant, and that complainant should then become the owner of the proceeds, whether cash or notes, which should be held for its use and benefit until it should be fully paid. Held, that such contract was not one of bailment, but of sale with an attempt to retain a lien upon the property sold, and that complainant could maintain an action at law thereon if valid to recover the price when due.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 7-11.]

2. SAME—LEGALITY UNDER LAW OF TENNESSEE.

A contract for the sale of merchandise on credit for the purpose of resale in the ordinary course of business, providing that the title shall not pass until payment of the purchase price, is illegal and void in Tennessee as contrary to the public policy of the state, and a suit to enforce the title or lien so attempted to be retained, being based upon such void contract, cannot be maintained in either the state or federal courts in that state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 1336-1352.]

3. AGRICULTURE—FERTILIZERS—SALE IN VIOLATION OF STATUTE.

Under Laws Tenn. 1897, p. 297, c. 123, to regulate the sale of commercial fertilizers, which requires all such fertilizers before being sold or offered for sale, or shipped into the state for sale, to be submitted to the commissioner of agriculture for analysis, and to have on each package a stamp showing its chemical analysis, the place of manufacture, the name of the manufacturer, and a certificate of approval of the commissioner, a contract under which an outside manufacturer shipped such fertilizer to a dealer within the state for sale without complying in any way with such law is illegal and void, and no action can be maintained thereon.

Appeal from the Circuit Court of the United States for the Eastern District of Tennessee.

This is a bill to have an accounting and to enforce a lien upon or trust in the proceeds of the sale of some hundreds of sacks of fertilizer. The bill shows that on June 27, 1901, the Coweta Fertilizer Company, a corporation of the state of Georgia, and having its factory and office within that state, entered into a written contract with the defendant, a citizen of the state of Tennessee, whereby it agreed "to furnish" to Brown, "for sale" by him, certain amounts and kinds of fertilizers specifically described and having the analysis set out, delivery to be made in car load lots at three points named, all within the state of Tennessee. The paragraphs of this contract more directly bearing on the question at issue read as follows:

"(c) That the customer may sell all fertilizers at such advance over the prices hereinbefore stipulated as he shall see fit, and the same shall constitute his entire compensation and commission hereunder. The customer agrees:

"(1) To receive during the continuance of this contract all said fertilizers for sale, and to take the same and pay therefor the said prices hereinbefore mentioned, and that any advance, over and above such price at which he may sell the same, shall constitute his entire compensation so far as the company is concerned. * * *

"(3) That, until sold or settled for by the customer, the fertilizers contracted for under this agreement shall remain the property of the company and when sold, all the proceeds of the sales of such fertilizers including cash, notes, open accounts and collections therefrom, whenever in possession of the customer, shall be kept separate and be held by the customer for the use and benefit of the company and subject to its order, and the same, together with any unsold fertilizers taken under this agreement, shall be the property of the company until the entire indebtedness of the customer arising under this agreement has been paid. * * *

"(6) That any failure on the part of the customer to fulfill his obligation arising under this agreement, shall cause the debt hereunder to become immediately due and payable to the company, and any report or occurrence unfavorable to his credit shall terminate this agreement at the option of the company. * * *

"(9) That all shipments shall be made under this agreement by or before December 1, 1901, and that the payment of all taken is guaranteed in full to the company at the prices stated, and settlements are to be made on or before December 1, 1901, by cash or negotiable notes (on the company's regular form without erasure) of the customer, maturing 1-3 Ea. Nov. 15, Dec. 1, 15, 1902, and payable at Greenville, Tenn., Bank of _____. If the customer pays before December 1, 1901, a discount will be allowed at the rate of 7 per cent. per annum, from date of payment to December 1, 1901.

"(10) That this agreement shall be signed in quadruplicate and be operative only after being approved in writing by the company's home office. It is further agreed by and between the parties hereto:

"(x) That the company shall have the right to enforce the collection of the notes of the customer, given it in settlement for said fertilizers, upon the maturity of same, notwithstanding there may be any outstanding and unpaid accounts or notes held by him for the sales of the said fertilizers made by him, or on hand unsold any of said fertilizers, and any renewals given of notes under this agreement, or other forbearance or indulgence of any kind extended to the customer, or to the maker or endorser of any notes given by the party purchasing from him the fertilizers agreed to be furnished herein, shall not affect its terms and stipulations.

"(y) That the company shall be at no costs, expenses, or charges whatever in the collection of notes and obligations of purchaser of said fertilizers delivered to or held for the company by the customer, but all the same shall be borne by the customer.

"(z) That the customer will pay over to the company all the cash proceeds of sales made for cash, when sold, and on or before the first day of December, 1901, will send to the company a complete list of his time sales, and endorse, if necessary, and surrender to the company all notes received

by him from the purchaser of said fertilizers, which notes are to be returned by the company to him, if no contrary reason arises, for the purpose only of collection and remittance to the company, and when so returned are to be receipted for, in trust, to the company."

The bill charges that the quantity and quality of fertilizers shown by an exhibit were received by the defendant, that all or nearly all were sold by him to his customers, and that proceeds aggregating \$3,500, either in money or customer's notes, have been received by him; and are withheld by him, he having paid over or accounted for only \$103, and that he is accountable for the remainder. It then shows that the defendant refuses to account for the said proceeds as provided by said contract made an exhibit to the bill, "but, under some pretended claim that the goods did not contain the ingredients called for by the statutes of Tennessee, refuses to recognize your orator's rights in the premises or to account to it. * * *" It then avers that this conduct amounts to a breach of trust, as he holds said proceeds, as well as any goods unsold, in a fiduciary capacity and as the trustee of complainant, that it is remediless in a court of law or otherwise than in a court of equity. The prayer is for an accounting for the goods sold and unsold and of the proceeds "whether in notes or cash"; that the complainant "be decreed to be entitled to, and to recover such of said goods on hand as may not have been sold and be decreed to be entitled to, and recover from said defendant all moneys collected by him, the proceeds of said goods, and all notes or choses in action received as the proceeds of such goods, where the same have not been paid for in money; and that by a proper decree of this court the title and possession of such notes and choses in action be vested in your orator, and the same be required to be delivered to it; that where the same cannot be so turned over and delivered, or if the court shall not decree that the same be so delivered, that orator have a decree against said defendant for the face value of the said choses in action."

In this view of the jurisdiction of a court of equity, we cannot deny relief, unless the contract to which the complainant appeals is illegal and unenforceable for some one or more of the grounds urged against it. We cannot, therefore, escape a decision touching the merits of the case, for it is well established that, when one cannot make out a case for relief without relying upon an illegal contract, he cannot recover.

The defendant demurred, first, because complainant's remedy, if any he had, was complete and adequate at law; second, because neither the description and analysis of the fertilizers sold nor the averments of the bill show that said fertilizer conformed in quality to the requirements of the law of Tennessee, but that the same constituted goods which could not be legally sold under the statutes in force within the state. The demurrer was overruled. The answer denies that the complainant has ever complied with the Tennessee statute prescribing terms upon which corporations of other states may do business within that state; denies that the fertilizer which he had received conformed to the Tennessee statute regulating the sale of fertilizers within the state; denies that he is indebted to the complainant in any sum, and says that he did business with complainant the previous year and had bought and sold a large quantity of fertilizers, mainly upon a credit; that before making collections he paid to complainant his full account; that subsequently the Supreme Court of Tennessee had decided that fertilizers which did not conform to the law regulating their sale were illegally sold and that no suit would lie to recover the sale price; that in consequence of this ruling he had not been able to collect much of the amount due him for sales so made in 1900, as well as for very little of that sold in 1901. The sums thus lost to him by the defective character of complainant's fertilizers he pleads as an offset to anything which the court might find was due from him.

Upon the final hearing the court below dismissed the bill without prejudice to a suit at law.

Alex. King, for appellant.
Dana Harmon, for appellee.

Before LURTON and RICHARDS, Circuit Judges, and KNAPPEN, District Judge.

LURTON, Circuit Judge (after stating the facts as above). 1. The concession of learned counsel for both parties is that the contract under which Brown received the goods of the Coweta Company was one of sale, and not one of bailment. All of the rights and risks of ownership pertained to the buyer. There was an attempt to retain the title until the goods were paid for, but this, if valid under the public policy of Tennessee (see *Star Manufacturing Co. v. Nordeman et al.*, 118 Tenn. 384, 100 S. W. 93), was only for the purpose of security. The goods were bought to be resold. When a sale occurred, assuming the title effectually reserved, the title passed to the purchaser, and by agreement the proceeds, whether money or credits, stood charged with a trust in behalf of the Coweta Company for any part of the original price. No right to return goods unsold was reserved. On December 1, 1901, Brown was obligated to pay or settle by cash or bankable notes for goods sold or unsold, regardless of sale on credit by him, good or bad. Every risk of loss by blameless accident rested upon Brown. We agree with the court below that under this contract the liability of Brown was that of a purchaser, and that a plain action of debt was a remedy open to the complainant upon his failure to pay for the goods received on or before December 1, 1901. *Arbuckle v. Kirkpatrick*, 98 Tenn. 221, 39 S. W. 3, 36 L. R. A. 285, 60 Am. St. Rep. 854; *Manufacturing Co. v. Nordeman*, 118 Tenn. 384, 100 S. W. 93; *Herryford v. Davis*, 102 U. S. 235, 26 L. Ed. 160.

But appellants say that an action of debt at law is inadequate as a remedy; that under the contract the title to unsold sacks of fertilizer is in them, as are the proceeds of sales, whether in the shape of money or notes, such proceeds being by the agreement substituted for the goods so sold; that they are entitled to an accounting as to sold and unsold goods and as to proceeds of goods sold; that, so far as such proceeds of sales consist of notes or obligations of purchasers, it is entitled to have them turned over to it for purposes of collection, and to have a decree appropriating such notes and all moneys in his hands arising from such sales appropriated upon the debt so due; that they are also entitled to have the unsold goods sold and proceeds appropriated in the same way. The contract of sale and security by retention of title, whether it operated to retain or pass the title, in view of all the other circumstances and terms, is capable of being construed as an executory agreement manifesting an intention to constitute unsold goods and the proceeds of goods sold a security for the unpaid price of the goods. Such an agreement, when the property appropriated to that purpose is designated in such a manner as to set it apart from the other property or funds of the purchaser, creates an equitable charge, lien, or mortgage which is enforceable against the debtor, his administrator, and those who take with notice or who are mere volunteers. 3 Pom. Eq. §. 1,235; *Walker v. Brown*, 165 U. S. 654, 665, 17 Sup. Ct. 453, 41 L. Ed. 865; *Bank v. Owens*, 2 Pet. 527, 539, 7 L. Ed. 508; *Miller v. Ammon*, 145 U. S. 421, 426, 12 Sup. Ct.

884, 36 L. Ed. 759; Pullman's Palace Car Co. v. Central Transportation Co., 171 U. S. 138, 151, 18 Sup. Ct. 808, 43 L. Ed. 108; Singer Manufacturing Co. v. Looney, 103 Tenn. 262, 264, 265, 52 S. W. 879. In the Pullman Car Company Case, cited above, the Supreme Court said:

"* * * In no way and through no channels, directly or indirectly, will the courts allow an action to be maintained for the recovery of property delivered under an illegal contract where, in order to maintain such recovery, it is necessary to have recourse to that contract. The right of recovery must rest upon a disaffirmance of the contract, and it is permitted only because of the desire of courts to do justice as far as possible to the party who has made payment or delivered property under a void agreement, and which in justice he ought to recover. But courts will not in such endeavor permit any recovery which will weaken the rule founded upon the principles of public policy already noticed."

This was a Tennessee contract. The seller agreed to deliver the goods to the buyer in Tennessee for the purpose of retail sales in that state. Contracts of sale of merchandise made on credit for purpose of resale in ordinary course of business, providing that the title shall not pass until payment of the purchase price, are in Tennessee illegal and void as contrary to the public policy of that state. Manufacturing Company v. Nordeman, 118 Tenn. 384, 100 S. W. 93. The case cited arose out of a contract for the sale of merchandise to a retail merchant for the purpose of reselling in the ordinary course of his business. The contract provided:

"As a condition to this contract, it is agreed that title to the goods does not pass until goods are paid for in full."

The purchaser became a bankrupt and the goods came to the possession of his trustee in bankruptcy, who sold them and held the proceeds. The suit was by the original vendor against the trustee to recover the value of the goods. The Tennessee court denied relief, although the title of the trustee was no better than that of the bankrupt. Among other things that court said:

"A conditional sale of personal property, as understood in this state, means one in which the title is retained by the vendor, with no right in the vendee to sell the property (Houston v. Dyche, Meigs, 76, 33 Am. Dec. 130; Price v. Jones, 3 Head, 84; Holmark v. Molin, 5 Cold. 482; Acts 1899, p. 19, c. 12, § 1; Shannon's Code Supp. p. 638), and in which the property is not subject to the debts of the vendee (Gambling v. Read, Meigs, 281; Bradshaw v. Thomas, 7 Yerg. 497). The foregoing characteristics of the sale do not preclude the idea, however, of a very distinct interest in the vendee. Meagher v. Hollenberg, 9 Lea, 392. The two characteristics above mentioned are inconsistent with a sale made to a retail merchant of goods to be resold by him in the ordinary course of his business. We are of the opinion, therefore, that the retention of title was nugatory, and that the goods belonged to the S. Steinberg Dry Goods Company, and properly passed into the hands of its trustee in bankruptcy. We are aware that a different view of this question is entertained in some of the states, but we believe the foregoing to be the sounder view and most in accord with public policy. It is certainly in line with our own previous decisions, and with the disinclination of this court to extend the law of conditional sales further than has already been done, since they are essentially out of harmony with the policy which underlies our registration laws."

Thus, under the public policy of Tennessee, the very provisions of the contract of sale upon which complainant relies are illegal and

void as contrary to the public policy of that state. If unenforceable through a state court in consequence of such a policy, their provisions are equally unenforceable through a federal court.

But upon a still stronger ground this contract was illegal under the laws of Tennessee. By chapter 123, p. 279, of the Acts of Tennessee for the year 1897, the sale of commercial fertilizers within the state is regulated. Sections 2, 3, 4, 10, and 11 read as follows:

"Sec. 2. Be it further enacted, that all commercial fertilizers sold or offered for sale in this state shall, by stamp or otherwise, distinctly set forth on each package or parcel the chemical analysis of such fertilizers, the name of the manufacturer, the place of manufacture, and each of said packages or parcels shall be freely submitted to inspection, as hereinafter provided, and shall bear a certificate of inspection, or tag furnished by the commissioner of agriculture, and showing authority from the state to sell such fertilizers.

"Sec. 3. Be it further enacted, that none of said fertilizers shall be sold in this state, unless their analysis shall show a given per cent. to be prescribed by the commissioner of agriculture.

"Sec. 4. Be it further enacted, that before selling or offering for sale any commercial fertilizer, its manufacturer, dealer or agent, shall file with the commissioner of agriculture a guaranteed analysis of each brand of commercial fertilizers, thus sold, or offered for sale, in this state. On all such fertilizers sold, or offered for sale, in this state, an inspection fee of fifty (50) cents per ton, or fraction of a ton, shall be paid to the commissioner of agriculture by the manufacturer, dealer or agent thereof. The sum accruing from said fees shall be applied first to the expenses of inspection, including an amount of not more than eight hundred (\$800.00) dollars per annum for analysis, the balance to become a part of the general fund annually provided by the state for the maintenance of the bureau of agriculture. The said commissioner of agriculture shall keep a separate account for all fees received for the inspection of fertilizers, and the expenses of said inspection. * * *

"Sec. 10. Be it further enacted, that any person, or persons, firm or corporation selling or offering for sale any commercial fertilizers in this state, without having complied with the provisions of this act, shall be guilty of a misdemeanor, and, upon conviction, shall be fined two hundred (\$200.00) dollars for each offense; and it shall be the duty of the commissioner or any inspector, to seize the fertilizers of said person or persons, firm or corporation thus failing to comply, and store the same at a point convenient to the place of seizure, and immediately give notice to its owner, or owners, or their agents, if known, of such action, and if such owner or owners, or their agents, fail or refuse to comply with this act within thirty (30) days after said notification, the commissioner is empowered to sell or have sold said fertilizers, and to apply the proceeds first to the payment of the fees, fines and storage, and shall hold the residue, if any, subject to the order of the owner.

"Sec. 11. Be it further enacted, That all of said tags, purchased for the sale of said fertilizers, shall be attached to the package containing the fertilizer before the same enters the state. No railroad, express company, steamboat, or other common carrier, corporation or person shall deliver to the consignees any shipment or consignment of fertilizers, unless the same has attached to it the tags required by this act. Any railroad, express company, steamboat, or other common carrier, corporation or person, receiving any shipment or consignment of fertilizers to be delivered in this state, that has not these tags attached to it, shall at once notify the commissioner of agriculture of the reception of each shipment or consignment, and shall hold all such shipments or consignments until the requirements of the law have been complied with, and in the event said shipper or consignee shall fail or refuse to comply with said requirement of the law, their said shipment shall be returned to him at his expense. Any railroad, express company, steamboat, or other common carrier, corporation, or person violating

this section, shall be guilty of a misdemeanor, and, on conviction thereof, shall pay a fine of not less than \$100.00, and not more than \$500.00."

With the exception of a small part of the fertilizers sold, for which this suit is brought, which small part was specifically paid for by the payment of \$105 confessed by the bill, none of the bills rendered showed a compliance with the law, and the evidence fully sustains the answer that this company had not complied with the requirements of the statute, either in respect to tags showing the analysis, or in fact as respects the ingredients demanded by the statute.

The other defense, that this company, as a foreign corporation, had not complied with the provisions of the Tennessee law requiring the registration of its charter as a prerequisite to doing business in this state, we pass by, as we are not satisfied that this corporation by this sale was doing business within the state within the meaning of the Tennessee statute. Considered only as a straight sale by a nonresident company to a merchant in Tennessee, the sale constituted an interstate transaction not subject to the statute referred to. *Milan Milling Co. v. Gorten*, 93 Tenn. 590, 27 S. W. 971, 26 L. R. A. 135; *Manufacturing Co. v. Ferguson*, 113 U. S. 727, 5 Sup. Ct. 739, 28 L. Ed. 1137; *Oakland Sugar Mill Co. v. Wolf*, 118 Fed. 239, 55 C. C. A. 93.

Remand, with direction to dismiss the bill with prejudice.

**TITLE GUARANTY & TRUST CO. v. PUGET SOUND ENGINE WORKS
et al.**

(Circuit Court of Appeals, Ninth Circuit. June 10, 1908.)

No. 1,451.

1. UNITED STATES—BONDS OF CONTRACTORS FOR "PUBLIC WORK"—CONSTRUCTION AND SCOPE OF STATUTE.

A steam vessel built for the United States under a contract providing for partial payments as the work progressed, and that the parts of the vessel completed and paid for under such method should become the property of the United States, is a "public work," within the meaning of Act Aug. 13, 1894, c. 280, 28 Stat. 278 (U. S. Comp. St. 1901, p. 2523), as amended by Act Feb. 24, 1905, c. 778, 33 Stat. 811 (U. S. Comp. St. Supp. 1907, p. 709), requiring the usual penal bond to be given by a contractor "for the construction of any public building and the prosecution and completion of any public work," with an additional obligation that the contractor shall promptly make payments to all persons supplying him labor and materials in the prosecution of the work, and a bond so given and conditioned by the contractor for such vessel may be sued on by persons furnishing labor or materials as therein provided after the lapse of six months from completion and settlement of the contract; no suit having been brought in the meantime by the United States.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 6, pp. 5838, 5839; vol. 8, p. 7774.]

2. SAME—ACTION ON BOND BY LABORERS OR MATERIALMEN.

While such statute provides that after the lapse of such six months, on application therefor and the filing of an affidavit, any person furnishing labor or materials shall be given a certified copy of the contract and bond on which he may sue, the obtaining of such certified copy is

not jurisdictional, and the failure to apply therefor will not defeat an action on the bond.

3. SAME—CLAIMS COVERED BY BOND—"CLAIMS FOR LABOR OR MATERIAL."

Claims for patterns made for the contractor from which to make castings required for the vessel, for towing in the delivery of materials, for wharfage paid in connection with such delivery, and by a local transfer company for hauling materials, are all for labor or material, within the meaning of the statute, and recoverable on the bond; but advances of freight made to common carriers by such transfer company are not so recoverable.

4. ASSIGNMENTS—CAUSE OF ACTION.

The right of laborers and materialmen to enforce the obligation of the sureties on such a bond is assignable and passes by an assignment of their claims.

5. UNITED STATES—CONTRACTORS' BONDS—ACTIONS—COSTS—ATTORNEY'S FEES.

In an action on such a bond the court may in its discretion allow a statutory attorney's fee in favor of each claimant who has become a party and recovers on his claim to be taxed as costs.

Appeal from and in Error to the Circuit Court of the United States for the Northern Division of the Western District of Washington.

This action was brought in the Circuit Court for the Western District of Washington in the name of United States of America, for the use and benefit of Crane Company, a corporation, plaintiff, against the Puget Sound Engine Works, incorporated, and the Title Guaranty & Trust Company of Scranton, Pa., a corporation, defendants.

The substance of the complaint is that about February 17, 1905, the Puget Sound Engine Works made a written contract with Capt. Grant, of the United States Army, acting for and in behalf of the United States of America, whereby the Puget Sound Engine Works agreed to furnish all the material and labor required for, and to construct and deliver to the United States, free from incumbrances, a steamer with engines, boiler, apparel, furniture, etc., in accordance with certain specifications made and furnished; the steamer to be known as the "Lieutenant Harris." It is alleged that, in compliance with the law, the Puget Sound Engine Works and the Title Guaranty & Trust Company executed and delivered to the United States, through Capt. Grant, their certain bond, wherein it was agreed that the Puget Sound Engine Works should fully perform the covenants, agreements, and conditions contained in the contract for the construction of the steamer, and agreed and provided that the Puget Sound Engine Works should promptly make all payments to persons supplying it with labor and material in the performance of the work provided for in the contract; that the bond was executed and delivered on February 27, 1905; that between June 3 and September 15, 1905, the Crane Company, at the special instance and request of the Puget Sound Engine Works, furnished and delivered to the Puget Sound Engine Works certain goods, wares, and material for use, and which were used, in the construction of the steamer. It is alleged that the construction work was completed on September 22, 1905, and that no action has been brought on the bond by the United States, and that more than six months have elapsed since the final completion of the work of construction upon the steamer, as provided for in the contract. Judgment is asked against the defendants and each of them for \$1,194.88.

Thereafter the Olympic Foundry Company intervened, and alleged, substantially, that between May 2 and September 2, 1905, at the special instance and request of the Puget Sound Engine Works, it had furnished and delivered to the said Puget Sound Engine Works certain material, which was used by the Puget Sound Engine Works in the construction of the steamer Harris. Judgment was asked against the defendants and each of them in the sum of \$771.04.

Complaint in intervention was also filed by Eyres Transfer Company; its claim being for services in the way of cartage of material to the steamer

Harris, and for payment of certain sums for freight upon material to be used in the construction of said steamer, and which was carted to the said steamer. Judgment was asked against the defendants and each of them in the sum of \$89.34.

Complaint in intervention was also filed by Dunham, Carrigan & Hayden Company, a corporation. Said company alleged that it had furnished merchandise and material used in the construction of the steamer. Judgment was prayed for in the sum of \$80.20 upon one cause of action, and \$223.45 upon another.

The defendant Title Guaranty & Trust Company demurred to the complaint of the Crane Company, and to the several complaints in intervention upon the ground that it did not appear from the face of the complaint that all claims against the bond in favor of the United States had been paid, because it did not appear from the face of the complaint that, before the commencement of the suit, plaintiff applied for or secured a certified copy of the bond or undertaking declared upon, because the action was not predicated upon a certified copy of said obligation, because the United States was not made a party defendant, because the material and service, the price of which is sought to be recovered, were not such as come within the class of material and service provided for by statute governing and defining such a bond as is declared upon, and because the statute does not contemplate construction of a vessel.

There were a number of other complaints in intervention filed, and, in order to facilitate proceedings, a stipulation was entered into, whereby such complaints in intervention should be brought before this court as would exemplify the record in respect to the various points presented, and providing that any judgment which may be entered shall be entered as to all claims, except in so far as any such judgments may be distinguished by individual features.

The demurrers of the appellant Title Guaranty & Trust Company to the complaint of the Crane Company, and to each of the complaints in intervention, were overruled. The Title Guaranty & Trust Company answered. It admitted that it executed, as surety, to the United States, a certain bond, whereby it agreed that the Puget Sound Engine Works should fulfill the conditions contained in the contract for the construction of the steamer Harris, and that the bond was further conditioned for the full payment by the Puget Sound Engine Works to all persons supplying labor or materials for the prosecution of the work provided for in said contract. It denied any indebtedness, and affirmatively set forth the contract between Capt. Grant, for the United States, and the Puget Sound Engine Works. Omitting the more formal parts, the contract is substantially as follows:

Article 1 provided that the Puget Sound Engine Works should furnish all the material and labor required, and should construct, complete, and deliver to the United States, free from incumbrance, a wooden steamer, with engines, machinery, apparel, furniture, etc., as specified and described in the specifications attached to and made part of the contract.

Article 2 provided that full access to the vessel, while under construction, and full facilities for examination of labor and material, should be given to the inspectors appointed by the United States to supervise the work, and that such tests of material as might be deemed necessary should be made at the expense of the Puget Sound Engine Works, under the supervision of such inspectors, and before receiving the finish coat of paint the vessel should be tested, in order to satisfy the United States.

Article 3 provided that, in consideration of the faithful performance of the agreement, the contractor should be paid for the completed vessel, according to plans and specifications, \$24,886. Payments were to be made as the work progressed, provided that, in the opinion of the officer in charge, the work progressed satisfactorily, one-fourth the amount, less 20 per cent. of the same, when the labor and material furnished should equal 25 per cent. of the total; a second payment of 15 per cent. of the amount, less 20 per cent. of the same, when the labor and material furnished should equal 40 per cent. of the total. Third and fourth payments upon percentage plans were provided for, less 10 per cent. on the total amount, which was reserved to be paid 60 days after

date of delivery and acceptance of the vessel, provided no defects, due to inferior material or bad workmanship, should be detected or developed.

Article 4 provided that the portion of the vessel completed and paid for under said method of partial payments "should become the property of the United States, but the party of the second part shall be responsible for the proper care of such portion of the vessel so paid for until the final delivery to, and acceptance by, the United States, as more particularly specified in paragraph 15, at page 6, of said specifications."

Article 5 provided that the vessel should be satisfactorily completed by July 15, 1905, and for liquidated damages for time consumed in excess of that time.

Article 6 required the work to be commenced by February 18, 1905.

Article 7 provided that the builder should be paid at the quartermaster's office at Seattle for the vessel completed, as specified, \$24,886.

Article 8 provided that, in case of failure of the builder to comply with the contract, the United States should have the power to complete the work at the expense of the builder in such manner as the United States should deem best for the interest of the public service, either by days' labor, or open market purchase, or contract, or both, and any excess of cost resulting from such failure should be charged to the contract.

The defendant also pleaded the execution and delivery of the bond. By the terms of the bond, the Puget Sound Engine Works and the Title Guaranty & Trust Company were held unto the United States in the penal sum of \$10,000. The condition of the obligation was such that if the Puget Sound Engine Works should in all respects perform the conditions and agreements agreed upon by the Puget Sound Engine Works to be observed and performed in the contract for the construction of the vessel, and should promptly make full payments to all persons supplying it labor and material in the prosecution of the work provided for in the contract, then the obligation should be void; otherwise, should be in full force and effect.

The defendant further pleaded: That the bond was executed and accepted by the United States for its sole benefit and protection, and that the execution was without any consideration as to any party furnishing labor or material to the Puget Sound Engine Works, to be used, or which was used, in the construction of the vessel, and that the bond was without consideration and without authority of law as to the complainant and the interveners, and each of them, and was without consideration as to the United States; that the complainant and each of the interveners is asserting a claim under the provisions of an act of Congress of August 13, 1894 (chapter 280, 28 Stat. 278 [U. S. Comp. St. 1901, p. 2523]), entitled "An act for the protection of persons furnishing material and labor for the construction of public works," and the amendment to said act, made February 24, 1905 (Act Feb. 24, 1905, c. 778, 33 Stat. 811 [U. S. Comp. St. Supp. 1907, p. 709]); and that the provisions of said act and amendment refer to the construction of structures built entirely upon soil belonging to the United States, and have no application to the construction of vessels or the making or completing of chattels.

The Title Guaranty & Trust Company also set forth: That under the laws of the state of Washington any person who furnished material in the construction of a vessel in the state has a lien, and that whatever labor or material was furnished to the Puget Sound Engine Works by the interveners for use in the said vessel was furnished and became a part of the said vessel, when the same belonged to the Puget Sound Engine Works, and before the same became the property of the United States; that the complainant neglected to enforce its lien against the vessel and suffered the security for the payment of the claim to be lost; that by reason of negligence and delay there has been lost to this defendant all security to which it would be lawfully entitled upon the payment to the said complainant and intervener under said obligation; and that by reason of said action on the part of the said complainant defendant has lost its right to be subrogated to any lien which said complainant had and could have enforced.

To each of these affirmative defenses, the plaintiff and each of the interveners demurred. The court sustained the demurrers.

As no question was raised as to amounts of the various claims, a stipula-

tion was made in respect to certain issues raised by the pleadings. In this stipulation it is set forth: That Charles H. Allmond & Co. furnished certain drawings and patterns between May 10 and September 20, 1905, for which there remains unpaid the sum of \$167.87; that said drawings and patterns were used for the making and casting of certain metal parts of the steamer, which said metal parts so cast from said drawings and patterns were used in the actual construction of the boat. It was also stipulated: That the Puget Sound Pattern Works furnished certain drawings and patterns between June 29 and September 21, 1905, for which there remains unpaid the sum of \$182.56; that said drawings and patterns were used in the making and casting of certain metal parts of the steamer, which said metal parts, so cast from said drawings and patterns, were used in the actual construction of the vessel. It was stipulated: That the Chesley Towboat Company, between June and August, 1905, furnished certain towing and wharfage for the material furnished the Puget Sound Engine Works for the construction of the vessel; that said material so towed and wharfed by the said towboat company entered into the cost of the construction of the steamer; that the balance due is \$83.15; that the Eyres Transfer Company, between May and September, 1905, carted from the various docks to the plant of the Puget Sound Engine Works certain material for use in the construction of the steamer, and paid advance charges to carriers, which amounts to \$55.32; and that all of the material so carted, and upon which the charges were paid, was used upon the steamer. It was further stipulated that the steamer was completed September 21, 1905, that no action was brought by the government of the United States within six months thereafter upon the bond, and that the present action was brought within a year after September 21, 1905.

The court entered a judgment against the defendant Title Guaranty & Trust Company, and in favor of each of the claimants. The court also allowed attorney fees as part of the costs in favor of the plaintiff and each intervener, and against the Title Guaranty & Trust Company. Appellant contends such costs are not proper.

Graves, Palmer & Murphy, for appellant and plaintiff in error.

H. T. Grainger, for appellees and defendants in error.

Before GILBERT, Circuit Judge, and DE HAVEN and HUNT, District Judges.

HUNT, District Judge (after stating the facts as above). The rulings of the court below were, in effect, that, under the terms of the contract entered into, the vessel was a "public work" within the provisions of the statute entitled "An act for the protection of persons furnishing materials and labor for the construction of public works," approved August 13, 1894 (28 Stat. 278, c. 280 [U. S. Comp. St. 1901, p. 2523]), as amended by Act Feb. 24, 1905, c. 778, 33 Stat. 811 (U. S. Comp. St. Supp. 1907, p. 709). The act of 1894 provides:

"That hereafter any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work or for repairs upon any public building or public work, shall be required before commencing such work to execute the usual penal bond, with good and sufficient sureties, with the additional obligations that such contractor or contractors shall promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work provided for in such contract; and any person or persons making application therefor, and furnishing affidavit to the department under the direction of which said work is being, or has been, prosecuted, that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, shall be furnished with a certified copy of said contract and bond, upon which said person or persons supplying such labor and materials shall have a right of action, and

shall be authorized to bring suit in the name of the United States for his or their use and benefit against said contractor and sureties, and to prosecute the same to final judgment and execution; provided, that such action and its prosecutions shall involve the United States in no expense."

The amended act reads as follows:

"That hereafter any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work, shall be required, before commencing such work, to execute the usual penal bond, with good and sufficient sureties, with the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract; and any person, company, or corporation who has furnished labor or materials used in the construction or repair of any public building or public work, and payment for which has not been made, shall have the right to intervene and be made a party to any action instituted by the United States on the bond of the contractor, and to have their rights and claims adjudicated in such action and judgment rendered thereon, subject, however, to the priority of the claim and judgment of the United States. If the full amount of the liability of the surety on said bond is insufficient to pay the full amount of said claims and demands, then, after paying the full amount due the United States, the remainder shall be distributed pro rata among said interveners. If no suit should be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and materials shall, upon application therefor, and furnishing affidavit to the department under the direction of which said work has been prosecuted that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, be furnished with a certified copy of said contract and bond, upon which he or they shall have a right of action, and shall be, and are hereby, authorized to bring suit in the name of the United States in the circuit court of the United States in the district in which said contract was to be performed and executed, irrespective of the amount in controversy in such suit, and not elsewhere, for his or their use and benefit, against said contractor and his sureties, and to prosecute the same to final judgment and execution: Provided, that where suit is instituted by any of such creditors on the bond of the contractor it shall not be commenced until after the complete performance of said contract and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract, and not later; and provided further, that where suit is so instituted by a creditor or by creditors, only one action shall be brought, and any creditor may file his claim in such action and be made party thereto within one year from the completion of the work under said contract, and not later. If the recovery on the bond should be inadequate to pay the amounts found due to all of said creditors, judgment shall be given to each creditor pro rata of the amount of the recovery. The surety on said bond may pay into court, for distribution among said claimants and creditors, the full amount of the sureties' liability, to wit, the penalty named in the bond, less any amount which said surety may have had to pay to the United States by reason of the execution of said bond, and upon so doing the surety will be relieved from further liability: Provided further, that in all suits instituted under the provisions of this act such personal notice of the pendency of such suits, informing them of their right to intervene as the court may order, shall be given to all known creditors, and in addition thereto notice of publication in some newspaper of general circulation, published in the state or town where the contract is being performed, for at least three successive weeks, the last publication to be at least three months before the time limited therefor."

Appellant's counsel earnestly contend that the view of the lower court is erroneous, and argue that the contract of the Puget Sound

Engine Works was not for the prosecution or completion of any public work, that title to the vessel did not pass to the government until completion, delivery, and acceptance, and that the laborers and materialmen were amply protected by the lien laws of the state of Washington.

The purpose of the original act of 1894 is not altered by the amendment of 1905; nor does the amended act restrict the classes of persons who are entitled to the benefits of the bond required. As the Supreme Court has said, in comparing the two statutes, the amendment "shows the consistent purpose of Congress to protect those who furnish labor or material in the prosecution of public work." *Hill v. American Surety Co.*, 200 U. S. 197, 26 Sup. Ct. 168, 50 L. Ed. 437. Undoubtedly, Congress meant to substitute the obligation of the bond required for such a security as can in most cases be obtained by attaching a lien to the property of an individual. Such purpose harmonizes with the broad object of the whole legislation, which is the protection of persons furnishing materials and labor for public work. As protection is afforded by state statute to the materialman by filing a lien upon a building erected by an individual, so may it be had through an obligation to the United States in contracts for the construction of public works. By keeping in mind that the intent of the statute is that material and labor actually contributed to the construction of the work shall be paid for, and thus that the materialman and the laborer shall be protected, construction of the statute and bond is quite simple.

In *United States v. National Surety Co.*, 92 Fed. 551, 34 C. C. A. 529, the Court of Appeals for the Eighth Circuit said:

"It is also noticeable that in its title the act professes to be one for the benefit 'of persons furnishing materials and labor,' and that in the body of the act the form of the condition to be inserted in the bond for the benefit of the United States is not in terms prescribed; the only provision in that regard being that the bond shall be 'the usual penal bond'—meaning, evidently, such an obligation for the government's own protection as it had long been in the habit of exacting from those with whom contracts were made for the doing of public work. On the other hand, the condition for the benefit of persons who might furnish materials or labor is carefully prescribed. Obviously therefore Congress intended to afford full protection to all persons who supplied materials or labor in the construction of public buildings, or other public works, inasmuch as such persons could claim no lien thereon, whatever the local law might be, for the labor and materials so supplied. There was no occasion for legislation on the subject to which the act relates, except for the protection of those who might furnish materials or labor to persons having contracts with the government. The bond which is provided for by the act was intended to perform a double function: In the first place, to secure to the government, as before, the faithful performance of all obligations which a contractor might assume toward it; and, in the second place, to protect third persons from whom the contractor obtained materials or labor. Viewed in its latter aspect, the bond, by virtue of the operation of the statute, contains an agreement between the obligors therein and such third parties that they shall be paid for whatever labor or materials they may supply to enable the principal in the bond to execute his contract with the United States. The two agreements which the bond contains, the one for the benefit of the government, and the one for the benefit of third persons, are as distinct as if they were contained in separate instruments; the government's name being used as obligee in the latter agreement merely as a matter of convenience."

It is urged that the contracts contemplated and referred to in the statute are only those which have to do with public buildings, or with such works as fortifications, river and harbor improvements, and other works, where the improvement is attached to the soil, and where no mechanic's lien could attach by operation of any state statute. In support of this argument, the appellant quotes from an opinion of Attorney General Griggs, dated June 21, 1900. A careful examination of the reasoning of Attorney General Griggs will disclose that he laid stress upon the fact that the statute of 1894 was intended, in a measure, to remedy the defect in prior legislation in the means of collection at the disposal of laborers and materialmen against contractors upon permanent public works, where no mechanic's or laborer's lien would attach by operation of any state statute. He emphasizes this view by saying that no such reason is applicable to cases of the construction of a specific article, not attached to the soil, the title to which is not in the United States, but which is a mere movable article, such as a vessel, the whole title to which remains in the contractors until its completion and acceptance by the government. The opinion cannot be looked upon as of special force when applied to the case before us, because, as already pointed out, it is expressly provided, by article 4 of the contract involved, that the portion of the vessel completed and paid for under the partial payment arrangement shall become the property of the United States; the party of the second part being responsible for the proper care of such portion of the vessel so paid for until final delivery to and acceptance by the United States, as more particularly specified in the specifications.

Again, the statute extends to construction not only of any public building, but to the prosecution and completion of "any public work," and even goes farther by including "repairs upon any public building or public work." There is no limitation that it shall only apply to public works attached to the soil, and where it is agreed that, as fast as any part of the thing upon which the work is being done is completed and paid for under a percentage plan, such completed part becomes the property of the United States, no lien under a state statute could be enforced, and therefore there is no reason for excluding the construction of a vessel from within the definition of a public work.

In *United States v. Perth Amboy Ship Building & E. Co. (C. C.)* 137 Fed. 689, the court said:

"Counsel cites in support of his proposition definitions of 'public works' from the Century Dictionary and the American and English Encyclopedia of Law, Second Edition. Without quarreling with these definitions, we conclude that the meaning of the words 'public works' in the act is broader and more comprehensive than the dictionary meaning given to 'public works'; that 'public work' is susceptible of application to any constructive work of a public character, and is not limited to fixed works."

In *American Surety Company v. Lawrenceville Cement Company et al. (C. C.)* 110 Fed. 717, Judge Putnam discussed the expressions used in the statute and the bonds given under it, and held that the statute of 1894 does not have the same aspect as the ordinary lien statutes of a state, which are generally held to cover only what has

been added to the value of the property against which the lien is asserted. He points out that the underlying equity of such ordinary lien statutes requires them to be so limited in their application, but that the act of Congress referred to and the bond given are susceptible of a more liberal construction, which should be applied as may be necessary to effect the purpose for which the bond of the contractor is given.

The Supreme Court of the state of Washington approved Judge Putnam's opinion, and held that recovery could be had for the furniture for lighthouse keeper's residences under the provisions of the contract and bond then under consideration by the court. *United States, to Use of Standard Furniture Co., v. Ætna Indemnity Co. et al.*, 40 Wash. 87, 82 Pac. 171.

Clarkson v. Stevens, 106 U. S. 505, 1 Sup. Ct. 200, 27 L. Ed. 139, is also cited by appellant. The contract in that case contained a provision that the Secretary of the Navy should appoint some person, whom Stevens, the contractor, should admit within his establishment for the purpose of receiving and receipting for, on account of the Navy Department, all materials delivered therein for constructing the steamer, which materials, when so received and receipted for, should be distinctly marked with the letters "U. S.," and should become the property of and belong to the United States. The Secretary of the Navy agreed to pay as the price of the steamer, when fully completed and delivered in conformity with the contract, a certain sum. Payments were to be made from time to time until a certain amount had been paid, when inspection was to be had, and, if there should be a certification that the vessel could be fully completed according to contract for the remaining balance which might then be due, that the payment of further bills should continue. It was also provided that when Stevens should have fully completed the steamer, and she should have been delivered to and received by the agent of the United States, the full amount of the price remaining unpaid and to become due when she should be fully completed and accepted was required to be paid, and a mortgage security was to be canceled and returned. The contention of the plaintiffs in error in that case was that the title to the unfinished vessel passed, as the work progressed, to the United States, and became vested, together with a right to enforce the contract for its completion, and the security of the mortgage as against the estate of Stevens. The Court of Errors and Appeals of New Jersey held that the title to the ship never vested in the United States as owner. The Supreme Court, through Justice Mathews, decided that the intent which controlled the construction of agreements such as was made was to be ascertained by the terms of the contract and the circumstances attending the transaction, and that the fact that advances were made out of the purchase money, according to the contract for the cost of the work, as it progressed, and that the government was authorized to require the presence of an agent to join in certifying to the accounts, were not conclusive evidence of the intent that the property in the ship should vest in the United States prior to final delivery, and, furthermore, that it did not follow that, because the materials provided for were declared to be the property of the Unit-

ed States, it was intended that they should remain so after becoming part of the structure. "Such a precaution," said Justice Matthews, "might well have been suggested, as a security against a diversion of the materials to any unauthorized use, to preserve them to the United States, in case, by reason of the failure of the work, or from any other cause, they should not be used in the vessel." The case is readily distinguished from that before us, when it is observed that the contract between Stevens and the United States contained no provision that the portion of the vessel, as it was completed and paid for, should become the property of the United States.

The recent decision of the Supreme Court, in *Ellis v. United States*, 206 U. S. 246, 27 Sup. Ct. 600, 51 L. Ed. 1047, accords with the view that we take of the contract and bond involved in the present suit. The questions there considered by the court arose under indictments and informations filed under Act Aug. 1, 1892, c. 352, 27 Stat. 340 (U. S. Comp. St. 1901, p. 2521), relating to the limitation of the hours of service of laborers and mechanics employed upon the public works of the United States. The statute referred to provides that employment of laborers and mechanics employed by the government or by any contractor "upon any of the public works of the United States * * * is hereby limited and restricted to eight hours in any one calendar day." The words "the public works" led the court to conclude that the objects of the labor referred to must have some kind of permanent existence and structural unity. Justice Holmes said:

"Both of the phrases to be construed admit a broad enough interpretation to cover these cases, but the question is whether that interpretation is reasonable, and, in a penal statute, fair. Certainly they may be read in a narrower sense with at least equal ease. The statute says 'laborers and mechanics * * * employed * * * upon any of the public works.' It does not say, and no one supposes it to mean, 'any public work.' The words 'upon' and 'any of the' and the plural 'works' import that the objects of labor referred to have some kind of permanent existence and structural unity, and are severally capable of being regarded as complete wholes. * * * It is unnecessary to lay special stress on the title to the soil in which the channels were dug, but it may be noticed that it was not in the United States. The language of the acts is 'public works of the United States.' As the works are things upon which the labor is expended, the most natural meaning of 'of the United States' is belonging to the United States."

But an important difference exists between the statute quoted from, regulating hours of labor, and the act of 1894, *supra*, requiring a bond by a contractor. In the one, the words of the statute are "any of the public works" of the United States, while, in the other, they are "the prosecution of any public work, or for repairs upon any public building or public work." Thus, the statute requiring the bond is more comprehensive than that controlling the hours for laborers and mechanics employed upon any of the public works, and contains the more general words, which the Supreme Court says do not occur in the law regulating hours.

Finally, taking the language of the contract for the construction of the steamer *Harris*, and the bond, and construing them with relation to the statute, our opinion is that it was agreed upon and intend-

ed by the parties that the property should be passed to the United States as any part or parts thereof should be completed, and that such parts so paid for did pass, that the work was a public one, and that the ruling of the lower court applying the statute of 1894 as amended was correct.

Appellant also claims that it has been deprived of a priority right of the United States; but no claim of the United States is before this court, and none such appears to have been before the court below. The point is not material.

It is contended that the United States ought to have been made a party to this suit; but the United States failed to institute any suit and failed to assert any rights by intervention. It does not appear to have had any interest in this action. Under the amended act, the United States has a priority under certain conditions: It may protect such prior right by bringing suit on the bond within six months after the completion and final settlement under the contract; but, if no such suit is brought, then a creditor can sue, and all creditors have a right to intervene within a year. It would seem that the United States, having failed to sue, or to intervene in a suit brought, cannot claim against the surety by reason of the execution of the bond.

It is said that application by affidavit to the department under whose direction the work of constructing the vessel was performed was a condition precedent to bringing the suit. The amended statute contemplates that the person who may wish to bring a suit shall file an affidavit of his claim with the department having charge of the work for which the bond has been given, and obtain a certified copy of the contract and bond upon which right of action is given. The object of this requirement is to protect the department of the government which may be concerned from being required to give information upon any simple request as to the nature of the contract and bond under which the contractor may be performing his contract, and also to show good faith and interest in the subject-matter. But we do not think that jurisdiction is lacking, unless such an affidavit has been filed.

Objection is made to the claims of the Eyres Transfer Company, Chesley Towboat Company, Allmond Company, and Puget Sound Pattern Works, upon the ground that bills for the labor and materials furnished by these several parties are not within the purview of the bond. The Eyres Transfer Company claimed cartage and freight money paid out. It was not a common carrier, protected by its lien on freight carried, but was a local transfer company engaged in the business of cartage and delivering. In *American Surety Company v. Lawrenceville Cement Company*, supra, a claim for hauling material from a regular steamboat landing to the place where the work was being performed was allowed under the following ruling, which we approve:

"We think the master was too strict with reference to some minor claims for transportation. Clearly, he was right in his illustrative suggestion which led up to his conclusion with reference to claims for trucking and water carriage. As stated by him, the carrier ordinarily has a lien for his freight, which is a sufficient protection for him. Therefore, in cases of transportation by a carrier from distant points, or, indeed, from another port than the port at which the contractor's work is being done, the carrier would not

ordinarily be protected by the statutory bond, for two reasons: First, transportation for considerable distances in the regular course, by the ordinary lines of either steam, sail or rail, cannot easily be brought within the words of the statute, 'supplying labor or materials'; and, second, inasmuch as carriage of that character, especially under an ordinary bill of lading, or its equivalent, creates a well-recognized lien for freight, the equitable rule would apply that a carrier, under such circumstances, cannot give up his cargo, and enforce his claim against a mere surety, after he has so placed himself that the surety cannot be subrogated to the security which the law gave. The first objection, however, does not necessarily apply to truckmen who are moving materials from a place of landing to the exact locality of the work under contract, although the distance may be somewhat considerable, nor to water-borne transportation carried on by the servants of the contractor, or for short distances without the aid of steam or a fully equipped vessel. The second objection, moreover, must not be carried to an extreme; otherwise it would defeat the practical operation of the statute. Every person selling materials for cash holds a lien for the purchase money until he voluntarily waives it by delivery, and every person engaged in transportation, who is not the mere servant of the owner of the merchandise transported, holds a carrier's lien, even though the carriage is of miscellaneous parcels, over short distances in the immediate locality, and at frequent, irregular intervals. Nevertheless, with reference to each, such liens are not ordinarily insisted on, and it would be an unreasonable construction of the statute to hold that it intended to interfere with the convenience of minor dealings in such methods as the usual practices establish. Therefore, as already stated with reference to either class, to insist on the fact that the lien is waived, and short credit given, would defeat the beneficial purpose of the statute and the practical ends which it is intended to accomplish."

We cannot approve, though, of the claim of the Eyres Company for freight money advanced to the carriers and added to the cartage bill.

The claim of the Chesley Towboat Company was for wharfage. Such a claim seems to be within the reasonable purview of the statute. *United States v. Morgan* (C. C.) 111 Fed. 474.

The claims of the Allmond Company and the Puget Sound Pattern Works were for patterns furnished to the molding department of the Puget Sound Engine Works. The patterns were used for the castings which went into the vessel. Why should not those who furnished the patterns be protected as are those who erect the scaffolding upon which carpenters stand, in doing their work upon the actual construction of a ship? We believe they should be.

The point is made that the claims of laborers and materialmen are not assignable under the act; but in *United States, to the Use of Fidelity National Bank of Spokane, v. Rundle et al.*, 100 Fed. 400, 40 C. C. A. 450, the right of laborers and materialmen to enforce the obligation of the sureties on the bond of a contractor for government work, as required by 28 Stat. 278, was held to be assignable.

Error is assigned upon the action of the court in allowing each of the interveners a statutory fee of \$10, taxed as costs. The decision in the case of *The Oregon*, 133 Fed. 609, 68 C. C. A. 603, sustains the action of the lower court.

It is unnecessary to discuss the other points raised by appellant. We have examined them all and find no reason to reverse the decision.

The judgment will be modified by reducing the amount awarded to the Eyres Company by deducting \$55.32, amount of freight money paid. As so modified, the judgment in favor of that particular claimant will be affirmed, and the judgments in favor of all other claimants will be affirmed.

In re COLE.

FIRST NAT. BANK OF BIDDEFORD et al. v. COLE.

(Circuit Court of Appeals, First Circuit. October 24, 1907. On Rehearing, February 5, 1908.)

No. 686.

1. **BANKRUPTCY—ORDERS—REFUSAL TO OBEY—CONTEMPT.**

If a bankrupt willfully disregards an order of the court requiring payment of money to the trustee, he may be proceeded against for contempt under the general powers vested in superior courts of judicature, or under Bankr. Act July 1, 1898, c. 541, § 2, 30 Stat. 545, 546 (U. S. Comp. St. 1901, p. 3420).

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 166.]

2. **SAME—REVIEW—MODE.**

Where a proceeding in the District Court against a bankrupt for contempt in refusing to comply with an order of the court requiring her to pay money to the trustee is taken by virtue of the authority conferred on District Courts in bankruptcy by Bankr. Act July 1, 1898, c. 541, § 2, 30 Stat. 545, 546 (U. S. Comp. St. 1901, p. 3420), the proper mode of obtaining a review of the proceeding is by a petition for revision under such act.

[Ed. Note.—Appeal and review in bankruptcy cases, see note to In re Eggert, 43 C. C. A. 9.]

3. **SAME—SCOPE OF REVIEW—OPINIONS OF TRIAL COURT.**

Where such a proceeding for contempt was based on Bankr. Act July 1, 1898, c. 541, § 2, 30 Stat. 545, 546 (U. S. Comp. St. 1901, p. 3420), on a petition for revision the Court of Appeals may revise any question of law as to which it may justly infer from the record, including the opinions of the District Court, that such court reached a conclusion, whether formally expressed or presented or not.

4. **SAME—RECORD—CHARACTER OF PROCEEDINGS.**

In proceedings against a bankrupt for contempt in refusing to obey an order for the payment of money to the trustee, the record should show that an issue had been made on the question of contempt, and that the bankrupt adjudged guilty thereof had had an opportunity to be heard thereon.

5. **BANKRUPTCY—CONTEMPT—NATURE OF PROCEEDINGS—PLEADING—EVIDENCE.**

Contempt proceedings against a bankrupt are not required to be formal, but may be instituted by a petition sufficient to notify the bankrupt of the charge made against him, which may be established by affidavits.

6. **SAME—PETITION.**

A petition in contempt against a bankrupt for refusing to comply with an order directing her to pay money to her trustee was defective, where it was only such as would be required for ordinary supplementary proceedings for the recovery of a debt, and did not allege that her failure was willful or was not caused by mere inability.

7. **SAME—ORDERS—CONTEMPT—EVIDENCE.**

In a contempt proceeding against a bankrupt for failure to comply with an order directing her to pay money to her trustee, evidence held insufficient to show that she had such control of the money at the time the order was entered as enabled her to comply therewith so as to render her failure to do so willful.

8. **SAME—REMEDIES OF TRUSTEE.**

That a bankrupt's trustee was not able to compel her to pay over money in accordance with the order of the court by contempt proceedings for failure to show that the bankrupt had such control of the fund at the time the order was made as to have enabled her to comply therewith did not prevent the trustee from perusing any other remedies given for the

collection of a judgment from an insolvent debtor for the recovery of such fund.

Elbridge R. Anderson (Charles W. Bartlett, on the brief), for petitioner.

Benjamin Cleaves, for respondents.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

PER CURIAM. The court has no question as to adhering to its opinion passed down on February 16, 1906, in Annie M. Cole, petitioner, No. 618, that the order then under consideration is valid in so far as it may be regarded as a legal judgment against Mrs. Cole for the amount therein named; but the question before us now is whether that judgment can be enforced only in the ordinary way in which civil judgments rendered by the federal courts are enforced, or whether the further order of the District Court providing for enforcing it by summary proceedings involving imprisonment of the petitioner may also be availed of under the circumstances. Therefore the court desires reargument on the following questions:

First, what portion of the records and proceedings in bankruptcy relating to Annie M. Cole, and what facts, may the District Court, or may this court, properly consider with reference to the subject-matter of the pending petition?

Second, can the order brought in question by the pending petition be regarded as valid, or be enforced, unless it is shown that the petitioner, Mrs. Cole, had at the date of said order funds, or could then have obtained funds, from which the payment of the amount ordered to be paid by her could then have been made or in any way secured?

Third, what are the facts, pro and con, bearing on all the topics involved in the last preceding question?

Ordered that the case be reargued at the January, 1908, session on the questions propounded by the per curiam passed down this day, and that printed briefs in reference thereto be filed on or before December 21, 1907.

On Rehearing.

PUTNAM, Circuit Judge. This petition relates to the same proceeding as that out of which our opinion arose which we passed down on February 16, 1906 (144 Fed. 392, 75 C. C. A. 330), namely, an order of the District Court of March 4, 1905, that the bankrupt pay certain moneys to her trustee in bankruptcy. As a sequence thereto, the District Court, on November 6, 1906, after suitable intervening proceedings, entered an order that Mrs. Cole stand committed to the marshal of the district, to be incarcerated until she delivered to her trustee in bankruptcy \$2,425, or until otherwise discharged. The petition before us was filed under the statutes in bankruptcy to revise this order of committal in matters of law. The order was in pursuance of a petition filed by the trustee in bankruptcy on June 4, 1906, setting out that Mrs. Cole had not paid over the moneys required by the District Court, as we will more fully show. The propositions of the present petitioner which we need to consider are: First, that the

District Court admitted proofs which it should not have admitted; and, second, that there were not proofs to justify the District Court in making the order of committal.

If Mrs. Cole, who had been adjudged a bankrupt by the District Court, has willfully disregarded its order in reference to the payment of money to the trustee, she might be proceeded against under the general powers vested in superior courts of judicature with reference to contempt, or, also, under the second section of the act of July 1, 1898, c. 541, 30 Stat. 545, 546 (U. S. Comp. St. 1901, p. 3420), which authorizes the District Courts in bankruptcy "to enforce obedience by bankrupts, officers and other persons to all lawful orders, by fine or imprisonment or fine and imprisonment." If the proceeding in the District Court was taken by virtue of the specific provision of the statute, it would be the natural presumption that the proper method of reaching us would be that which was in fact availed of, namely, a petition for revision under the same act. If, on the other hand, the proceeding in the District Court had relation to the general powers vested in superior courts of judicature with reference to contempts, the question would at once arise whether the present petitioner, Mrs. Cole, should not have come to us by writ of error. The parties themselves have made no issue as to either of these topics; but, as this application is without precedent in this court, and without authoritative exposition in all respects in the Supreme Court or in other Circuit Courts of Appeals, and as the extent to which the conclusions in the District Court may be reviewed may depend on the nature of the proceeding there, as also on the method taken to obtain a review thereof by this court, it is advisable that we should explain the position further.

When a case comes up on writ of error with reference to a jury-waived trial of a civil case, or to a proceeding for contempt according to the ordinary course of the common law, the then method of raising questions which do not appear on the face of the pleadings would, if applied to this record, very much limit the scope of our examination with regard to the merits. If, on the other hand, the proceeding in this case was that especially authorized by the second section of the act of July 1, 1898, so that a petition to revise would presumably be the ordinary way of reaching us, and if, on any petition to revise like that before us, we are not restricted as we would be on a writ of error, our outlook is much broadened, and we are authorized to search the opinions filed in the District Court, although not a part of the record in the strict sense of the word, for the purpose of ascertaining at large what were in fact the issues which that court considered. While such opinions cannot be referred to for the purpose of eking out findings of fact when those findings are required to be of record, yet they are constantly made use of when, as for example on a writ of error from the Supreme Court to a state tribunal, the appellate tribunal is at liberty to ascertain at large the propositions of the common, or statute, or constitutional law, on which the case proceeded. This is a clear rule, a very late application of which is in *Burt v. Smith*, 203 U. S. 129, 134, 27 Sup. Ct. 37, 51 L. Ed. 121. As the parties have freely discussed the case at large without objection

on either side, we feel safe to adopt the broader view, and it is our present opinion that it is our right so to do. We are supported in this by *Mueller v. Nugent*, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405. On the whole, we accept for this case the position that the proceeding in the District Court was by virtue of the statutory provision expressly authorizing it to compel obedience to its orders; that the way for any party dissatisfied with the conclusion of that court to reach us was by a petition for review; that on such petition we can revise any question of law as to which we may justly infer that the District Court reached a conclusion, whether formally expressed or not, and whether or not formally presented; and that, to that end, we may search, not only the record in that court, but also its opinions.

As said in the opinion passed down by us on February 16, 1906, already referred to, the District Court proceeded originally by a consolidated order, directing the bankrupt to turn over to the trustee the money in controversy, and also directing that, in default thereof, she should be committed. There is no doubt that that order was supported by some precedents; but it seemed to us not consonant with the rules intended for the protection of personal liberty, which rules ought to be applied with special strictness where the imprisonment of a citizen is in any extent absolutely at the control of a single judge, as is the fact here. Therefore we followed the practice in this particular shown by *Mueller v. Nugent*, 184 U. S., at page 5, 22 Sup. Ct. at page 269, 46 L. Ed. 405. The proceedings there were more summary than before us; but the clear essentials were preserved as we directed them to be preserved here, in that the order to turn over the property was entered, notice thereof given to the individual against whom it ran, with an interval of time to comply therewith, and a refusal so to do, before any order was issued as against one in contempt. The fact that we thus, in a certain sense, dissevered the proceedings, gave rise to the contention now made as to what proofs were properly cognizable by the District Court on the precise issue now before us.

In our opinion we said that:

"A proceeding for contempt is of a different character from one resulting in a mere order for the payment of money to a trustee in bankruptcy."

We also added:

"It is claimed that it is criminal in its nature, while an order for the mere payment of money is purely civil; that it would be justified only by the proofs and the amount of proofs requisite on ordinary criminal issues; and that it is in effect an independent proceeding which can be initiated only after an order for payment of money has been disobeyed, and on an order to show cause, or some other new notice, given to the person alleged to be in default."

On the present proceeding, the petitioner, Mrs. Cole, seems to assume that we ruled all that we said was claimed by her. We were so far therefrom that we added that it was sufficient then to say that the record did not show that she had had any day in court on the question of contempt. The sum and substance of all we authoritatively ruled was that the record should show that an issue had been made in some way on the question of contempt, and that the person

adjudged guilty thereof had had an opportunity to be heard in reference thereto.

It now becomes necessary for us to take a definite position with regard to some of the propositions which we then left open, because now it is apparently claimed by the petitioner that the proceeding against her for contempt is not merely criminal in its character, but is governed by the strict rules of ordinary criminal proceedings, even apparently to such an extent that the allegations of the petition that she be incarcerated for disobedience of an order for payment of money must be supported by new proofs covering all the issues made thereby, and by witnesses confronting her in accordance with the sixth amendment to the Constitution. The precise point is that the learned judge of the District Court, in connection with the petition for commitment, not only heard witnesses produced before him after the filing thereof, including Mrs. Cole, but also to a certain extent improperly examined the prior proceedings. The details we will come to hereafter. At the outset we may say it is enough for us to show generally on this point that, while the petition that Mrs. Cole should be incarcerated for contempt may well have raised to a certain extent a new issue, as, for example, the specific issue suggested by our previous opinion, whether or not there was in fact an inability to obtain possession of the funds in question, which it appears from the record were actually in the hands of her husband, and while also it seems to be conceded on all sides that, before committing for contempt, the court should be satisfied beyond a reasonable doubt of a willful refusal or a willful act on the part of the person proceeded against, yet neither the sixth amendment to the Constitution, nor any principle shadowed out by it, has strict application to proceedings of the character before us. *Eilenbecker v. Plymouth County*, 134 U. S. 31, 39, 10 Sup. Ct. 424, 33 L. Ed. 801. In *re Debs*, 158 U. S. 564, 596, 15 Sup. Ct. 900, 39 L. Ed. 1092.

The general rule as to the effect of the first 10 amendments is distinctly stated in *Robertson v. Baldwin*, 165 U. S. 275, 281, 17 Sup. Ct. 326, 329, 41 L. Ed. 715, as follows:

"The law is perfectly well settled that the first 10 amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had, from time immemorial, been subject to certain well-recognized exceptions arising from the necessities of the case. In incorporating these principles into the fundamental law there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed."

It is settled that the general rule thus stated in *Robertson v. Baldwin* applies to proceedings of the character before us. By necessity such proceedings are sometimes summary, and therefore informal in their character. *Eilenbecker v. Plymouth County*, 134 U. S. 31, 38, 10 Sup. Ct. 424, 33 L. Ed. 801. In *Savin, Petitioner*, 131 U. S. 267, 278, 9 Sup. Ct. 699, 33 L. Ed. 150, it appeared that objections were made because the court which entered the judgment as for contempt did not require service of interrogatories according to the older practice. The

opinion said that the court could have adopted that mode in trying the question of contempt, but it was not bound to do so. It added:

"It could, in its discretion, adopt such mode of determining that question as it deemed proper, provided due regard was had to the essential rules that obtain in the trial of matters of contempt."

The court declared that such proceedings were analogous to proceedings for the removal of an attorney, according to what was done in *Randall v. Brigham*, 7 Wall. 523, 19 L. Ed. 285. In that case there was neither any formal accusation nor formal citation; but it was plain that the attorney understood the nature of the charge against him, and had been afforded ample opportunity to explain the transaction and vindicate his conduct. The opinion in *Randall v. Brigham*, where it is quoted in *Savin*, Petitioner, continued as follows:

"It is not necessary that proceedings against attorneys for malpractice, or any unprofessional conduct, should be founded upon formal allegations against them. Such proceedings are often instituted upon information developed in the progress of a cause; or from what the court learns of the conduct of the attorney from its own observation. Sometimes they are moved by third parties upon affidavit, and sometimes they are taken by the court upon its own motion. All that is requisite to their validity is that, when not taken for matters occurring in open court, in the presence of the judges, notice should be given to the attorney of the charges made, and opportunity afforded him for explanation and defense. The manner in which the proceeding shall be conducted, so that it be without oppression or unfairness, is a matter of judicial regulation."

Certainly, there is nothing in the nature of the thing which permits proceedings for the removal of an attorney to be more informal than those for punishment for contempt. The reverse is the fact, because the loss of a life's occupation is involved in the loss of the right to practice in courts of law.

There can be no question that, in reference to this topic, we may search the rules on practice in equity with safety. Equity rule 90 refers us to the practice of the High Court of Chancery in England for assistance in that direction, and this rule relates to the time when it was first enacted. *Thomson v. Wooster*, 114 U. S. 112, 5 Sup. Ct. 788, 29 L. Ed. 105. There is nothing to show that the rules as to evidence in the federal courts on proceedings in equity for punishment for contempt are any more stringent than formerly in England, where an issue of fact when it arose was often tried on affidavits. 3 *Daniell's Chancery* (1841) 373; 4 *Blackstone's Commentaries*, 288. That in the United States *ex parte* affidavits may be thus used is shown by *Rapalje on Contempts* (1890) § 126. We may also cite the practice as approved by the experienced Judge Hammond in *United States v. The Anonymous* (C. C.) 21 Fed. 761, 767, decided in 1884, and by the likewise experienced Judge Green, of the District of New Jersey, as shown in *Mexican Ore Co. v. Mexican Mining Co.* (C. C.) 47 Fed. 351, 353, decided in 1891. Affidavits were also used without disapproval before Mr. Justice Nelson in *Whipple v. Hutchinson*, 4 Blatchf. 190, 191, Fed. Cas. No. 17,517, and before Circuit Judge Bond and District Judge Giles in *Birdsell v. Hagerston Company*, 1 Hughes. 59, 63, Fed. Cas. No. 1,436.

The great fullness with which we have explained this proceeding, and the practice in regard thereto, will be found to have been necessary. For example, the petition on which Mrs. Cole was ordered by the District Court to be incarcerated is only such as would be required for ordinary supplemental proceedings for recovering a debt. It shows only that Mrs. Cole had been ordered to pay and had not. It contains no allegation that her failure to pay was willful, nor anything to show that it was not caused by mere inability. Applying strict rules, this, of course, would not be sufficient to put her on the defensive. Nevertheless, the parties have made no issue on this account, they have proceeded to trial on the merits, they appear to have had no misunderstanding as to the fundamental questions involved, and therefore we pass this by.

The petition in bankruptcy against Mrs. Cole was involuntary, and was filed on November 23, 1903. It alleged that she concealed \$2,700, being a part of the sum received by her on September 17, 1903, from the sale of her homestead at Saco in this state. It described her as then living in Wakefield in Massachusetts. She was duly adjudicated a bankrupt, and was examined, and thereupon, after a full report of the referee, which report and the statement of facts therein were confirmed by the District Court, the order was entered on March 4, 1905, to which our opinion passed down on February 16, 1906, related, as follows:

"It is therefore ordered that the bankrupt turn over and deliver to the trustee within 15 days the said sum of \$2,425; in default of which she stand committed to the marshal of this district, to be incarcerated until she obeys the order of this court, or is otherwise discharged by due process of law, or until the further order of this court."

The report of the referee on which that order was entered stated fully the transactions leading up to and following the petition in bankruptcy, so far as they affected, or could affect, the issue. It appeared thereby that Mrs. Cole's indebtedness consisted of indorsements of her husband's notes, held by several banks in Biddeford and Saco, amounting in all to \$2,725. On September 14, 1903, Mrs. Cole, whose husband then lived at Saco, sold the homestead there for \$3,800 in actual cash—that is, bills—which bills were paid directly into the hands of Mr. Cole. Less than two weeks after selling the homestead, Mr. and Mrs. Cole together moved to Wakefield, where they established a new home, and where they were when the petition in bankruptcy was filed. A day or two before the close of October, 1903, the cashier of one of the banks holding the notes of Mr. and Mrs. Cole called on them at Wakefield, and sought to secure an adjustment. During the conversation, in reply to a question to Mr. and Mrs. Cole as to what they had to say, she answered: "We have not got anything to say." Other conversation occurred, during which Mrs. Cole said that they did not have the money, adding: "We have sent it to his brother"—meaning the brother of Mr. Cole. The referee reported also other evidence, including that of Mr. Cole, which suggested, among other things, certain remarkable improbabilities with reference to Mrs. Cole's statement that the money had been sent to Mr. Cole's brother. No reason for moving to Wakefield was suggested except a purpose

of carrying out of the jurisdiction the money received for the home-stead.

Thereupon, the court found in March, 1905, specifically as follows:

"The referee has found affirmatively that the bankrupt has under her control the balance of the fund, to the amount of \$2,425, that she had possession or control of it at the date of the filing of the petition in bankruptcy, that she has withheld and concealed the same from her trustee, and is now withholding and concealing the same from him."

On the proceeding before us to revise the order of March 4, 1905, we pointed out that we were not then obliged to go into any question whether Mrs. Cole was in manual possession of the money, or exercised such absolute control of it as would enable her to turn it over to the trustee; but, on the case now before us, it remains for us to consider whether, on the record here, we can find that it was permissible for the District Court to find a contemptuous—that is, a willful—refusal on the part of Mrs. Cole to turn over the moneys to the trustee, with the accompanying ability on her part to do so.

On this immediate proceeding Mrs. Cole testified orally, and other testimony was introduced. If the case rested, as Mrs. Cole now claims it should rest, on this subsequent testimony alone, we would be compelled to say, without hesitation, that there were in the record no proofs which would permit the District Court, or any court, by reason thereof, to find Mrs. Cole in contempt on March 4, 1905, or at any subsequent time; but at this hearing Mr. Anderson appeared for Mrs. Cole, and Mr. Cleaves for the trustee in bankruptcy, and the following occurred:

"Mr. Cleaves: I would like to have it appear that I offer the entire record which went to the Circuit Court of Appeals, or rather, I offer all of the testimony and documents which have been taken or used in this case in bankruptcy.

"Mr. Anderson: And that, may it please your honor, if your honor considers it—I understand we are taking it de bene—I desire to have whatever rights we have saved.

"The Court: The stenographer is to write out the testimony taken at this hearing, and the offers made by counsel. Upon this record and upon such part of the printed record as the court may find material and legal evidence—upon this evidence counsel shall be heard in court, and are requested also to prepare suitable and sufficient briefs, setting forth their exact positions in the premises."

With reference to this, the opinion of the learned judge of the District Court of November 6, 1906, said as follows:

"In the case before me I have treated the order to show cause as an independent proceeding, and have applied the rules of evidence pertinent to a criminal case. I find, upon the threshold of the proceeding, the decree of the Circuit Court of Appeals that the bankrupt pay over certain money to the trustee, and that she have her day in court upon the question whether she shall be held to be in contempt. In pursuance of the request of the respondent, I have considered only the testimony of the bankrupt herself, the greater part of which I have given in full, and of Mr. Jordan, her nephew, together with her examination before the referee, which she has verified and made part of her testimony. With reference to the other rulings, requests for which have been preferred by the learned counsel for the respondent, I do not find it necessary to pass upon them affirmatively and in detail; but it will be seen that I have adopted substantially the rules of law which he has invoked

in the proceeding. I have also examined the records of the District Court, so far as they are material, relevant, and admissible."

Whatever the learned judge might have examined in the records of the District Court according to what we have quoted from him, he would have found nothing except the petition in bankruptcy, the schedules filed by the bankrupt, her prior examination, various proofs of debt, the ordinary bankruptcy proceedings, and the depositions of witnesses taken in the presence of the bankrupt, and subsequently cross-examination by her. While the introduction of these at the stage of the case to which the petition now before us refers would not be permissible according to the strict rules of the amendments to the Constitution in reference to criminal procedure, yet it would seem that they are of such authority, and arose under such circumstances, that they would come within the various expressions which we have cited from the Supreme Court, in that the use of them would have due regard to substantial rights, and even greater regard thereto than the affidavits which we have seen are sometimes used with reference to proceedings for contempts. Moreover, where a proceeding for contempt is on the heel of a strictly civil proceeding, like a decree in equity, or, in this case, like the order of the court of March 4, 1905, it would be almost an obstruction of justice if the court and parties could not refer back and make liberal use of what led up to the principal decree. But the conclusion we reach renders it unnecessary that we should dispose of all the questions submitted to us, and which we have discussed, or determine what the learned judge of the District Court meant by "the records of the District Court," etc., or whether he could properly make an examination, as stated by him, without exhibiting to the parties specifically what he regarded as material and admissible, so that the parties might make a direct issue with reference thereto if they saw fit. Examining all the proceedings which it is possible for the learned judge to have examined, we think we have stated the most significant facts that appear therefrom, and, although the case is a troublesome one, yet, taking it by and large, notwithstanding the combined judgment of both the learned judge of the District Court and the referee, which, of course, in accordance with the decisions, should have great weight on a question of fact like this, we find that there was in fact not sufficient evidence of the kind which the law requires on the exact issue pending here; that is to say, whether Mrs. Cole willfully refused to pay over moneys which it was necessary to show that she could pay over at the specific date to which the orders of the court properly related. Under the rules which touch petitions of this character, which permit only revision in matter of law, we could not interfere with the decree of the District Court of March, 1905, because, under the circumstances, we would not be justified in declaring that there was not sufficient to permit the District Court to pass on the question whether, as a result of collusion between Mrs. Cole and her husband, a mere debt according to the rules of civil procedure might not have been established against both her and her husband, or either of them; but when it comes to the proposition that, at any specific date or time to which the proceedings might refer,

Mrs. Cole had so completely under her control funds which she could command that her failure to command them was a willful contempt of the court, or when it comes to the issue that funds might not have been squandered, or even wrongfully disposed of by sending them to her husband's brother, or in some other way, there is such a failure of proof that even the determination of the District Court cannot supply it. With reference to the character of the proofs required for this purpose, we approve the language of Judge Shelby in *Samel v. Dodd*, 142 Fed. 68, 72, 73 C. C. A. 254, 259:

"It follows unquestionably that an order imprisoning a bankrupt for contempt for failure to obey a decree to pay money or surrender goods into court is erroneous as matter of law, where the bankrupt by sworn answer denies that he has the money or the goods, and it does not appear clearly and affirmatively from the record, notwithstanding his denials, that he has the power to comply with the decree."

As our conclusion can hardly become a precedent for any future case than can arise, we do not deem it profitable to enlarge in regard thereto. It is to be borne in mind that our determination deprives the trustee of no ordinary rights given him by the law. It merely shuts him out from the extraordinary proceeding which, in case of an error on the part of the court, would result in most unfortunate and painful injustice. In our previous decision in regard to this proceeding we found, as we have said, sufficient to enable us to sustain the District Court in entering a judgment against Mrs. Cole for the amount claimed by the trustee, and we leave him the ordinary remedies which the law gives for collecting a judgment from a debtor who is insolvent, or who claims to be so.

Let there be a decree reversing the decree of the District Court, with costs for the petitioner.

WM. CARAWAY & SONS V. KENTUCKY REFINING CO.

(Circuit Court of Appeals, Sixth Circuit. August 3, 1903.)

No. 1,790.

1. COURTS—FEDERAL COURTS—AMENDMENT OF PROCESS.

Where the declaration in an action in a federal court, a copy of which was served upon defendants with the summons, was properly entitled in the district and division of the district in which defendants resided, but through mistake the summons required them to appear in another division of the district, such fact was not ground for abatement of the suit; but the court had power in its discretion, under Rev. St. § 948 (U. S. Comp. St. 1901, p. 696), to permit an amendment of the summons and its reservice in the amended form.

2. SET-OFF AND COUNTERCLAIM—COUNTERCLAIM—ACTION ON CONTRACT.

To avoid a multiplicity of actions, a defendant, when sued on a contract, may file a counterclaim for damages arising out of the same transaction, even though it sounds in tort, as for fraud inducing one of the terms of the contract, and have it determined in the same suit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Set-off and Counterclaim, §§ 49, 50.]

3. DEPOSITIONS—ADMISSIBILITY IN EVIDENCE—PREMATURE TAKING.

Depositions relating to the merits of the case, taken before it was at issue, while a plea in abatement was pending, and at which defendants

did not appear, were premature, where no emergency existed, and, on proper objection, should have been excluded.

4. SALES—CONSTRUCTION OF CONTRACT—SALE BY SAMPLE.

A contract made by the acceptance of an offer "for one million first-class $\frac{3}{4}$ x $2\frac{1}{2}$ inch red oak staves, guaranteed to be equal to the sample staves received from you * * * on which the average width is $5\frac{1}{2}$ inches," did not require the delivery of staves $5\frac{1}{2}$ inches in width, but staves equal in dimensions to the samples, whether more or less than such width.

In Error to the Circuit Court of the United States for the Eastern Division of the Western District of Tennessee.

Thomas C. Rye, for plaintiff in error.

Wassel Randolph, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. This is a suit brought by the Kentucky Refining Company to recover damages for the breach of a contract which it alleges it made with the plaintiffs in error, Caraway, for the sale by them to the refining company of 1,000,000 oak staves intended to be used in barrel making. The suit was brought by the filing of a declaration on June 11, 1906, in the Circuit Court of the United States for the Eastern Division of the Western District of Tennessee, and at the same time filing a cost bond and suing out a summons which, together with copies of the declaration, was served upon the defendants, severally. The declaration, the cost bond, and the summons were each properly entitled "In the Circuit Court of the United States for the Eastern Division of the Western District of Tennessee," and the cost bond describes the suit as one commenced in said district "at Jackson," which is the place for holding the court in the Eastern division. But in the summons the defendants were required to appear before the court in the "Western district of Tennessee at Memphis," which is the place for holding the court in the Western division of the district. The defendants, who were residents of the Eastern division, filed a plea in abatement in the court for each division, that they resided in the Eastern division and were unlawfully required to appear at Memphis and not at Jackson, and that the court was without jurisdiction. Upon an affidavit of the clerk that the mistake arose from his inadvertently using a blank summons adapted to the Western division of the district, and upon inspection of the record, the court allowed a motion to amend the summons by making it read to appear "at Jackson," instead of "at Memphis," and thereupon the court ordered another summons to issue in the corrected form and be served upon the defendants, and overruled the plea in abatement.

Enough has been stated to present the first question raised, which is whether the court acquired jurisdiction of the parties defendant. They contend that inasmuch as they were not summoned to appear at Jackson in the Eastern division, but at Memphis in the Western division, the court sitting at the former place had no authority to amend the summons, or to issue what they term an alias summons; but the declaration and summons first served contained sufficient to show them that probably a mistake in the place to which the writ was returnable

was made, and it was a proper case in which to exercise the discretion of the court to amend conferred by the statute of jeofails, (Rev. St. § 948 [U. S. Comp. St. 1901, p. 695]), which provides as follows:

"Any Circuit or District Court may at any time, in its discretion, and upon such terms as it may deem just, allow an amendment of any process returnable to or before it, where the defect has not prejudiced and the amendment will not injure the party against whom such process issues."

This assignment of error is therefore overruled.

The defendants demurred to the declaration upon grounds which do not seem to require consideration, separately from that given herein to other questions. The demurrer was overruled. The defendants thereupon pleaded several defenses to the action, and in the fifth paragraph set up a counterclaim against the plaintiff founded on an averment that in the making of the contract sued on the plaintiff had fraudulently misled and deceived the defendants in respect to the dimensions of the samples of staves sent by the defendants to the plaintiff as the basis of the proposed agreement of purchase and sale.

Before proceeding further, it is necessary to state the circumstances and the nature of the contract. The plaintiffs on April 19, 1901, solicited an offer for red oak staves in the rough—that is, the material out of which the plaintiffs would form and finish the staves—and sent to them six samples of rough staves upon which they solicited an offer. On April 20, 1901, the plaintiff addressed to the defendant the following letter:

"Louisville, April 20, 1901.

"Messrs. W. Caraway & Sons, Big Sandy, Tenn.—Gentlemen: Your favor of April 19th received. In reply we beg to offer you \$18.00 per thousand for one million first-class $\frac{3}{4}$ x 35 $\frac{1}{2}$ inch red oak staves, guaranteed to be equal to the sample staves received from you on or about April 18, 1901, on which the average width is 5 $\frac{1}{2}$ inches delivered at our refinery, Louisville, Ky. All subject to our count and cull. Terms: Cash upon receipt. The Kentucky Refining Company to make no allowance for any cull staves and it to be understood that we are to cull and measure up 500 staves from each car and arrive at the average number of culls and width therefrom. We cannot use any cut-off staves, as we only have use for such as can be used in the manufacture of first-class oil barrels. All staves to be delivered within one (1) year from date. We regret that we cannot consistently give you the option of making the contract for 500,000 additional, as this would be entirely too indefinite and we must have a specified amount in order that we may make our calculations correctly. This letter is written in duplicate, so you will kindly sign both copies and return one to us, which will answer in place of a contract.

"Very respectfully,

Kentucky Refining Company,
R. C. Waggener, Treasurer."

On the 23d of the same month, the defendants accepted the offer and the contract was closed. Subsequently the parties proceeded with its execution, but the proportion of culls thrown out by the plaintiff was much larger than the defendants expected, and the plaintiff measured the staves which it accepted upon the basis of 5 $\frac{1}{2}$ inches in width of stave for one stave, and claimed that the contract required this. The defendants, supposing the samples which they had sent, but had not measured, were of the width of 5 $\frac{1}{2}$ inches, continued to deliver the staves by the carload; but not more than about one-quarter of the 1,000,000 staves were delivered within the year. The parties

went on, however, with the performance of the contract without any further stipulation limiting the time for the completion of the contract. Further disagreement occurred about the terms of the contract and about the due measurement of the staves and the proportion of culls thrown out. Finally, after 248,678 staves, according to the measurement of the plaintiff, had been received, the defendants ceased to ship the staves. Some correspondence ensued, in which the plaintiff called for more staves and inquired whether or not the defendants intended to ship any more. The defendants did not in terms refuse to make further shipments, but did not do so. Some time after the last-mentioned inquiry, the plaintiff rendered a bill for damages sustained on account of the failure to fulfill the contract. The fifth plea alleged: That the defendants were induced to accept the plaintiff's offer for the staves by the fraud and deceit of the plaintiff in representing that the sample staves measured $5\frac{1}{2}$ inches in width; that they had had no previous experience in the business, and did not know in what manner the dimensions of the staves were arrived at, but suppose that the plaintiff had measured the staves by a proper method and found them to meet the requirements of $5\frac{1}{2}$ inches in width; and that they were ignorant of the actual measurements of the samples, not having measured them. The plaintiff moved that this plea be stricken out. The court so ordered, and the defendants excepted. We think there was error in this, if the contract were to be construed as the court construed it—that is, that it stipulated the staves should average $5\frac{1}{2}$ inches in width—a matter to be considered later. The plea was somewhat informal, but it stated the substance of a good counterclaim. Defects in form should have been met by a demurrer, and the proper course was to have required the plaintiff to urge its objection by demurrer or replication. The ground on which the counsel for plaintiff supports the action of the court in this regard is that the defense was in the nature of a set-off, and that in such cases the action and the set-off must both be for liquidated damages, or at least must be founded on contract; whereas, in the case at bar, not only was the plaintiff's claim for unliquidated damages, but the defendants' sounded in tort. But there is a clear distinction between a set-off and a counterclaim, and it has long been settled that to avoid a multiplicity of actions a defendant, when sued upon a contract, may file a counterclaim, even though it be in the nature of a tort arising out of the same transaction, and have it determined in the same suit. But if the contract be construed, as we think it should be, as one for staves which in all respects would average with the samples sent, there would be no ground for the counterclaim, and this question of pleading would become immaterial.

While the plea in abatement was pending and undetermined, the plaintiff gave notice to take the depositions of several witnesses, and the depositions were taken; the defendants not appearing lest they should thereby be deemed to have waived their plea. The depositions related to the merits of the case, and not to any issue then presented. After the depositions had been filed, the defendants moved to suppress them upon the ground that they had been prematurely taken.

This motion was overruled, and an exception taken. Upon the trial they were offered in evidence. The defendants objected to the reading of them upon the grounds assigned for the motion to suppress them. The objection was overruled, the defendants excepted, and the depositions were read to the jury. In this also we think the court erred. The taking of the depositions was premature. No issues had been made to which they related, and no emergency was shown, such as the apprehended death of the witnesses or an expectation of their going abroad and being absent when the depositions could be properly taken or their attendance at the trial secured.

In giving its instruction to the jury, the court construed the contract, and said:

"I instruct you that by that contract the plaintiff bought, and the defendants sold to it 1,000,000 staves to be furnished within one year, and the staves were to be $85\frac{1}{2}$ inches long, $\frac{3}{4}$ inch thick and to average $5\frac{1}{2}$ inches wide, and equal to the sample received by the plaintiff from the defendants in quality."

The defendants excepted to this construction and contend that the contract was for 1,000,000 red oak staves of the length and thickness specified (which were the same as the actual dimensions of the samples) and of the width of the samples; in other words, 1,000,000 staves of the same kind of timber and of the same dimensions as the samples. There was evidence from which the jury might have found that the samples were of a less width than $5\frac{1}{2}$ inches. We are inclined to think that the latter should be held to be the true interpretation. If the offer of the plaintiff which was accepted by the defendants was intended to mean that the width of the staves would be unaffected by the width of the samples, there was no occasion to refer to them in that connection, and the natural order would have been to have simply stated the width in connection with the other dimensions. The construction of the court seems to ignore the samples as a factor in the contract. The construction the plaintiff insisted upon was neither that of the court nor that of the defendants, but was that the width of particular staves was not controlling, but that the width of all the staves accepted after throwing out the culls should be divided by $5\frac{1}{2}$ inches, and the result would be the count of staves received under the contract. We do not think this could be the natural interpretation of the language of the parties, and, if the plaintiff insisted upon it, as they seem to have done, it furnished fair ground for the defendants to refuse to deliver the staves upon that interpretation. The record shows that evidence was offered by defendants to show that, on an occasion when one of them went to the plaintiff's place of business at Louisville to get an understanding of the cause of their disagreement, an employé to whom, in answer to his complaint the representatives of the plaintiff in its office referred him, and who was an overseer or master in the yards of the plaintiff, stated how the plaintiff measured the staves received from defendants, which was to first run the staves through a jointing machine, and then measure their width as finished up; but this evidence was excluded on the objection of counsel for the plaintiff that the yardmaster was not the representative of the plaintiff, and the defendants excepted. The matter of this

statement was important. The contract did not contemplate the delivery of finished staves, nor a measurement to be made of them after the plaintiff had finished them; but the evidence leaves it doubtful whether the employé could be regarded as the representative of the company in making them. We think, however, that the fair inference is that the yardmaster had charge of the reception and measurement of the staves, and was referred to by those whom the defendant might reasonably suppose to have authority to make the reference. Moreover, the testimony of the plaintiff's manager, who was a witness for the plaintiff, tends to show that the statement made by the yardmaster was true.

Many other assignments of error (there are 49 in all) raise questions of minor importance, many of which may not arise upon a new trial, or may be presented in different form. We have endeavored to sift out and decide those which seem of controlling importance.

The judgment will be reversed, with costs, with a direction to award a new trial.

MURHARD ESTATE CO. v. PORTLAND & SEATTLE RY. CO.

(Circuit Court of Appeals, Ninth Circuit. July 6, 1908.)

No. 1,420.

1. EMINENT DOMAIN—CONDEMNATION PROCEEDINGS—NATURE AND MODE OF REVIEW.

A proceeding to take land for public use by condemnation is a suit at common law and is reviewable only by writ of error.

2. APPEAL AND ERROR—MATTERS REVIEWABLE—FINDINGS OF JURY.

Under the seventh constitutional amendment, the only modes by which a fact tried by a jury can be re-examined in any court of the United States are the granting of a new trial by the trial court, or by an appellate court for some error of law in the proceedings.

3. SAME—RULING ON MOTION FOR NEW TRIAL.

In the federal courts a motion for new trial is addressed to the discretion of the court, and its ruling thereon is not reviewable.

4. SAME—CONDEMNATION PROCEEDINGS—TRIAL—VIEW BY JURY.

Under Ballinger's Ann. Codes & St. Wash. § 4998 (Pierce's Code, § 612), which provides that a jury may be permitted to view the real property in litigation whenever in the opinion of the court it is proper, the refusal of the court to grant such permission in a condemnation suit is reviewable only for an abuse of discretion.

5. TRIAL—INSTRUCTIONS.

The refusal of instructions requested in a proceeding by a railroad company to condemn right of way, relating to the measure of compensation recoverable, held not error, in view of the charge given.

Appeal from and in Error to the Circuit Court of the United States for the Western District of Washington.

The Portland & Seattle Railway Company, defendant in error, brought suit in one of the courts of the state of Washington against the Murhard Estate Company, plaintiff in error, to condemn a right of way for railroad purposes across land owned by the Murhard Estate Company in Clark county, Wash. It is provided by the statutes of Washington (sections 5037-5040, Ballinger's Ann. Codes & St. [Pierce's Code, §§ 5102-5105]), in substance, that a corporation seeking to exercise the right of eminent domain shall file in the superior

court of the county where the land is located, a petition setting out the description of the land needed, the names of the owners, the object for which the land is sought, together with a prayer for a jury to determine the compensation to be made. It is also provided that the court shall first grant a hearing and determine whether the particular land sought to be appropriated is necessary for the enterprise. If the court finds in favor of the petitioner, a jury shall be summoned to assess and determine the amount to be awarded the landowner for taking or injuriously affecting his land, irrespective of any benefits arising by reason of the proposed improvement. The Murhard Estate Company, by proper proceedings, had the cause removed to the United States Circuit Court for the Western District of Washington, and thereafter, in the federal court, a trial was had before a jury, and an award of \$6,000 made in favor of the Murhard Estate Company. Judgment was thereafter entered in favor of the Murhard Estate Company for the sum of \$6,000, and awarding use of the premises involved to the railway company. The award not being satisfactory to the Murhard Estate Company, it seeks to bring the cause before this court by appeal and writ of error.

Milton W. Smith, for Murhard Estate Co.

James B. Kerr and George T. Reid, for Portland & Seattle Ry. Co.

Before GILBERT, Circuit Judge, and DE HAVEN and HUNT, District Judges.

HUNT, District Judge (after stating the facts as above). The appeal in the case will have to be dismissed. A proceeding to take land for public uses by condemnation is a suit at common law. This was decided in *Kohl et al. v. United States*, 91 U. S. 367, 23 L. Ed. 449, the court citing *Weston v. Charlston*, 2 Pet. 464, 7 L. Ed. 481. "The right of eminent domain," said Justice Strong, "always was a right at common law. It was not a right in equity, nor was it even the creature of a statute. The time of its exercise may have been prescribed by statute, but the right itself was superior to any statute."

In *Chicago, Burlington & Quincy Railroad Company v. Chicago*, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979, the Supreme Court, on writ of error, considered questions relating to the jurisdiction of that court to re-examine a final judgment of the Supreme Court of Illinois, where, in an eminent domain proceeding, under the laws of the state, a jury had fixed a compensation to be paid to certain individual owners of parcels of land sought to be taken. The Constitution of Illinois, like the Constitution of Washington, declared that no person should be deprived of his property without due process of law, and that private property shall not be taken or damaged for public use without just compensation. The court considered whether it could go behind the final judgment of the state court for the purpose of re-examining and weighing the evidence, and of determining whether, upon the facts, the jury erred in not returning a verdict in favor of the railroad company for a larger sum than was assessed. The question was discussed with reference to the seventh amendment to the Constitution, which provides that:

"In suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law,"

—and also with reference to section 709, Rev. St. (U. S. Comp. St. 1901, p. 575), which provides that the final judgment of the highest court of a state in certain instances may be re-examined by the Supreme Court upon writ of error. The court held that the last clause of the seventh amendment is not restricted in its application to suits at common law tried before juries in the courts of the United States, but “applies equally to a case tried before a jury in a state court and brought here by writ of error from the highest court of the state,” and refused to retry the facts tried by the jury. Nor’did the court regard it as material that the proceeding was one under the state’s power of eminent domain, for the jury, impaneled under the laws of the state, was regarded as a jury as ordained by the Constitution of the state in cases of the condemnation of private property for public use, and, having been a jury within the meaning of the seventh amendment to the Constitution of the United States, the facts tried by it could not be retried in any court of the United States otherwise than according to the rules of the common law. “The only modes known to the common law to re-examine such facts are the granting of a new trial by the court where the issue was tried, or to which the record is properly returnable, or the award of a venire facias de novo by an Appellate Court for some error of law which intervened in the proceeding.”

In the later case of Metropolitan Railroad Company v. District of Columbia, 195 U. S. 322, 25 Sup. Ct. 28, 49 L. Ed. 219, appeal and writ of error were taken to obtain a review of the action of the Court of Appeals of the District of Columbia, affirming an order of a lower court which sustained an award against the railroad company contained in the verdict of a jury, rendered in condemnation proceedings under an act of Congress. It was said:

“That a proceeding involving the exercise of the power of eminent domain is essentially but the assertion of a right legal in its nature has been determined. So, also, the decisions of this court have settled that a condemnation proceeding initiated before a court conducted under its supervision with power to review and set aside the verdict of the jury, and with the right of review vested in an appellate tribunal, is in its nature an action at law. *Kohl v. U. S.*, 91 U. S. 367 (23 L. Ed. 440); *Searl v. School District No. 2*, 124 U. S. 197 (8 Sup. Ct. 460, 31 L. Ed. 415); *Chappell v. United States*, 160 U. S. 499 (16 Sup. Ct. 397, 40 L. Ed. 510).”

The appeal was dismissed. Plaintiff in error could have moved for a new trial under section 726, Rev. St., which provides that the Circuit Courts of the United States have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law.

In *United States v. Train et al.* (C. C.) 12 Fed. 852, Justice Gray, sitting in the Circuit Court, held that section 914 of the Revised Statutes,¹ providing that the practice and procedure in the United States courts shall conform as near as may be to the practice and procedure existing at the time in like causes in the courts of record of the state within which said courts are held, does not apply to motions for a new trial; nor, “whatever rule may be prescribed by the statutes of the state upon that subject, does it control or affect the power of the federal courts under Judiciary Act Sept. 24, 1789, c. 20, 1 Stat. 83, § 17, and under section 726 of the Revised Statutes (U. S. Comp.

¹ U. S. Comp. St. 1901, p. 684.

St. 1901, p. 584), to grant or refuse a new trial at their discretion."

In *Indianapolis, etc., R. R. Co. v. Horst*, 93 U. S. 291, 23 L. Ed. 898, it was held that a motion for a new trial is addressed to the discretion of a court of the United States, and that such a motion is not a mere matter of proceeding or practice in the District and Circuit Courts, and is not therefore within the act of June 1, 1872, and cannot be affected by any state law upon the subject. This rule was followed in *Chateaugay Iron Company, Petitioner*, 128 U. S. 544, 9 Sup. Ct. 150, 32 L. Ed. 508, and in *Missouri Pacific Railway Company v. Chicago & Alton R. Co.*, 132 U. S. 191, 10 Sup. Ct. 65, 33 L. Ed. 309.

In *Wilson v. Everett*, 139 U. S. 616, 11 Sup. Ct. 664, 35 L. Ed. 286, the principal ground of complaint by the defendant was that the jury had no basis for finding a verdict in a certain sum; but the Supreme Court said that was a question to be reached only through a motion for a new trial, and that on writ of error no error committed in that respect by the jury could be reviewed.

In *Hughey v. Sullivan* (C. C.) 80 Fed. 72, Judge Hammond considered the effect of an order made by the Circuit Court of the United States granting a new trial in a case where damages assessed by the jury were inadequate. A statute of the state of Ohio forbade the granting of a new trial on account of the smallness of damages for an injury to the person or reputation of another. It was contended that the state statute was a rule of property; but the learned judge held that, as a practice act, it was not binding upon the federal court, not being within the purview of section 914, Rev. St., and he affirmed the rule laid down in *Mattox v. United States*, 146 U. S. 140, 13 Sup. Ct. 50, 36 L. Ed. 917, that the granting or denying of a new trial rests in the sound discretion of the court, and could not be made the subject of review by writ of error. *Foster's Federal Practice*, 885.

In *Capital Traction Co. v. Hof*, 174 U. S. 1, 19 Sup. Ct. 580, 43 L. Ed. 873, the court sustained the reasoning of Justice Nelson in *Justices v. Murray*, 9 Wall. 274, 19 L. Ed. 658, analyzing the statements of Justice Story in *Parsons v. Bedford*, 3 Pet. 433, 7 L. Ed. 732, saying:

"The ratio decidendi, the line of thought pervading and controlling the whole opinion, was that the seventh amendment undoubtedly prohibited any court of the United States from re-examining facts once tried by a jury in a lower court of the United States, and that there was no reason why the prohibition should not equally apply to a case brought into a court of the United States from a state court. 'In both instances, the cases are disposed of by the same system of laws and by the same judicial tribunal.'"

In the light of these authorities, it is clear that the right to move for a new trial existed, and that this court cannot re-examine the facts tried by the jury.

We are cited to the case of *United States v. Tennant et al.* (D. C.) 93 Fed. 613, wherein the District Court of the Northern Division of Washington had before it a proceeding for the condemnation of land necessary for fortifications. A verdict was rendered by a jury in favor of Mrs. Wood, the owner of certain tracts. The United States moved for a new trial on the ground that the compensation awarded

was excessive. The court, through Judge Hanford, presiding, decided that the statutes of the United States (1 Supp. Rev. St. U. S. [2d Ed.] pp. 601, 780), providing that proceedings for the condemnation of land required for fortifications should conform as near as may be to the practice in condemnation proceedings in the courts of the state, in which the land is situated, made it the duty of the federal court to deny the motion for a new trial and to leave to the appellate court the question as to the amount of damages because, under the eminent domain statutes of the state, not only was there no provision expressly conferring power upon the trial court to set aside the verdict of a jury or grant a new trial, but authority was expressly given to the appellate court to determine the amount of damages. The foundation, however, of the decision of the learned judge (who presided also at the trial of the present case), was that the statutes of the United States just referred to specially controlled in proceedings had by the government for the condemnation of land for fortifications, and, by their terms, prescribed that the practice in the courts of the state in which the land is situated should govern in the federal court. But we know of no such statute to be applied to ordinary condemnation proceedings, which, as we have shown, are governed by the usual practice pertaining to suits at law in the federal court.

Confining our consideration of the case to errors assigned, we find the first contention is that the court erred in refusing to permit the jury to view the premises in question. The statute of Washington (section 4998, Ballinger's Ann. Codes & St. [Pierce's Code, § 612]) provides that whenever, in the opinion of the court, it is proper that the jury should have a view of the real property in litigation, it may order the jury to be conducted in a body to view the premises. The question is left to the discretion of the trial court, and as the record before us shows that maps of the land were introduced, and that engineers testified in detail concerning the nature of the land, the location of the quarry involved, how it could and should be worked, the position of the railroad tracks, and of the road, we cannot say that there was any abuse of discretion in not sending the jury to see the premises. 2 Lewis on Eminent Domain, § 424; Wigmore on Evidence, § 1164.

One of the instructions asked by the Murhard Estate Company, and refused by the court, was to the effect that claimant was entitled to recover the market value of the property taken by the proposed right of way and for the depreciation in the market value of the remaining premises, and that the owner of the property was entitled to the difference in value of the entire land, as a whole, as it was before the taking, and as it was or would be after the construction of the improvement, irrespective of any benefits which might arise by reason of the construction of the railroad. The point made is that the court should have told the jury expressly that the recovery should be had by ascertaining the value "irrespective of any benefits which might arise by reason of the construction of the railroad." This is the rule as provided by the Constitution of Washington (art. 1, § 16), and by section 5641, Ballinger's Ann. Codes & St. (Pierce's Code, § 5106); but there is nothing in the record to show that the railroad company

attempted in any way to introduce any element of benefits, or that any benefits as excluded by the constitutional provision were testified to.

Taken as a whole, the instructions conveyed to the jury a clear understanding of the rules of law necessary to guide them upon the measure of compensation. After stating the obligation of the Portland & Seattle Railway Company to pay for the appropriation and use of the land in question, the court, among other things, charged that the value was to be the fair market value, and that the railway company must pay to the owner such sum as would compensate it for any damage done by building the railroad through the premises on account of the impairment of the value of the part of the land retained by the owner. The jury were also told, in substance, that in estimating the value of what an owner retains, and the money it receives for what is taken, the owner should be as well off in a pecuniary sense as if it had not been interfered with. They were told to consider the value of the land in the situation in which it was without the railroad, and in the situation in which it would be with the railroad constructed and in operation. Their attention was addressed to the consideration of the kind of land involved, the use that it might be put to, and to whatever might be found to be an element of damage, including any additional expense in the use of the property and the interfering with the use or loss of an opportunity to make it yield a profit. These matters were fairly and sufficiently covered by the court in a way to make it impossible to believe that the jury considered benefits in assessing just compensation.

The court also refused a requested instruction to the effect that, if the jury found that the property contained stone which was available and would be required for use in jetty construction or other purposes, they should take into consideration the quantity of stone, and that the fact that the property was not then in use for such purposes was not material. It is undoubtedly correct, generally speaking, that property is not to be deemed worthless because the owner allows it to go to waste, and is not to be regarded as valueless because the owner is unable to put it to any use, and that a capability of being made available for use gives it a market value which can be estimated. *Boom Co. v. Patterson*, 98 U. S. 403, 25 L. Ed. 206. But this principle was recognized by the court by that portion of the charge which stated that the principal value of a cliff on the north side was the rock "that may be disposed of at a price." The court also said to the jury:

"You are to judge of all of the circumstances shown by the testimony, to determine whether that part of the claimant's property on the north side will be damaged by the location of the railroad, and, if so, consider all of the uses it may be put to, and determine what would be a reasonable assessment for the damage."

Another request, which was refused by the court, stated generally that the county through which the railroad passed did not own the land covered by the county road, but that the owner of the land through which the road ran owned the land in the county road subject to an easement for the public, and that the owner of the land could leave his wagon in the road or leave a pile of stone in the road as long as

such things did not materially interfere with the right of the public to travel safely. This was a statement of abstract propositions without such apparent relation to the case as to enable us to say that the court erred in not adopting it.

By the fourth and fifth requested instructions which were refused, plaintiff in error asked the court to charge, in effect, that the owner of the land involved could blast stone and permit the same to be thrown or roll down upon the county road, provided precautions were taken to prevent accident, and to remove quickly such stone as might obstruct travel; but that a railroad company has absolute control of the land within the limits of its right of way and, upon condemnation, can erect buildings on its right of way, and can take out rock and earth within its right of way at its convenience, and that in this case the owner of the quarry would have no right to blast stone so as to throw it upon the railroad right of way, and that, if stone were blasted and thrown upon the right of way, the railroad company could sue for damages and for an injunction to prevent the continuance of such blasting. We think the instruction was properly refused, because it was not material to the case that the court should draw any distinction between possible right of the quarry owner to throw stones upon the county road situate between the railroad and cliff, and the right such an owner had to throw stones upon the right of way of the railroad company. The only right that was material to be determined in the case was that of the railroad company toward the plaintiff in error, and upon that issue the charge was, in substance: That, in quarrying rock and transporting it, an owner must so use his property as not to injure others; that prudence and care would be required in operating the quarry so as not to injure people who might be traveling on the railroad, or to injure the property of the railroad company in using an elevated tramway the quarry owner had been given a right to use; and that the jury should consider whether the quarry owner was damaged by having the railroad there by reason of any additional expense or inconvenience or impairment in the value of the property. A proper standard of care was sufficiently well laid down to enable the jury to consider the restrictions upon the use of the property and to weigh the evidence upon the point in considering damages.

These views dispose of the questions of law, of which, upon the record, we can take cognizance, and which we think are of sufficient importance to require notice.

Being of the opinion that no error was committed, the judgment is affirmed.

WARDEN v. HINDS.

(Circuit Court of Appeals, Fourth Circuit. July 17, 1908.)

No. 788.

1. MASTER AND SERVANT—CONTRACT OF EMPLOYMENT—DURATION OF EMPLOYMENT—"HIRING AT WILL."

A contract of employment, which states no term, but merely provides that the employé shall be paid a stated sum per week, constitutes a hiring at will, which may be terminated at any time by either party without notice.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 19.]

2. WILLS—CONTRACT TO MAKE REQUEST—ACTION FOR BREACH.

An action at law to recover damages for alleged breach of a contract to make a bequest of a certain sum to plaintiff by will cannot be maintained during the lifetime of the proposed testator.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 179.]

In Error to the Circuit Court of the United States for the Eastern District of Virginia, at Richmond.

W. D. Carter and Robert H. Talley, for plaintiff in error.

Scott & Buchanan, for defendant in error.

Before PRITCHARD, Circuit Judge, and BOYD and DAYTON, District Judges.

BOYD, District Judge. In this case, Nellie R. Hinds, the defendant in error, who was the plaintiff below, and who will hereafter be called the plaintiff, brought a suit at law in the Circuit Court of the United States for the Eastern District of Virginia, at Richmond, against Henry Warden, the plaintiff in error, who was the defendant below, and who will hereafter be called the defendant. The plaintiff filed her declaration in trespass on the case in assumpsit and sought to recover of the defendant damages in the sum of \$15,000 for breach of contract of employment. The plaintiff alleged, in substance: That in the month of April, 1904, the defendant, who was then 48 years of age, and who was engaged in business in the city of Fredericksburg, Va., desired the services of the plaintiff as an amanuensis, stenographer, and typewriter, and induced the plaintiff to give up a lucrative business in the city of Philadelphia and accept employment with the defendant at the compensation of \$25 per week, beginning on the 18th day of April, 1904; that said employment was to continue as long as the defendant lived, and at his death there was to be paid from his estate to the plaintiff the sum of \$5,000. The written evidence of the contract, as set out in the record, is the following letter:

"Fredericksburg, Va., 4, 17, 1904.

"Miss N. R. Hinds, No. 667 Bourse Building, Phila.—Dear Madam: I wish to conclude the arrangement we talked about on Friday, and you can consider yourself in my employ from the moment you receive this letter. Your salary of twenty-five dollars per week will begin from to-morrow and you are to report here at the earliest possible moment. In consideration of the fact that, in entering my employ, you are giving up an established business of greater or less value (its value to you being indicated by the salary I have

agreed to give you) it is my intention to add a codicil to my will bequeathing to you the sum of five thousand dollars, this to recompense you for the above business and to enable you to re-establish yourself, should I die within the next few years. It is my intention, even should I live to a good old age, that this bequest shall stand and be in force.

"Hoping that you will be able to report for work in a very few days, I am
Yours sincerely,
[Signed] Henry Warden."

The plaintiff entered the employment of defendant under this contract and continued in his service until the 16th day of April, 1905, when defendant discharged her, as she alleges, without cause, and she brought this suit. The defendant, through his counsel, filed his plea of nonassumpsit in the usual form and thus raised the issue. The cause was tried at Richmond, in said district, beginning on the 16th day of October, 1907, and a verdict rendered for plaintiff in the sum of \$2,478.05. Judgment was accordingly entered thereon by the court, and defendant sued out his writ of error from this court. At the close of the testimony, the defendant requested the court to charge the jury that plaintiff was not entitled to recover and to direct a verdict for the defendant. This request was refused, and the defendant excepted. The court, in the instructions to the jury, held that the contract contained in the letter of April 17, 1904, set out in the declaration, was a binding contract consummated between the parties and constituted a general hiring to do and perform the services contracted for; that it was a hiring without fixing the duration of service and was presumed to be a hiring for a year, one revolution of the seasons. The defendant's counsel duly excepted to this instruction. The court further instructed the jury:

"You are further charged that if you believe from the evidence that the defendant wrote the plaintiff the letter of 17th of April, 1904, which letter concluded the contract of employment between them, and one of the provisions of which is as follows: 'In consideration of the fact that in entering my employ you are giving up an established business of greater or less value (its value to you being indicated by the salary I have agreed to give you) it is my intention to add a codicil to my will bequeathing to you the sum of \$5,000, this to recompense you for the above business, and to enable you to re-establish yourself should I die within the next few years. It is my intention, however, even should I live to a good old age, that this bequest shall stand and be in force'—and that the plaintiff, in accepting the said contract and entering upon said employment, gave up an established business in the city of Philadelphia, such as was mentioned in the provisions of the said contract, and moved to the city of Fredericksburg, and there entered upon the service called for in said letter, and faithfully performed all of the duties required of her in the premises, and that the defendant thereafter and without justifiable cause discharged the plaintiff from said employment, and repudiated the arrangement to make provision for her as thus contemplated, by said codicil, then the undertaking to make such provision by adding a codicil to his will constituted a binding contract upon him properly enforceable in equity against his estate, or for the breach of which damages can be recovered at law against him in his lifetime."

To this instruction defendant's counsel then and there duly excepted. The defendant's counsel requested, among others, the following instructions, both of which were refused by the court, and to the refusal to give each of which the defendant's counsel duly excepted:

"The jury is charged that under the evidence in this case there is no definite period fixed for the duration of the employment of the plaintiff by the

defendant, and therefore the same is merely a contract at will, terminable by either party at any time without notice, and no liability rests upon the defendant to pay the plaintiff any salary subsequent to her discharge on July 15, 1905.

"The court charges the jury that the expression by the defendant in this case to the plaintiff of an intention to add a codicil to his will bequeathing money to the plaintiff, though conclusively proven and subsequently repudiated by the defendant, does not render the defendant liable in any amount whatever to the plaintiff in damages, and no damages can therefore be awarded the plaintiff to compensate her for any alleged loss growing out of the failure, or refusal of the defendant to execute such codicil."

The jury returned a verdict in favor of the plaintiff against the defendant, assessing plaintiff's damages in the sum of \$2,478.05, and for this amount the court rendered judgment, with interest on the amount of \$2,478.05, from the date of the trial, and for costs. In the course of the trial there were other exceptions than those above stated, taken by defendant's counsel; but the exceptions presented by the instructions which the court gave and the exceptions based upon the instructions refused are those alone which we deem it necessary to consider in order to dispose of this case.

We do not think that the terms of employment, as set forth in the letter written by defendant to plaintiff on the 17th of April, 1904, can be construed into a contract from year to year. The duration of employment is altogether indefinite. The compensation was \$25 per week, and there was no fixed period for plaintiff's service to the defendant. Under these circumstances, it is our conclusion that the contract should be construed as a hiring at will, which could be ended at any time by either party without notice. We do not think it necessary to cite authorities to sustain this view of the contract, so far as the duration of employment is concerned, further than to refer to a case recently decided by this court, *The Pokanoket*, 156 Fed. 241, 84 C. C. A. 49. We think therefore there was error in the instruction that, under the contract contained in the letter above referred to "it was a hiring without fixing the duration of service and was presumed to be a hiring for the year, one revolution of the seasons," and there was also error in the refusal of the court to give the instruction requested by defendant's counsel that "the jury is charged that under the evidence in this case there is no definite period fixed for the duration of employment of plaintiff by the defendant and therefore the same is merely a contract at will, terminable by either party at any time, without notice, and no liability rests upon the defendant to pay the plaintiff any salary subsequent to her discharge on July 15, 1905." This brings us to the consideration of that part of the letter of the defendant in which he expressed his intention to make a codicil to his will bequeathing to the plaintiff the sum of \$5,000 to recompense her for her business (established in Philadelphia) and to enable her to re-establish herself, and so forth.

The grounds upon which the plaintiff bases her right to sue for damages for defendant's failure in respect to the \$5,000 which he had promised to bequeath to her by his will are that the promise was not a nudum pactum, or a mere gratuity, but was a valid contract founded on a valuable, or at least a sufficient, consideration, in that she, in order

to enter the service of defendant, gave up an established business of more or less value in the city of Philadelphia, and she alleges in her declaration that she had established a lucrative business as a stenographer and typewriter in the city of Philadelphia, which was then and there worth to her a large sum, and so forth, and that the defendant, in discharging her without cause, committed a breach of this contract, and that thereby a cause of action accrued to her. We do not deem it necessary in the case before us to pass upon the merits of this contention of the plaintiff. The question for us is whether the plaintiff, if her position be tenable, has a present cause of action which can be maintained in a court of law.

The trial judge held that such cause of action existed, and instructed the jury, as before stated, that if they believed from the evidence (which was the written contract contained in defendant's letter of April 17, 1904, set out hereinbefore) that the plaintiff in accepting the said contract and entering upon such employment gave up an established business in the city of Philadelphia, such as was mentioned in the provisions of said contract, and moved to the city of Fredericksburg, and there entered upon the service called for in said letter, and faithfully performed all the duties required of her in the premises, and that defendant thereafter and without justifiable cause discharged the plaintiff from said employment and repudiated the arrangement to make provision for her as thus contemplated by the said codicil, then the undertaking to make such provision by adding a codicil to his will constituted a binding contract upon him properly enforceable in equity against his estate or for breach of which damages could be recovered in law against him in his lifetime.

The verdict of the jury as to the present value of the \$5,000 which was to be provided for plaintiff in the codicil to defendant's will was based upon an estimate made by an actuary, giving the age of the defendant at 47 years, and counting the net value of \$5,000 insurance on a life at that age to be \$2,378.05. This latter amount, with \$100 added by the jury, makes the whole amount of the verdict. Now, assuming that the expressed intention of the defendant, as set out in his letter to the plaintiff, to make a codicil to his will and bequeath her the sum of \$5,000, was a contract based upon sufficient consideration to support it, when could a breach of it occur such as to entitle the plaintiff to bring her suit? All the authorities agree that one may, for a valuable consideration, and in some instances a good consideration, renounce the absolute power to dispose of his estate at pleasure and bind himself by a contract to dispose of his property by will to a particular person, and that such contract may be enforced in the courts after his decease, either by an action for a breach against the personal representative or in the proper case by a bill in the nature of specific performance against his heirs, devisees, or personal representative. *Johnson v. Hubbell*, 10 N. J. Eq. 332, 66 Am. Dec. 773. However, we have been unable to find any case in which the right to recover damages in an action at law for an alleged breach of such contract during the life of the testator has been upheld. Indeed, the principle generally declared is that such contracts are susceptible of enforcement only after the death of the testator by bill in equity for specific performance,

and it is well said in the case of *Bolman v. Overall*, 80 Ala. 451, 2 South. 624, 60 Am. Rep. 107:

"The principle upon which courts of equity undertake to enforce the execution of such agreements is referable to its jurisdiction over the subject of specific performance. It is not claimed, of course, that any court has the power to compel a person to execute a last will and testament, carrying out his agreement to bequeath a legacy, for this can be done only in the lifetime of the testator, and no breach of the agreement can be assumed so long as he lives, and after his death he is no longer capable of doing the thing agreed to be done. There can be no doubt but that a person may make a valid agreement binding himself legally to make a particular disposition of his property by last will and testament. The law permits a man to dispose of his property at his pleasure, and no good reason can be assigned why he may not make a legal agreement to dispose of his property to a particular individual or for a particular purpose as well by will as by a conveyance to be made at some specific future period or upon the happening of some future event. It may be unwise for a man in this way to embarrass himself as to the final disposition of his property, but he is the disposer by law of his own fortune and the sole and best judge as to the time and manner of disposing of it. A court of equity will decree the specific performance of such an agreement upon the recognized principles by which it is governed in the exercise of this branch of its jurisdiction."

In the case of *Rivers v. Rivers, Executors*, 3 Desaus. (S. C.) 195, 4 Am. Dec. 609, the court, in sustaining the propriety of a court of equity recognizing and enforcing such an agreement, very properly remarked:

"A man might renounce every power, benefit, or right which the law gives him, and he will be bound by his agreement to do so, provided the agreement be entered into fairly, without surprise, imposition, or fraud, and that it be reasonable and moral."

The case of *Johnson v. Hubbell*, *supra*, which is a leading case upon the subject we have under discussion, and in which, we may say, almost every view of the question is presented, was a bill in equity filed by the complainant to have specific performance as to the disposition of property which his father had agreed to make by will and failed to do so. The facts are substantially these: Hannah Johnson, the mother of the complainant, at the time of her marriage with complainant's father, Robert Johnson, was possessed of large and valuable property. During the coverture she joined with her husband in the sale of a part of her property for a consideration of \$20,000, which was received by the husband and expended in the improvement of property which he held in his own right. The mother died, leaving the father and two children, the complainant, and a sister surviving, and at the time of her death she left real estate of the value of about \$80,000. By the laws of New Jersey the complainant was entitled by inheritance to two-thirds and his sister to one-third of the estate of their mother, and the father, Robert Johnson, was tenant by the courtesy of his deceased wife's real property. The father was also the owner of a large estate in his own right, and in this situation he entered into an agreement with his son, the complainant, by which the son conveyed to his sister an equal interest in the mother's property, the father agreeing to make them equal in his will; otherwise upon the refusal of the son to divide equally the mother's estate, the father declared

his purpose to leave the larger portion of his estate to the daughter. The sister was present and concurred in this arrangement, and, as before stated, the complainant conveyed to her one-half of the deceased mother's property. The father died leaving a will by which he entirely cut off and excluded the complainant from all right and participation in his estate. The court held that this contract was enforceable in equity, that it was founded upon sufficient consideration, and that, the father having failed to provide in the will for the son as he had agreed to do, in consideration of the fact that the son was parting with property to which he was legally entitled, the court would decree specific performance according to the terms of the original agreement, and, to quote the language of the opinion:

"In this case the son performed his part of the agreement. He paid a valuable consideration and parted with his property."

But, as will be seen, no cause of action accrued to the plaintiff until the death of his father, because it was not known until that event that the father would disregard his part of the agreement, and it is said in one of the notes to the case:

"It is obvious that an agreement to make a certain disposition of property by devise is one which, strictly speaking, will not support an action in the party's lifetime, because any testamentary instrument is by its nature revocable. No one can tell what it will be until the maker dies, and he has his whole life in which to perform the covenants."

Numerous authorities are cited to support this principle.

As before suggested, we do not consider it necessary at this juncture to pass upon the validity of plaintiff's claim as respects the provision to be made for her by a codicil to defendant's will; but, however that may be, it is our opinion that whatever her right is, and whether her remedy be by action at law for breach of the contract or by bill in equity for specific performance, her cause of action does not accrue until the defendant's death, because, if defendant's letter can be construed into an enforceable contract to bequeath to plaintiff \$5,000 by a codicil to his will, there can be no breach whilst the defendant lives, for to the very last moment of his life he may carry out his expressed intention. It is true there is authority for the position that in some instances under an agreement to bequeath property the person to whom the bequest is to be made may in the lifetime of the proposed testator, in order to prevent the loss of the property through extravagance or other misconduct of the latter, file a bill quia timet on the equity side of the docket to have such testator declared a trustee to the extent of the claim; but the elementary writers and the judicial decisions all seem to be in harmony in support of the proposition that upon an agreement to make a will an action at law does not lie during the lifetime of the proposed testator. It would seem that the fact that bills quia timet based upon contracts for the disposition of property by will are entertained, as stated above, in the lifetime of the proposed testator, gives additional strength to the position that an action to enforce the contract itself cannot be maintained until after his death.

For the reasons given we are of the opinion that there is error in the judgment of the Circuit Court below, and that the same should be reversed.

Reversed.

RICH v. VICTORIA COPPER MINING CO.

VICTORIA COPPER MINING CO. v. RICH.

(Circuit Court of Appeals, Sixth Circuit. June 25, 1908.)

Nos. 1,792, 1,793.

EJECTMENT—JUDGMENT FOR VALUE OF PREMISES—MICHIGAN STATUTE.

3 Comp. Laws Mich. §§ 10,996, 10,997, provide that in an action of ejectment, where defendant makes claim for improvements, plaintiff may also have submitted to the jury the question of the value of the premises without improvements, and if no waste had been committed, and if he recovers, may at his election abandon the premises to defendant, in which case "judgment shall be rendered against the defendant for the sum so estimated by the jury, with costs of suit, which judgment shall be a lien upon the premises in question, and execution may issue on such judgment and be levied upon said premises, and the same may be sold by virtue thereof, in the same manner and with like effect as any other real estate of the defendant." Held that, where such a judgment was rendered, plaintiff was entitled to the issuance of an execution at any time, notwithstanding the fact that by section 10,981 defendant was entitled as matter of right to a new trial at any time within three years, but that such judgment was not a general judgment against defendant, and the execution could only be levied on the premises in controversy in the action.

In Error to the Circuit Court of the United States for the Western District of Michigan.

See 147 Fed. 380, 77 C. C. A. 558.

The following is the opinion of KNAPPEN, District Judge, in the court below:

The defendant's motion asks: First, that execution upon the judgment for the value of the land, under 3 Comp. Laws Mich. 1897, § 10,997, be stayed until the expiration of the three-year period within which defendant is entitled to a new trial; and, second, that proceedings under the execution, so far as the judgment for value is concerned, be limited to a sale of the premises in question.

1. The conclusion reached is that execution is issuable immediately upon the entry of judgment, notwithstanding the statutory provision for a new trial.

The statute contains no express limitation of the right to immediate issue. After providing for the rendering of judgment, it provides that execution may issue thereon and be levied upon such premises, and the same sold by virtue thereof. 3 Comp. Laws Mich. 1897, § 10,997. The provision for judgment for the value of the land, without improvements, is part of the general scheme of the statutes pertaining to ejectment. Where plaintiff prevails, and the defendant does not ask to have the value of his improvements determined, or where, in the case of such request, the plaintiff elects to pay the estimated value of the improvements, writ of possession is provided. 3 Comp. Laws Mich. 1897, § 10,978; 1 Stevens' Michigan Practice, pp. 388-399. Otherwise plaintiff is entitled to execution for the value of the land without improvements or waste. No reason is apparent for inferring a difference in legislative intent, except as such intent is shown by a difference in statutory language.

There is no material difference in the language of the two statutes cited. The former reads: "Execution may issue on such judgment," etc. And the latter: "The plaintiff recovering such judgment shall be entitled to a writ of possession." Neither statute contains an express provision for the immediate issue of writ. It has, however, been held that the statutory right to a new trial does not militate against the right of immediate writ of possession. *Dawson v. Chippewa Circuit Judge*, 127 Mich. 323, 86 N. W. 801.

A similar construction of the provision for execution upon judgment for value would seem natural. The fact that another statute (section 10,986) expressly provides that possession taken under the writ, by virtue of any recovery in ejectment, shall not be affected by any vacating of judgment, does not, to my mind, indicate a distinction between the writ of execution and the writ of possession, for, however much such provision might have seemed necessary in a case where possession had been transferred under the writ, no necessity is apparent in the case of execution sale. Moreover, the Supreme Court of Michigan has seemingly construed the statute in question as permitting a sale under execution at any time after judgment, without reference to the right of redemption; the purchaser under the execution sale simply taking title subject to the right of the defendant to defeat it by taking a new trial at any time within the statutory three years. *Cook v. Circuit Judge*, 70 Mich. 94, 37 N. W. 906.

This construction of the decision of the Supreme Court in the case last cited is adopted by Mr. Stevens. 1 Stevens' Michigan Practice, § 204, p. 414. This seems to be the view taken in *Newell on Ejectment*, p. 824. Such construction does not nullify the statute (section 10,981) providing for a new trial. The right remains unaffected by the sale, from the fact that the purchaser takes his title subject to be defeated upon defendant's election to take a new trial. In the absence of legislative provision, the fact that competition is lessened on account of the liability of the sale to be set aside furnishes no sufficient reason for a different construction than that adopted.

Indeed, the evil of lack of competition, where no property is liable to be sold except the premises in question, is not greater than always exists in cases of mortgage foreclosure and execution sale generally, which are in this state always subject to be defeated by the exercise of the right of redemption. While this court doubtless possesses the power, independently of statute, to stay execution in a proper case, yet the fact that the only statutory provision for staying execution is limited to cases of application for a new trial is not without significance. 3 Comp. Laws Mich. 1897, § 10,983.

There is no apparent force in the contention that the granting of immediate execution would interfere with the assertion of the statutory lien, enforceable in equity, for the amount paid for the tax titles held invalid. Whatever lien the defendant may have, on account of his tax titles, would seem to be unaffected by a present sale under execution. If upon a new trial the defendant prevails, the lien becomes unimportant. If upon such new trial the plaintiff again prevails, the status of the lien would seem to be then the same as now.

2. Should the execution run against the defendant's property generally?

3 Comp. Laws Mich. 1897, § 10,995, 10,996 provide (in substance sufficient for the purposes of this inquiry) that the jury trying an action of ejectment shall, if the finding be for the plaintiff, determine upon defendant's request the increased value of the premises by reason of betterments made thereon by the defendant during an actual and peaceable occupation, and upon plaintiff's counter request (which can be made only when defendant makes the request above mentioned) the value of the premises at the time of the trial, in case defendant had made no betterments and committed no waste. Section 10,907 provides for an absolute right of election by the plaintiff, within a specified time, to abandon the premises to defendant at the value estimated by the jury, and have judgment entered thereon "against the defendant for * * * the sum so estimated by the jury, with costs of suit, which judgment shall be a lien upon the premises in question, and execution may issue on such judgment and be levied upon such premises, and the same may be sold by virtue thereof, in the same manner and with like effect as any other real estate of the defendant." Section 10,998 requires the plaintiff (in case of failure to elect to so abandon the premises to defendant) to pay to the clerk

of the court, for the use of the defendant, within a specified time, the sum assessed for betterments, with interest thereon, and that until such sum is paid no writ of possession shall issue upon the judgment. Failure to make such payment is made an abandonment of plaintiff's claim of title to the premises.

The provisions cited extend to cases of undivided interests in lands. The jury found plaintiff owner in fee of an undivided 8/20 of the premises, found the value of the entire land \$25,600, without betterments or waste, and that the betterments made by defendant had not increased the value beyond the waste committed. The plaintiff elected to abandon the land to defendant, and judgment was entered that the "plaintiff do recover against the said defendant the sum of \$9,647.70, being 8/20 of the value of said premises so estimated by said jury, together with his costs and charges by him about his suit, in this behalf expended, to be taxed, and that this judgment be a lien on said premises, and that said plaintiff have execution for the collection thereof, according to the force, form, and effect of the statute in such case made and provided."

The question is whether, in addition to the remedy by enforcement of lien on the premises, execution can run against the defendant's property generally, both real and personal; or whether plaintiff is limited in the satisfaction of his judgment to an enforcement of his lien under execution upon the defendant's interest in the premises.

At common law a defendant against whom recovery was had in ejectment could recover nothing on account of betterments. No matter how peaceable his possession, or how great his good faith, the improvements passed to the plaintiff by his recovery in ejectment. A recovery of the kind of judgment here in question is purely the result of statutory provision, growing out of the practice in equity, and provisions of the civil law framed for the protection of a good-faith occupant. *Sedgwick & Wait on Trial of Title to Land*, §§ 690-693; *Burkle v. Circuit Judge*, 42 Mich. 513, 4 N. W. 192; *Lemerand v. Railroad Co.*, 117 Mich. at page 814, 75 N. W. at page 763.

The Supreme Court of Michigan has, in at least two cases, applied the provisions of the statute in question to suits in equity brought to restrain proceedings in ejectment. *Sherman v. Cook Co.*, 98 Mich. 61, 57 N. W. 23; *McKenzie v. A. P. Cook Co.*, 113 Mich. 452, 71 N. W. 363. The election to abandon the land to defendant, and to have judgment and lien for its value, is given plaintiff only when the defendant avails himself of the statutory provision for the protection of his betterments. The provision is in derogation of the common law. It is the general rule that where a right of recovery is purely statutory, and a remedy is expressly given by the statute, any other remedy than that so given will be deemed excluded unless the contrary appears expressly or by fair and reasonable implication from its nature, or purpose, or the language employed. *Black on Interpretation of Laws*, § 99. As said by Mr. Justice Campbell in *Chapman v. Lumber & Salt Company*, 20 Mich. at page 366: "It is certainly an elementary principle that, where a statute creates a right and accompanies it with a specific remedy, it excludes other remedies." In *Dewey v. Goodenough*, 56 Barb. (N. Y.) at page 58, it is said: "As a general rule, where a statute is intended to abrogate a common-law right, or to confer a right not vested by the common law, it will be so construed as not to go beyond the letter, and not even to that extent, unless it appears to be according to the spirit and intent of the act." In *Miller v. Clark*, 60 Mich. at page 165, 26 N. W. at pages 872, 873, the Supreme Court of Michigan, speaking of the statute in question, said: "The only right and authority for the entry of any judgment of this character is derived from this statute, and it would seem, owing to its extraordinary provisions, that it ought to be strictly construed as against the plaintiff."

The precise question here raised has not, so far as appears from briefs of counsel or the examination made by the court, been expressly answered by the decisions of courts of states other than Michigan, the provisions of whose statutes upon this general subject vary greatly. The Supreme Court of Michigan has not in express terms passed upon the identical question here raised, although it is believed it has done so by implication. Except so far as the statute may have been so impliedly construed, its construction must be de-

terminated by reference to the specific language of the statutory provision in question, and the general rules of construction.

It is urged that the provision of the statute that "judgment shall be entered against the defendant," is an explicit declaration that a personal judgment is intended, and that this idea of personal judgment is further necessarily involved in the provision that the premises affected by the lien may be sold under the execution "in the same manner and with the like effect as any other real estate of the defendant."

The language "judgment shall be rendered against the defendant" is not, to my mind, conclusive of an intent to make the judgment a personal one. The spirit and intent of the statute, which is primarily for the protection of the defendant, and not of the plaintiff, is not such as to justify from this language alone a necessary inference of an intent to create a personal liability against the defendant, except so far as that liability is to be satisfied by the enforcement of the lien provided. If such further personal liability, so markedly in derogation of the common law, were intended, it would seem natural to have so provided by express words. A judgment in form against the defendant, to be satisfied only by enforcing the lien thereunder, is not unnatural, as the lien created by the judgment is only upon the interest of those who are bound by the judgment as parties or privies. *Platz v. Englehardt*, 138 Mich. at page 491, 101 N. W. 849.

The provision that the premises be sold under the execution "in the same manner and with the like effect as any other real estate of the defendant" is not, to my mind, equivalent to a declaration that any other real estate of the defendant may be likewise sold under the execution. There is no such express declaration. Such construction, moreover, would produce the peculiar result of excluding by natural (though not, perhaps, necessary) implication the liability to execution of defendant's goods and chattels, which under executions upon personal judgments are usually required to be exhausted before sale of real estate is permitted. To my mind, the natural interpretation of the language of the statute is this: It gives a judgment for the value of the premises and makes this judgment a lien upon the defendant's interest therein (judgments not being generally in Michigan liens upon either real or personal property). It provides for enforcing this lien by writ of execution under which levy is to be made and sale of the defendant's interest in the premises had; the remedy provided for collecting judgment by way of enforcing this lien being exclusive. The provision that the sale under the execution to enforce the lien shall be had "in the same manner and with the like effect as any other real estate of the defendant" is interpreted as meaning "in the same manner and with the like effect as real estate of defendants generally under execution sales." In other words, the statutes pertaining to sales of real estate on execution on judgments generally are made to apply to sales under execution for the enforcement of the adjudged statutory lien. Such construction is not inconsistent with the letter of the statute. It is in direct harmony with its spirit. It is not inconsistent with the characterization above quoted of the provisions of this statutory judgment, as "extraordinary." It must be remembered that under this statute the plaintiff is given the absolute right of election, whether to pay for the defendant's improvements or to sell the defendant's interest in the land for the recovery of the value of the plaintiff's interest therein. The defendant is given no choice whatever, nor has he any claim upon the land for his betterments, except such as is subject to be cut off by plaintiff's election to enforce his statutory lien for the value of the land. The defendant cannot even enforce the payment of its award for betterments against the plaintiff personally, for, notwithstanding the express provision that the plaintiff in default of election to abandon the premises "shall pay to the clerk of the court for the use of the defendant such sum as shall have been assessed for buildings and improvements," it is held that no personal recovery is permitted; defendant's only safeguard being the prohibition of the issue of writ of possession until such payment is made. *Lemerand v. Railroad Co.*, 117 Mich. at page 314, 75 N. W. 763; *Guild v. Kidd*, 48 Mich. 309, 12 N. W. 158; 1 *Stevens' Mich. Practice*, page 388.

The construction so adopted of the statute here in question is thus in

harmony with the construction of the counter provision for the protection of the defendant just referred to. It is in harmony with the characterization of this judgment as "a special money judgment and constructive eviction." Long v. Sinclair, 33 Mich. 91. It is in harmony with the form given in the practice books, which is followed in the judgment entry in question. 1 Stevens' Mich. Practice, form 135, page 434. It is not inconsistent with the fact that in several cases (including Rawson v. Parsons, 6 Mich. 400; Miller v. Clark, 60 Mich. 162, 26 N. W. 872; Bertram v. Cook, 44 Mich. 396, 6 N. W. 868; s. c. 86 Mich. 358, 49 N. W. 42; Platz v. Englehardt, 138 Mich. 485, 101 N. W. 849; Sherman v. Cook, 98 Mich. 61, 57 N. W. 23) which have been before the Supreme Court, where judgments in substantially the form above given have been rendered, no criticism has been made upon the form of the judgment. In none of these cases does any question seem to have been raised of the enforcement of the judgment otherwise than by execution for the satisfaction of the statutory lien. The construction here adopted is likewise in harmony with the decree entered by the Supreme Court of Michigan in Mackenzie v. Cook, supra, which provided that: "If the A. P. Cook Co., Ltd., does elect to abandon the land, then no execution to be issued, according to the analogy of the statute, shall run against the defendants personally, nor shall they be personally liable excepting for the costs of this cause." It is true that the case referred to was in equity, to restrain the prosecution of an ejectment suit, and that the provision as to execution was thus within the equitable discretion of the court, and therefore does not necessarily amount to a judicial construction of the statute. But it is not clear that the relief from personal liability was based upon equitable considerations. This is the only case, so far as I am aware, in which the Supreme Court of Michigan has had occasion to expressly declare with respect to personal liability of a defendant under a judgment of this nature.

I do not understand counsel in this case to have knowledge of an actual practice to sell under the execution for value anything beyond the interest in the premises affected. The fact that the judgment for costs is collectible out of other property than defendant's interest in the premises in question, and that thus, under the construction here adopted, either the plaintiff may have two executions, or the one execution may contain two different præcipes, as to the manner of collecting judgments, is not significant. 3 Comp. Laws Mich. 1897, § 11,201, which provides for including execution for costs in the plaintiff's writ of possession, has been construed as giving an election to take separate writs. Dawson v. Chippewa Circuit Judge, 127 Mich. 328, 86 N. W. 801. No reason is apparent why a different rule should prevail with respect to the case here presented.

I am the better contented with the result reached from the fact that under the verdict rendered plaintiff has not been put to a real and substantial election whether to pay for the betterments or to take judgment for value (as the betterments were found to be of no value above waste), but rather to an election between a writ of possession and judgment for value. There is possible room for doubt whether the statute was intended to apply to such a case, but this question does not seem to be open.

An order will be entered permitting the immediate issue of execution, but with the provision inserted therein or indorsed thereon limiting the enforcement of the judgment for the value of the land to the levy upon and sale of the defendant's interest in the premises in question. In my opinion no amendment of the judgment entry is necessary.

D. H. Ball, for Ancil J. Rich.

C. D. Hanchette, for Victoria Copper Mining Co.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

PER CURIAM. The orders made by the Circuit Court which were brought here on writs of error by the respective parties are affirmed upon the grounds stated in the opinion of Judge Knappen, who pre-

sided in the court below. We are satisfied with the reasons given by him, and adopt his opinion as a sufficient statement of the reasons on which we approve and affirm the orders in question.

LOESER v. SAVINGS DEPOSIT BANK & TRUST CO. OF ELYRIA, OHIO.

(Circuit Court of Appeals, Sixth Circuit. August 8, 1908.)

No. 1,535.

1. JUDGMENT—VACATION AFTER TERM—VOID OR ERRONEOUS JUDGMENT.

The fact that a Circuit Court of Appeals, reviewed a judgment of a court of bankruptcy on appeal, when under the law it was reviewable only on petition to revise, under Bankr. Act July 1, 1898, c. 541, § 24b, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3432), does not render its judgment a nullity; but it is, at most, erroneous only, and the court has no power to expunge it on motion at a subsequent term.

2. SAME—PRESUMPTION OF VALIDITY.

When the power of a court to expunge one of its judgments is invoked on the ground of its nullity, every presumption in favor of the judgment which does not contradict the record must be indulged.

3. BANKRUPTCY—JUDGMENT OF BANKRUPTCY COURT—MODE OF REVIEW.

The judgment of a court of bankruptcy determining the claim of a chattel mortgagee to assets in the hands of a trustee in bankruptcy is one on a controversy arising in bankruptcy proceedings and reviewable by the Circuit Court of Appeals on appeal, under Bankr. Act July 1, 1898, c. 541, § 24a, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3431).

[Ed. Note.—Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 C. C. A. 9.]

Appeal from the District Court of the United States for the Northern District of Ohio.

L. J. Grosman, Frederick L. Taft, and Nathan Loeser, for appellant.
W. W. Boynton, for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge. This case was heard upon an appeal from a decree of the District Court sustaining a chattel mortgage made by the bankrupt, Mrs. Chadwick, to the Savings Deposit Bank & Trust Company. We reversed the decree and held the mortgage unenforceable against the bankrupt's trustee. The ground upon which this conclusion was reached is fully shown in the opinion of the court. 148 Fed. 975, 78 C. C. A. 597. The opinion was filed November 22, 1906. Subsequently the case was taken by appeal of the bank to the Supreme Court, where on April 27, 1908, the appeal was dismissed without opinion. The mandate to this court recites only that the appeal was dismissed "for the want of jurisdiction." It would be idle to speculate as to the grounds upon which this action was taken.

On May 25, 1908, the Savings Deposit Bank & Trust Company entered a motion to vacate the judgment entered at the November session, 1906, and dismiss the appeal. The ground stated in the motion is as follows:

"The defendant says as ground of this motion that this court was entirely without jurisdiction to enter said judgment of reversal, and consequently its

judgment is void. The case came into this court by appeal from the District Court of the Northern District of Ohio, and was not appealable because of the fact that the proceeding was one in bankruptcy, from which an appeal would only lie from an order declaring or refusing to declare said Cassie L. Chadwick a bankrupt, or from an order granting or denying a discharge, or from an order allowing or rejecting a debt or claim of \$500 or over, and said appeal was not founded upon either of said grounds. Wherefore the said defendant the Savings Deposit Bank & Trust Company pray the court to vacate and set aside such entry of reversal as made without jurisdiction by this court."

The power to vacate a judgment may undoubtedly be exercised during the term of the court at which it was rendered; but it is equally well established that, after the term has ended, final judgments and decrees pass beyond the control of the court, unless the power to correct, vacate, or modify is reserved by some step taken during the term by which the court reserves its right of action. *Bronson v. Schulten*, 104 U. S. 410, 26 L. Ed. 797. Neither the statutes of the state nor their practice or decisions are controlling in this matter over the courts of the United States. *Bronson v. Schulten*, cited above. In the case cited the court said:

"It is whether there exists in the court the authority to set aside, vacate, and modify its final judgments after the term at which they were rendered and this authority can neither be conferred upon nor withheld from the courts of the United States by a statute of a state or the practice of its courts."

But it is said that this rule has no application to judgments which are absolutely void, that such a judgment is a mere nullity, and may be expunged as might a surreptitious entry. For the purpose of this case we shall assume this distinction to exist. 1. Black on Judgments, §§ 306, 307. But what is an absolutely void judgment? It is one which is a mere semblance of a judgment. One in which an essential element to the rendition of any judgment is lacking, as that the court had no jurisdiction over the parties, or none over the subject-matter. A void judgment binds no one. It is a nullity. It protects no one acting under it.

This motion is predicated upon the suggestion that the judgment of the District Court was not appealable and could only be reviewed under the supervisory power conferred by section 24b of the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432]).

First. Assuming that the decree of the District Court was reviewable and not appealable, the fact that we erroneously exercised jurisdiction under the appeal does not make the judgment a nullity. It was, at most, an error to be corrected by a timely application to this court upon a petition to rehear or by resort to some appellate procedure for the correction of error. We had jurisdiction to determine whether the case was appealable under section 24a or 25a of the bankrupt act, or only reviewable upon a petition to review under section 24b. An erroneous determination of that somewhat cloudy question will not render the judgment void but only erroneous. But counsel say that the question of jurisdiction under the appeal is not shown by the record to have been raised or decided, and that this takes the judgment outside of the principle referred to. The distinction is not

sound. The subject was one within the general jurisdiction of this court. The procedure by which our appellate jurisdiction might be invoked was either by a petition for review under section 24b, or by an appeal in one of the several subjects mentioned in 25a, or by appeal under the general appellate jurisdiction conferred by section 24a "of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases."

When the power of this court to expunge one of its judgments is invoked upon the ground of its utter nullity, every presumption in favor of the judgment, which does not contradict the record, must be indulged. Limited as is the jurisdiction of the inferior nisi prius courts of the United States and subject to a presumption against jurisdiction throughout the progress of a cause, yet the judgments of these tribunals are not nullities, although jurisdiction is not shown upon the record. Such judgments are, although jurisdiction is not apparent, binding upon the parties and such apparent want of jurisdiction is available only in some form of review by a superior court. *Dowell v. Applegate*, 152 U. S. 327, 337 et seq., 14 Sup. Ct. 611, 38 L. Ed. 463; *Kempe, Lessee, v. Kennedy*, 5 Cranch, 173, 185, 3 L. Ed. 70; *Skillern's Ex. v. May's Ex.*, 6 Cranch, 267, 3 L. Ed. 220; *Des Moines Nav. Co. v. Iowa Homestead Co.*, 123 U. S. 552, 557, 559, 8 Sup. Ct. 217, 31 L. Ed. 202; *Evers v. Watson*, 156 U. S. 527, 533, 15 Sup. Ct. 430, 39 L. Ed. 520. In *Des Moines Nav. Co. v. Iowa Homestead Co.*, 123 U. S. 552, 557, 8 Sup. Ct. 217, 31 L. Ed. 202, the question arose as to whether a judgment relied upon as *res adjudicata* was a void judgment. It was objected that the judgment both of the Circuit Court and of the Supreme Court affirming that of the Circuit Court were void for want of jurisdiction. The suit was one which had been removed from the state court to the Circuit Court of the United States. The removal was upon the ground of diversity of citizenship; but the record showed that it was not a removable case, because some of the defendants who did not join in the removal were citizens of the same state with the plaintiff. All of the defendants, however, appeared in the Circuit Court and answered, no objection being made to the jurisdiction at any stage of the case, and a final judgment upon the merits was rendered. Touching this question, the court said:

"Here the question is whether, if all the parties were actually before the Circuit Court, the decree of this court on appeal is absolutely void, if it appears on the face of the record that some of the defendants who did not join in the petition for removal were citizens of the same state with the plaintiff. It was settled by this court at a very early day that, although the judgments and decrees of the Circuit Courts might be erroneous, if the records failed to show the facts on which the jurisdiction of the court rested, such as that the plaintiffs were citizens of different states from the defendants, yet that they were not nullities, and would bind the parties until reversed or otherwise set aside. In *Skillern's Executors v. May's Executors*, 6 Cranch, 267, 3 L. Ed. 220, the Circuit Court had taken jurisdiction of a suit and rendered a decree. The decree was reversed by this court on appeal, and the cause remanded, with directions to proceed in a particular way. When the case got back it was discovered that the cause was 'not within the jurisdiction of the court,' and the judges of the Circuit Court certified to this court that they were

opposed in opinion on the question whether it could be dismissed for want of jurisdiction after this court had acted thereon. To that question the following answer was certified back: 'It appearing that the merits of the cause had been finally decided in this court, and that its mandate required only the execution of its decree, it is the opinion of this court that the Circuit Court is bound to carry that decree into execution, although the jurisdiction of that court be not alleged in the pleadings.' That was in 1810. In 1825, *McCormick v. Sullivan*, 10 Wheat. 192, 6 L. Ed. 300, was decided by this court. There a decree in a former suit was pleaded in bar of the action. To this a replication was filed, alleging that the proceedings on the former suit were coram non iudice, the record not showing that the complainants and defendants in that suit were citizens of different states; but this court held on appeal that 'the courts of the United States are courts of limited, but not of inferior, jurisdiction. If the jurisdiction be not alleged in the proceedings, their judgments and decrees may be reversed for that cause on writ of error or appeal; but until reversed they are conclusive between the parties and their privies.' 'But they are not nullities.' There has never been any departure from this rule."

It follows therefore from the exercise of jurisdiction that there is an incontestable presumption that the court determined that it had jurisdiction under the appeal.

Second. But we made no mistake in treating the case as properly here by an appeal under the general appellate jurisdiction of this court. The case presented a "controversy" arising in bankruptcy. It involved the claim of the bank under a chattel mortgage to assets in the possession of the bankrupt's trustee. The bankrupt court, under the broad powers conferred by section 2 of the bankrupt act, had the power to determine controversies relating to the estate of the bankrupt in its possession, whether the controversy related to the title or to liens thereon or rights therein. The property here involved had been surrendered by the bank to the trustee; the bank reserving its rights against the proceeds of sale. Having the actual possession, it mattered nothing whether the trustee instituted a proceeding to bring the bank in for the determination of the controversy, or whether the bank had intervened by petition to assert its rights. *Whitney v. Wenman*, 198 U. S. 539, 25 Sup. Ct. 778, 49 L. Ed. 1157; *Wolkowich v. Mason*, 150 Fed. 699, 703, 80 C. C. A. 435.

Certain it is, whether the bankrupt was brought in under the power of the court, under section 2 of the act, to "bring in or substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy," or came in as intervener, there was no objection made at any time to the jurisdiction over either the property or the person of the claimant. In *Whitney v. Wenman*, 198 U. S. 539, 25 Sup. Ct. 778, 49 L. Ed. 1157, the trustee filed a bill in equity in the District Court against parties claiming rights against property of the bankrupt in his possession. The jurisdiction was sustained under section 2 of the bankrupt act. In that case the court said:

"Nor can we perceive that it makes any difference that the jurisdiction is not sought to be asserted in a summary proceeding, but resort is had to an action in the nature of a plenary suit, wherein the parties can be fully heard after the due course of equitable procedure."

The case of *First National Bank v. Title & Trust Co.*, 198 U. S. 280, 25 Sup. Ct. 693, 49 L. Ed. 1051, was one in which the property

in controversy was not within the possession of the trustee, and the defendant objected to the jurisdiction of the District Court over both the property and his person. The proceeding there which the court held reviewable and not appealable was the order of sale to which the bank had objected. Upon this objection being overruled, they did not abandon but asserted their claim. This was held not to be a waiver. In the case styled *In re McMahon*, 147 Fed. 684, 689, 77 C. C. A. 668, we explained that case as one holding that the order of sale was a step in bankruptcy which was reviewable. In *Wolkowich v. Mason*, 150 Fed. 699, 703, 80 C. C. A. 435, the Circuit Court of Appeals for the First Circuit made the same explanation. Manifestly, the case did not overrule *Hewit v. Berlin Machine Works*, 194 U. S. 296, 300, 24 Sup. Ct. 690, 48 L. Ed. 986. In *York Manufacturing Co. v. Cassell*, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782, the claimant came in by petition to set up a claim against property in the possession of the trustee. The decree of the bankrupt court came by appeal to this court and went by appeal to the Supreme Court. We entertain no doubt, if the question be open for consideration upon such a motion as this, that the case was appealable and not reviewable, and that we had complete jurisdiction.

The motion to vacate is denied.

STANDARD SAVINGS & LOAN ASS'N v. ALDRICH.

(Circuit Court of Appeals, Sixth Circuit. July 23, 1908.)

No. 1,788.

1. MOTIONS—CREDITORS' SUIT—ORDER FIXING AMOUNT OF CLAIM—POWER TO SET ASIDE.

In a creditors' suit an order fixing the amount of an intervener's claim is interlocutory only and may be set aside for good cause shown at any time before the close of the term at which final decree in the cause is entered.

2. BUILDING AND LOAN ASSOCIATIONS—POWERS—SUBSCRIBING FOR STOCK OF ANOTHER ASSOCIATION.

A building association, organized under a statute permitting such associations to be created "for the purpose of building and improving homesteads and lending money to the members only," has no power to become a shareholder in another similar association organized under the same statute, nor can the latter lawfully lend it money as such shareholder.

3. SAME—POWER TO BORROW MONEY.

A building association, organized under a statute providing that "not more than one-half of the funds received by the association in any one month shall be applied to the payment of withdrawing shareholders unless otherwise ordered by the directors; and when the demands of withdrawing shareholders exceed the funds applicable to their payment they shall be paid in the order in which their notice of withdrawal has been given"—has no power, express or implied, to borrow money to meet the claims of withdrawing shareholders, and a contract for a loan to be so used, with the knowledge of the lender, is ultra vires and cannot be enforced.

4. CORPORATIONS—LIABILITY FOR MONEY BORROWED—ULTRA VIRES CONTRACT.

To entitle a lender of money to a corporation on an illegal contract to recover the same as money received and which in equity it ought not

to retain, the burden rests upon the lender to prove that the corporation benefited by such money, either by acquiring property which it retains or by expending it in the payment of legal obligations.

5. BUILDING AND LOAN ASSOCIATIONS.

Intervener lent the defendant, a building association, which was insolvent, money to be used, and which was used, in paying off withdrawing shareholders, taking as security notes and mortgages. The association had no power to borrow money for such purposes, nor to pay withdrawing shareholders when insolvent. *Held*, that intervener could not recover the money so lent, either upon the contract or in equity.

Appeal from the Circuit Court of the United States for the Eastern District of Michigan.

This is an appeal from a decree dismissing a petition filed by an intervener in a creditor's suit pending in the Circuit Court. The Standard Savings & Loan Association and the Michigan Savings & Loan Association are two corporations organized under the general law of Michigan providing for the creation of building and loan companies. The Michigan Association became insolvent. Under a general creditors' bill filed in the Circuit Court, diversity of citizenship existing, a receiver was appointed, its assets impounded, and the creditors who desired to share in the distribution of assets required to file their claims. Among the creditors who came in by intervention to assert a claim was the Standard Savings & Loan Association. The claim, as stated in the petition, was for money loaned, originally aggregating \$65,000, which, by credits, had been reduced on April 1, 1901, to \$48,103.67. To secure this indebtedness it was averred that the Michigan Association had assigned certain real estate mortgages made to it by borrowing members. These securities, the petitioner consenting, were turned over to the receiver; the order providing that such lien as the Standard Association had against them should be transferred to the fund which should be realized from their collection by the receiver. A decree, by consent of the receiver, was entered July 1901, fixing the amount of the indebtedness of the Michigan Association to the Standard Association on account of the transaction referred to at \$44,240.33, but reserving any question of the "status" of the claim or interest. In July, 1904, this order was vacated so far as it determined any indebtedness, and the receiver allowed to withdraw his answer and to file defenses to the claim. Upon a final hearing the judge denied all relief and dismissed the intervening petition.

D. C. Rexford, for appellant.

De Forest Paine, for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge (after stating the facts as above). 1. There was no error in vacating the order determining the indebtedness of the Michigan Association to the Standard Association. Although the order was made at a subsequent term, yet the order set aside was not final, but interlocutory, and, upon good cause shown, might be set aside at any time before the close of the term at which the final decree was enrolled. *Loeser, Trustee, etc., v. Savings Bank* (decided at this session) 163 Fed. 212. The facts upon which the court acted in setting aside that order and allowing defense to be made to the claim amply justified the action of the court.

2. The origin of the debt in question was this: In November, 1897, the Michigan Association, though still a going concern, was in fact insolvent, and much in need of money to satisfy demands of withdrawing shareholders. In this emergency it applied to the Standard

Association for assistance. The negotiations were carried on by their respective secretaries, Galvin for the Standard Association and Wemple for the Michigan Association. These secretaries were the real managers of these associations and, to quote counsel, "were the whole thing." The evidence makes it plain that the purpose of the Michigan Association in borrowing was to pay off importunate withdrawing shareholders, and this purpose was as well known to the lender as the borrower. Indeed, Mr. Galvin, the man of all work for the Standard Association, and the negotiator of the loans, admits that the original plan was that the money loaned should be paid direct to such withdrawing shareholders, and that he therefore paid to himself, in his character of withdrawing shareholder, \$3,500, but did not carry out the scheme of direct payments further because of bookkeeping complications. To carry out the arrangement the Michigan Association subscribed to the requisite number of shares in the Standard Association, and upon the footing of a shareholder applied for and obtained the loans in question, using same as stated above. That the Michigan Association had no power to become a shareholder in the Standard Association is not disputed. The enabling act under which both associations were organized provides that such companies may be created "for the purpose of building and improving homesteads and lending money to the members only." Comp. Laws Mich. 1897, §§ 7554, 7581. The investment of funds in the shares of a company organized for a like purpose is beyond the scope of the most liberal view of the incidental or implied powers of such companies. The objects of such associations being only to lend the funds contributed by members for the purpose of building and improving homesteads, one such association could not become a member of another, nor could it lend its own funds except to its own members for the purpose indicated. The concession therefore that the Michigan Association could not legally become a member of the Standard Association, and that the latter could not legally lend its money to an association which was not and could not lawfully become a member, has not been inadvertently made. Thompson on Building Associations (2d Ed.) p. 215, § 114; 4 Am. & Eng. Enc. of L. (2d Ed.) p. 1028; Kadish v. Garden City Loan Ass'n, 151 Ill. 531, 38 N. E. 236, 42 Am. St. Rep. 256; North Am. Building & Loan Ass'n v. Sutton, 35 Pa. 463, 78 Am. Dec. 349; Mechanics' Association v. Agency Co., 24 Conn. 159.

The question as to whether, in the absence of statutory authority, such an association has the power to borrow money for the legitimate purposes of the association, such as to pay maturing shares and thereby avoid recalling or assigning profitable investments, has not often arisen and need not be here decided. The English authorities need to be distinguished, for they turn, in the main, upon whether the loans were made in accordance with rules adopted by the association made by authority of the general enabling acts. In *Murray v. Scott*, 9 App. Cas. 519, 538, it was held that the incorporating act having given power to the members to make rules and regulations for the conduct of the business, not in conflict with the objects and purposes of the society or the terms of the act, was broad enough to

sustain a rule allowing the managers to borrow for the legitimate purposes of the business; but such a power, resting upon implication, is not an unlimited power to borrow. In the case just cited, the Earl of Selborne very well said:

"The only real and true limit of the rule making power, as to a matter not governed by the general law of the realm or by any express prohibition in the statute, must be that pointed out by Gifford, L. J. The power cannot be so exercised as to make the society a thing different from a benefit building society formed for the purpose and in the manner defined by the act."

In *Cunliffe Brooks Co. v. Blackburn & District Benefit Society, L. R. 9 App. Cas. 857*, it was held upon full consideration that, when no rule allowing borrowing had been adopted, overdrafts were borrowings and ultra vires. The matter is generally regulated by statute in the United States, and in *Wilson v. Parvin*, 119 Fed. 652, 56 C. C. A. 268, we held that under the Tennessee incorporating act such associations had power to borrow for the legitimate purpose of their business. The Michigan statute providing for such associations confers no power to borrow, but does not in terms prohibit such transactions. If the Michigan Association had any such power, it arises by necessary implication and must therefore be limited to the necessary and legitimate purpose of the organization, as defined in the enabling act. *Goss v. Peters*, 98 Mich. 112, 57 N. W. 28, construing an act defining the powers of mutual fire insurance companies, points clearly to a very narrow power of borrowing by such associations as those here involved, if any such power exists under any circumstances. 4 Am. & Eng. Enc. of Law, 1023; *North Hudson Bldg. Ass'n v. Hudson National Bank*, 79 Wis. 31, 47 N. W. 300, 11 L. R. A. 845; *Blackburn Building Ass'n v. Cunliffe Brooks Co.*, L. R. 22 Ch. Div. 61, 70. The members of the Michigan Association had adopted no rules authorizing the managers to borrow money for any purpose; but, assuming that the corporation had an implied power through its directors and managers to borrow money, it was a power limited to the necessary and legal purposes and objects of the business. The known and assumed purpose for which this money was borrowed was to pay off withdrawing members. Of this purpose the lending association had full notice through its secretary, by whom the whole matter was arranged and negotiated. The evidence makes this clear, and we so find the fact to be. The power to borrow money to pay off withdrawing stockholders cannot be legitimately inferred or implied. The scheme of the enabling act, as indicated by the general purpose of such associations as well as by the terms and conditions under which shareholders are allowed to withdraw dues paid in and a proportionate share of the profits earned, is that only current income shall be so applied. The withdrawal of a shareholder is the withdrawal of capital pledged primarily to creditors and to carry on the business for which the association was organized. The funds applicable therefore to the payment of withdrawing shareholders is the fund arising from the current contributions of a solvent and going association, and no other funds can be legitimately so applied. This we think plain from the relation of shareholders to such associ-

ations and is plainly indicated by the proviso of the sixth section of the enabling statute:

"That not more than one-half of the funds received by the association in any one month shall be applicable to the payment of withdrawing shareholders unless otherwise ordered by the directors; and when the demands of withdrawing shareholders exceed the funds applicable to their payment they shall be paid in the order in which their notice of withdrawal has been given."

We conclude therefore that no authority existed, express or implied, to borrow money to meet the claims of withdrawing shareholders. Such a borrowing would not be for the purpose of paying debts and liabilities in due course of business. *Blackburn Building Society v. Cunliffe Brooks Co.*, L. R. 22 Ch. Div. 61, affirmed in L. R. 9 App. Cas. 857. Appellants, as we have before stated, had notice that the borrowing was for the payment of withdrawing shareholders and are constructively charged with knowledge that the managers were acting without power in so doing and in assigning the mortgages of borrowing shareholders to secure the loan. A contract beyond the scope of the power of the Michigan Association, express or implied, cannot be enforced by an appeal to the rules of estoppel. Any such application of the doctrine would be, in effect, to enlarge the power of the corporation in accordance with the discretion of its managers, violating thereby the rights of innocent shareholders and a sound public policy. *Central Transportation Co. v. Pullman's Palace Car Co.*, 139 U. S. 60, 11 Sup. Ct. 478, 35 L. Ed. 55; *Railway Co. v. Keokuk Bridge Co.*, 131 U. S. 371, 389, 9 Sup. Ct. 770, 33 L. Ed. 157; *Miller v. Insurance Co.*, 92 Tenn. 167, 176, 21 S. W. 39, 20 L. R. A. 765; *McCormick v. Market Bank*, 165 U. S. 538, 549, 17 Sup. Ct. 433, 41 L. Ed. 817; *Nat. Permanent Benefit Building Society v. Williamson*, L. R. 5 Ch. App. 309; *California Bank v. Kennedy*, 167 U. S. 363, 368, 17 Sup. Ct. 831, 42 L. Ed. 198. In *McCormick v. Market Bank*, cited above, the court said:

"The doctrine of *ultra vires*, by which a contract made by a corporation beyond the scope of its corporate powers, is unlawful and void, and will not support an action, rests, as this court has often recognized and affirmed, upon three distinct grounds: The obligation of any one contracting with a corporation to take notice of the legal limits of its powers; the interest of the stockholders, not to be subject to risks which they have never undertaken; and, above all, the interest of the public that the corporation shall not transcend the powers conferred upon it by law. *Pearce v. Madison & Indianapolis Railroad*, 21 How. 441, 16 L. Ed. 184; *Pittsburgh, etc., Railway v. Keokuk & Hamilton Bridge Co.*, 131 U. S. 371, 384, 9 Sup. Ct. 770, 33 L. Ed. 159; *Central Transportation Company v. Pullman's Palace Car Co.*, 139 U. S. 24, 48, 11 Sup. Ct. 478, 35 L. Ed. 55."

More than this, the Michigan Association was insolvent at the time. This fact, without more, suspended the power and right of the directors to apply any funds to the payment of withdrawing shareholders. This we held in regard to this very association in *Aldrich v. Gray*, 147 Fed. 453, 77 C. C. A. 597, where we held that the receiver might recover the funds so illegally paid out to such shareholders. That it is not shown that the appellant company knew that insolvency existed when the first loan was made in November, 1897, may, for the

purpose of this case, be conceded; but, when the last \$40,000 was paid over, it had constructive knowledge, for it had caused its own treasurer, Mr. Wilson, to be placed in the board of directors of the borrowing company for the purpose of discovering whether the condition of the Michigan Association was such as to justify further effort to save it. Going into the board as the representative of the Standard Association, it was charged with the knowledge which he could not escape without willfully shutting his eyes; but, irrespective of notice of insolvency, the Standard Association knew that the managers were borrowing money and assigning securities for an illegal purpose. They are therefore in no sense entitled to the footing of an innocent party.

Conceding the utter illegality of the contract, the appellants in the court below and here say that they abandon and repudiate the contract and sue only to recover money which the appellee association received and which *ex æquo et bono* it ought to retain. The principle to which the appellants appeal is perfectly plain and well settled. Although the managers of the Michigan Association had no power to borrow money for such purposes, yet, to the extent that the money has not been expended or has been paid out in discharge of legitimate obligations of the association, it would be unjust and inequitable that it should not be held accountable. *Pullman's Palace Car Co. v. Transportation Co.*, 171 U. S. 138, 18 Sup. Ct. 808, 43 L. Ed. 108; *Aldrich v. Bank*, 176 U. S. 618, 628-636, 20 Sup. Ct. 498, 44 L. Ed. 611; *Parkersburg v. Brown*, 106 U. S. 487, 1 Sup. Ct. 442, 27 L. Ed. 238; *Logan Bank v. Townsend*, 139 U. S. 67, 11 Sup. Ct. 496, 35 L. Ed. 107; *In re Cork, etc., Railway Co.*, L. R. 4 Ch. App. Cas. 748, 760; *Travelers' Insurance Co. v. Johnson City*, 99 Fed. 663, 666, 40 C. C. A. 58, 49 L. R. A. 123; *Perkins v. Boothby*, 71 Me. 91, 97; *Ditty v. Dominion Bank*, 75 Fed. 769, 22 C. C. A. 376; *Louisiana City v. Wood*, 102 U. S. 294, 26 L. Ed. 153; *Hedges v. Dixon County*, 150 U. S. 182, 186, 14 Sup. Ct. 71, 37 L. Ed. 1044; *In re National Permanent Benefit Building Society*, L. R. 5 Ch. App. 309, 313; *Cunliffe Brooks Co. v. Blackburn Building, etc., Society*, L. R. 9 App. Cas. 857; *In re Blackburn, etc., Society*, L. R. 22 Ch. Div. 61, 71. This right of recovery is based upon an implied promise to return the money or property so received or to make compensation to the extent that it has actually benefited by its application to the discharge of actual liabilities incurred in the legitimate course of business. In *Travelers' Insurance Co. v. Mayor, etc., of Johnson City*, 99 Fed. 663, 666, 40 C. C. A. 58, 49 L. R. A. 123, this court had occasion to deal with the question as to whether there was any liability in consequence of an issue of railroad bonds by a municipal corporation in aid of a railroad company. The bonds having been held void (*Johnson City v. C. C. & C. Railway Co.*, 100 Tenn. 138, 44 S. W. 670), an action was brought by a holder of bonds against the city for money had and received to its use. Speaking for this court, Taft, Circuit Judge, said:

"Such an action is based, not on an express or implied contract, but upon an obligation which the law supplies from the circumstances, because, *ex æquo et bono*, the defendant should pay for the benefit which he has derived

at the expense of the plaintiff. It is an obligation which the law supplies, because otherwise, it would result in the unjust enrichment of the defendant at the cost of the plaintiff. It is an obligation which arises only when the defendant has received money or property from the plaintiff and appropriated the same to his own use, either when he might have elected not to take it, or, having the power to do so, might return the benefit thus incurred to the plaintiff, and falls to do so."

In that case the city had received the shares for which the bonds had been issued to the railway company, but, having no power to make the subscription, it had none to receive or hold the share. The construction of a railway station was held not to inure to the benefit of the city because it had been erected on the railway's property and was not the property of the city. No direct benefit having been received, relief was denied. In *Parkersburg v. Brown*, the holders of the void obligations were permitted to follow the property acquired by their use. In *Louisiana City v. Wood*, cited above, a recovery was allowed for the money received upon the void obligations; the proceeds having been applied by the city for the very purpose, a lawful one, for which they were issued. In *Hedges v. Dixon County*, relief was denied. Referring to *Read v. Plattsmouth*, 107 U. S. 568, 2 Sup. Ct. 208, 27 L. Ed. 414, and *Louisiana City v. Wood*, cited above, the court said:

"In this case, as in *Louisiana City v. Wood*, the city got the full pecuniary consideration for the bonds, and applied the money to the very purpose for which they were issued, and upon well-settled principles, if the securities given for the money so obtained proved invalid or defective for any reason, there was a clear legal, as well as moral, obligation to refund the money which had been so advanced to and received by the city. The circumstances and conditions which gave the holders an equitable right in those cases to recover from the municipality the money which the bonds represented do not exist in the case under consideration, where the county received no part of the proceeds of the bonds, and no direct money benefit, but merely derived an incidental advantage arising from the construction of the railroad, upon which advantage it would be impossible for the court to place a pecuniary estimate, or say that it would be equal to such portion of the bonds in question as the county could lawfully have issued."

In *re National Benefit Society*, 5 Ch. App. 309, 313, was a case in which a building and loan society had borrowed money, having no power to borrow. It was held that the lender had no legal debt and no equitable claim for a recovery. In respect to the claim for equitable relief, Giffard, L. J., said:

"A class of cases has been referred to on that subject, the principal of which are *In re German Mining Company* (1) and *In re Cork and Youghal Railway Company* (2), the latter of which was before the Lord Chancellor and myself a short time ago. I have no hesitation in saying that those cases have gone quite far enough, and that I am not disposed to extend them. They were decided upon a principle, recognized in old cases, beginning with *Marlow v. Pittfield* (3), where there was a loan to an infant, and the money was spent in paying for necessities, and in another case of a more modern date, where there was money actually lent to a lunatic, and it went in paying expenses which were necessary for the lunatic. In such cases it has been held that, although the parties lending the money could maintain no action, yet, inasmuch as his money had gone to pay debts which would be recoverable at law, he could come into a court of equity and stand in the place of those creditors whose debts had been so paid. That is the principle of those cases. It is a very clear and definite principle, and a principle

which ought not to be departed from. Then it is said that the present case is brought within that principle. I do not think it necessary to go through the evidence. Suffice it to say that there is no proof whatever that one sixpence of this money went in payment of any debt which was recoverable against the company."

In *Cunliffe Brooks Co. v. Blackburn Building & Loan Society*, cited above, it appeared that the association had no power to borrow, but that it had made large overdrafts at its bankers and had assigned mortgages of borrowing members as security for any balance. It was held that such overdrafts were borrowings and ultra vires, and that the bankers were not creditors and were only entitled to hold the securities as a security for repayment of so much money as should be shown to have been applied to the legitimate debts and liabilities of the association.

The facts that appellants hold certain mortgages made by borrowing shareholders of the Michigan Association as security for the money loaned to the Michigan Association does not materially improve its situation. The managers assigned these securities illegally and appellants are constructively charged with knowledge of their want of power. Their utmost right to hold on to them is to retain them as security for so much of the loan as shall appear to have gone to the benefit of the Michigan Association by discharging legal debts and liabilities which would otherwise be valid claims against that company. This was the rule applied in *Blackburn Building & Loan Society v. Cunliffe Brooks Co.*, L. R. 22 Ch. Div. 61, 71, where it was said by Lord Selborne that "the burden of showing that they are entitled to anything lies upon them (the lender) and not upon the other side." To same effect is *In re Permanent Benefit Building Society*, L. R. 5 Ch. App. 309, 313. If this money was applied to pay off withdrawing stockholders, the association has not been benefited. To quote from the opinion of Judge Swan upon this point:

"The claim that petitioner can recover for money had and received on the ground that the Michigan Association has had the benefit of the money and *ex æquo et bono* should repay it cannot be maintained upon these facts. The only persons who received benefits were the withdrawing members of the Michigan who were not entitled to it. Such payments, instead of being beneficial to the association, hastened its failure and diminished its resources by reducing its membership and giving withdrawing members what they had no right to receive when there were no funds in the treasury. This was the first necessary effect of such payments. Its second was the wrong done to the remaining members whose share in its assets is by so much the less because of what was paid to withdrawing members. The third and necessary effect, and that scarcely the less injurious than the first, is that if the claim of petitioner is sustained, and it is given the status of a creditor, the members' rights in the assets of the Michigan Association are subordinated to petitioner, and they can share only in the assets, if any there be remaining after petitioner's claim is paid."

The burden of showing that the association has been benefited by the use of this money, and to what extent, is upon the lending association. The appellants have not met this burden. It is a possible thing that some part of the money loaned went to the payment of legitimate obligations; but, if so, this has not been pointed out in such a definite way as to justify any modification of the decree of the Cir-

cuit Court. The very purpose of the loan was to pay off withdrawing shareholders, and the original agreement that the funds should be paid by the Standard Association direct upon such claims was only abandoned after some claims had been so paid, on account of book-keeping difficulties. Wemple, the secretary of the Michigan Association, says that the money was all so paid out. The inferences from the book entries found in the evidence of Aldrich that possibly some other obligations were also paid in part from that source are too vague to enable us to say that a single dollar is shown to have been paid upon legitimate debts.

The suggestion that, because moneys paid to withdrawing shareholders may be recovered by the receiver, we should treat the money so supplied as though it had not been dissipated at all, would be to throw the whole chance of loss upon shareholders who did not withdraw and are not responsible for the precarious condition of the association or of the claim which the appellants assert. The burden was upon complainant to show to what extent the money borrowed had benefited the lending association. It has not shown that any part of the money paid out to withdrawing shareholders has or can be collected.

This is fatal to any relief, and the decree of the court below must be affirmed, with costs.

THE FRANK K. ESHERICK.

THE MARS.

(Circuit Court of Appeals, Fourth Circuit. July 22, 1908.)

No. 767.

COLLISION—STEAMER AND TOW OF MEETING TUG—NEGLIGENT NAVIGATION OF TUG AND TOW.

A collision at a bend in the Pasquotank river between a barge in tow of a tug passing up around the bend, which was on their starboard side, and a descending steamer. *held* due solely to the fault of the tug and barge in failing to so navigate as to keep the barge on its own side of the river; it being conceded that the passing itself at that point was usual and proper, the river being from 125 to 150 feet wide, and the preponderance of the evidence showing that the steamer was as close to the right bank as she could get.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, § 80.]

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk.

J. W. Wilcox, for appellants.

Floyd Hughes, for appellee tug.

Edward R. Baird, Jr., for appellee barge.

Before PRITCHARD, Circuit Judge, and McDOWELL, and DAYTON, District Judges.

DAYTON, District Judge. On August 1, 1906, a collision occurred between the steamer Thomas Newton and the barge Mars, in tow of the tug Frank K. Esherick, in a bend a little below Sawyer's Wharf,

in the Pasquotank river, in North Carolina. The hour was about 7 p. m., the weather was clear, and the waters high from recent heavy rains. At the time the steamer was descending the river on its way from Norfolk, Va., to Elizabeth City, N. C. The tug and barge were ascending the river on their way to Norfolk. Just above Sawyer's Wharf or landing a bend in the river occurs, followed by a reach of some 700 or 800 feet, followed by another bend to the left, when descending the river, where the collision occurred. The width of the river in this last bend is from 125 to 150 feet. The steamer was a wooden vessel 96 feet long, with a beam of 16 feet, and of about 39 tons burden. The tug was 68 feet, with 17-foot beam, and of about 66 tons burden. The barge was 150 feet long and with a beam of 23 feet. The steamer had on board a cargo of 150 barrels of lime, 40 barrels of flour, 350 bushels of corn, a quantity of household goods, and a number of passengers. The results of the collision were the sinking of the steamer and the burning of her upper works by reason of the action of the water on the cargo of lime. This libel was filed August 2, 1906, by appellants in the court below, claiming that the collision was due to the incompetency of those in charge of the tug and barge, their failure to keep the barge upon her side of the river, and towing with a hawser of too great length. The masters of the tug and barge filed answers, substantially the same, to the effect that the collision was due to the fact that the steamer, instead of keeping to its side of the river, ran down the center of the channel at too great speed. The court below, after hearing the evidence, on March 6, 1907, held the collision arose solely because of the negligence of the navigator of the steamer, and dismissed the libel, with costs.

In our view of the case it will not be necessary to discuss to any great extent several of the questions so ably and earnestly argued by counsel on both sides. The legal rule that the decision of the court below is not to be disturbed unless clearly against the weight of the evidence may be taken for granted. The technical rules of common-law pleading do not prevail in admiralty, and we may therefore dismiss the objections made on the grounds that the libel did not specifically enough set forth certain particular acts of alleged negligence proven on the trial, such as the failure to blow bend and danger whistles, and that it did not set forth the condition of the current. All these matters were considered by the court below, its decree determined several of them, and, as we will hereinafter indicate, several of them were matters immaterial to the true solution of the issue.

Much of the argument of counsel on both sides is devoted to the question as to which, under the circumstances, was the "incumbered vessel" and entitled to the right of way. On the one hand, it is insisted that the steamer was the descending vessel in a swollen river, with an unusual swift current, and entitled under the rules to the right of way. On the other hand, it is insisted that although the tug was the ascending vessel, yet, it having the barge in tow, became the "incumbered vessel," and in consequence the steamer was legally bound, not only to avoid collision, but also the risk of collision with it. After careful consideration, we are entirely satisfied that this rule that the unincumbered vessel must avoid both collision and risk thereof with

the incumbered one is right. It is in fact so well settled now that it admits of no question. At the same time the determination of what makes a vessel "incumbered" cannot be reduced to a mathematical demonstration. It could not be insisted that a battleship ascending a river should be held, as against a passenger steamer descending, an "incumbered" vessel, because of the fact that it was towing its steam launch behind it. Each case must be governed by its own peculiar conditions, and the ascertainment of which in fact is the greatest incumbered, not alone by its tow, but by other conditions, must depend upon those peculiar conditions. In this case, after sifting the testimony, it would seem to us the conditions would make it here very hard to determine which was incumbered. The captain of the tug says she was capable of towing in these waters seven barges. She had but one. With it he was ascending the river around a gradual bend with three or four times the horse power of the steamer. On the other hand, the steamer was loaded rather heavily, and was unquestionably greatly affected by the unusual current. But it seems to us clear that it is not necessary or material for us to determine which was the incumbered one; for in our view the application of the rule cannot be made, for this reason: All testimony agrees that it was perfectly legitimate and proper for these vessels to pass each other in this and other like bends of this river, and that it was constantly done. Cahoon, captain of the steamer, says: "We always have been doing it." Capt. Whitehurst, in answer to the question: "Is it not a fact that passenger steamers, in meeting these tugs and tows, are passing and meeting them continually in the bends of that river?"—answered: "Yes, sir; everywhere, night and day. I have been running there from one to five times a week, six or seven years." Capt. Richardson says it is "a common occurrence." Dryden, captain of the tug, repeatedly says there was plenty of room to pass, that he had repeatedly passed towboats and barges in these bends, and had never had any trouble passing round them, and that it was not the determination to pass that was wrong or negligent on the part of the steamer, but solely the manner in which she undertook to make the passage. Common sense and observation teach us that danger, more or less, attends all navigation, as it does many other pursuits in life. They also teach us that navigation of such waters as these would be almost completely stopped if, crowded with vessels ascending and descending, one or the other, in passing, should be compelled to stop and tie up in order to "avoid collision or the risk of collision."

The parties themselves, both in pleadings and proofs, have practically narrowed this issue down to the single question of which one was negligent in effecting this passing, or, in other words, failed to keep on his own side. Dryden, master of the tug, in answer to the question: "That is what you consider the collision due to entirely, the Newton's failure to keep to the right hand side of the bank, and not because she should not have attempted to pass the barge at the point where she did attempt to pass it?"—answers: "Yes; I contend that if he had kept to the side, he would have gone through all right." This he reiterates many times in his testimony, and this statement is in complete accord with the defense set up in the answers to the libel. To support

this defense he testifies emphatically: "And, instead of keeping to the starboard side, which he blowed for, he did not do it, but kept deliberately down the middle." He says she was coming down very fast, in the center of the stream, if anything on his side, and "as the boat drew up nearer Capt. Cahoon was sitting in a chair, and the deck hand, I suppose, at the wheel, and he was smoking a cigar, and as he passed me he said, 'Hey, Captain,' and that is all I heard until I heard his bells." In support of this Davis, assistant engineer of the tug in answer to the question: "Where was she [the Newton] in the river then?"—answered: "Looked to me like about the middle of the river." And again he says: "They kept very near the middle of the river, I suppose under one bell." Sayers, master of the barge, in answer to the question: "The collision occurred just as she [the barge] was coming round the bend?" says: "She was then turning. The motion of her head was almost unnoticeable." In answer to the question: "I mean at what point with reference to the middle of the river, we will say, for the purpose of making the question clear, was the position of the barge?" he says: "I should think the extreme bow, from the stem of the barge, might have been a few feet beyond the middle of the river"—and, further "The steamer drifted right broadside into the barge as near as I can remember." In answer to another question, he stated that he had for 15 hours at the time been in the pilot house.

In contradiction of this contention, Cahoon, master of the steamer, contends that he saw the pilot house of the barge first, gave the one blast passing whistle, received from the tug its reply of one blast, took the starboard side so close to the bank "as to rub the bushes along the side," having reduced speed so that he was going with the current and two miles per hour in addition, or about five miles per hour; that had he reduced below this the current would have rendered his boat unmanageable, and had he stopped and backed she would have gone into the woods; that the barge at the point of the bend, instead of turning, went straight across the stream and struck the steamer on her port bow some 10 or 12 feet from her stem. In this contention he is very clearly sustained by the evidence of Lester, engineer on the Newton, who says, "We were lying on the starboard side, so near that the bushes were brushing down on our house;" by Aubison, a boatman on her, who says they were on the left hand side, "just as close [to the bank] as she could get"; by Dixon, a deck hand on the steamer, who says, "The trees was [were] brushing it [her];" by Gregory, a farmer and passenger on the Newton, who in answer to the question, "How close was the bow of the Newton to the bank when the barge struck her?" says, "It was very near. I was on the left-hand side or corner of the pilot house, and I did not notice. We were very near the bank, probably as near as we can be;" and by Pell, another passenger, who says, "Then the Newton began to slow her speed after she blew the last whistle, and she was moving along right slow near the right-hand side;" by Harrison, a deck mate on the Newton, who says, "She went close enough to strike the bushes;" by Puckett, a commercial traveler and passenger on the Newton, who says the Newton was coming down on the right-hand side "as close to the shore as she

could get." In view of the evidence of these eight eyewitnesses, three of whom were passengers and wholly disinterested, we think the weight of the testimony is clearly in favor of the appellants and against the appellees as to the positions of the vessels at the time of the collision.

In this view we are still further convinced by the fact that Dryden, the principal witness for the appellees, is quite effectively contradicted in his statements that Cahoon was, at the time he passed the tug, sitting in the pilot house smoking a cigar, while a deck hand was at the wheel. Under these circumstances, after careful consideration of all the conditions, we are of opinion that neither the tug nor the barge were blameless in this collision. On the contrary, we do not believe proper measures were taken by the tug to bring the barge around the turn and keep it within reasonable limits of its side of the river. We do not think that the rudder of the barge was handled with such care as to prevent it from going across the river to such an extent as it did, in view of its master's and other testimony to the effect that its speed was very slow, likely as slow as a mile an hour, and "the motion of her head was almost unnoticeable." We therefore determine that the fault was the mutual one of the tug and barge, and that the loss should be apportioned equally between them; each being held responsible for the one-half thereof. The cause is therefore reversed, and remanded for further proceedings, to be had in accordance with this opinion.

Reversed.

UNITED STATES v. AMERICAN SURETY CO. OF NEW YORK.

(Circuit Court of Appeals, Fourth Circuit. July 24, 1908.)

No. 810.

1. POST OFFICE—BOND OF RAILWAY POSTAL CLERK—ACTION FOR BREACH.

It is no defense to an action to recover the penalty for breach of a bond given by a postal clerk, conditioned that he would faithfully discharge all duties and trusts imposed on him, where it is shown that he opened and rifled letters coming into his hands, that the United States is not liable to the senders for their loss.

2. SAME.

In such an action, proof that the principal defendant opened letters and packages in the mails and converted the contents to his own use entitles the government to recover, and the failure to prove his appropriation of particular sums or property alleged goes only to the amount of damages recoverable.

In Error to the Circuit Court of the United States for the District of Maryland.

For opinion of the court below, see 161 Fed. 149.

John C. Rose and Morris A. Soper, for the United States.

James U. Dennis (Samuel K. Dennis, on the brief), for defendant in error.

Before PRITCHARD, Circuit Judge, and WADDILL and BOYD, District Judges.

BOYD, District Judge. This suit was brought in the Circuit Court of the United States for the District of Maryland by the United States on the 7th of November, 1906, to recover from the defendant, the American Surety Company of New York, surety upon the bond of one Charles W. Hammel, the sum of \$1,000, the penalty of the bond for an alleged breach thereof by the principal. Beginning on the 1st day of December, 1904, and continuing to the 1st day of November, in the year 1905, Charles W. Hammel was a railway postal clerk employed in the post office establishment of the United States. On the 1st day of December, 1904, said Hammel, as principal, and the defendant, the American Surety Company of New York, as surety, duly executed a bond to the United States in the sum of \$1,000, conditioned as follows:

"The condition of the said obligation was such that if the said Charles W. Hammel should from and after the 1st day of December, 1904, faithfully discharge all the duties and trusts imposed on him as such railway postal clerk in any railway post office of the plaintiff to which he might be assigned, or in any position of transfer clerk to which he might be detailed, either by law or the rules and regulations of the Post Office Department of the United States, and should faithfully account for and pay over to the proper official all moneys which should come into his hands as such railway postal clerk, then the said obligation should be void; otherwise of force."

After setting forth the facts, substantially, as here given, the plaintiff further alleged:

"And afterwards, to wit, from the 1st day of December, in the year 1904, thence continuously until the 1st day of November, in the year 1905, the said Charles W. Hammel failed and neglected to discharge all the duties and trusts imposed on him as such railway postal clerk by law and the rules and regulations of the Post Office Department of the United States, and during said time did fail and neglect faithfully to account for and pay over to the proper official all moneys which came into his hands as such railway postal clerk, and the plaintiff claims \$1,000."

The defendant entered its pleas to the declaration non est factum, performance, and non damnificatus. The plaintiff filed a replication, and the issues were thus raised. The parties, by agreement duly filed, waived a jury and submitted the issues of fact arising upon the pleadings, to the court to apply the propositions of law upon the finding of the fact, as the court might adjudge proper. Thereupon, without the introduction of witnesses to testify orally or by deposition, the following stipulation, signed by counsel, was filed:

"It is hereby stipulated and agreed between the parties hereto, in order to render unnecessary the great expense involved in bringing very many witnesses from a great distance to testify in this case, or the nearly equal expense that would be incurred in taking the testimony of such witnesses at or near their respective places of residence: That the persons whose names are below written in the left-hand column would respectively testify, if examined as witnesses on behalf of the plaintiff in this cause, that they had, severally at the dates below written beside their respective names, mailed as ordinary, unregistered mail matter, letters addressed to the persons whose names are also written beside the respective names of such witnesses, which letters contained in currency or merchandise the sums or values respectively set beside each witness' name, and that no one of the letters so mailed by them respectively, and no part of any of the money or merchandise inclosed in any of the letters, was ever received back by the said sender thereof or by any other for said sender.

"And it further stipulated and agreed that the said persons whose names are below written as the respective addressees of said letters would respectively testify, if examined on behalf of the plaintiff as witnesses in this cause, that neither they nor any other for them ever received any one of said letters or any part of any of the money or merchandise inclosed in any of said letters.

"And it is further stipulated and agreed that a witness produced by and on behalf of the plaintiff, would testify, if examined as a witness in this cause, that letters addressed respectively as each one of the letters in the list hereunder written and mailed at the places and times specified in said list, would, in the regular course of transmission of the means to the places of their respective destination, pass at sometime during said transmission through the hands of Charles W. Hammel, mentioned in the bond sued on in this case, or be handled by another with said Hammel on the railway-mail car and be accessible to him, the said Hammel, in the performance of his duties as railway postal clerk, and, although handled by said Hammel, would be accessible to the other railway postal clerks on the same car with the said Hammel, and that the said letters would also in said transmission, both before and after they would pass through the hand of said Hammel or be accessible to him, be handled by and be accessible to other government postal employes in the regular performance of their respective duties.

"And it is further stipulated and agreed that the said Charles W. Hammel, if produced by and on behalf of the plaintiff as a witness, and if examined as a witness in this cause, would testify that during the time said letters referred to in the list hereunder written disappeared from the mails, he, the said Hammel, took from the mails passing through hands or accessible to him in the regular performance of his duties as railway postal clerk letters believed by him to contain money or merchandise in them to his own uses, and that the number of letters so taken by him exceeds the number of letters referred to in the list hereunder written, but that he, the said Hammel, cannot say whether or not any of the letters referred to in the list hereunder written were among those so taken by him, as aforesaid.

"And it is further stipulated and agreed that the United States of America, plaintiff in this case has not paid, and has assumed no obligations to pay, to either the senders or the addressees of said letters in the list hereunder written, the sums of money or the values of merchandise set forth in the list hereunder written, and will not pay such sums or values, or any of them, to any of the said persons, unless it shall recover such sums or values from the said Hammel or the defendant in this case.

"And it is further stipulated and agreed that this stipulation may be read in evidence with the same effect as if each one of the said persons had been produced and sworn on the witness stand as witnesses on behalf of the plaintiff and had testified as above in court; the defendant reserving all its rights of every description to object to the whole or any part of the said testimony as fully as if said testimony had been offered by a witness or witnesses duly sworn and examined in open court, in the usual manner, and this stipulation being made for no other purpose than to save the trouble and expense which would be involved in securing the attendance of or in examining said witnesses in any of the usual ways.

"And it is further stipulated and agreed that this case may be tried by the court without a jury, but reserving to both the plaintiff and defendant all rights of exception, appeal, etc., under section 700 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 570)."

Attached to this stipulation as to the facts was a list of letters, about 120 in all, giving the names of the senders, the names of the addressees, when and where mailed, and the destination, together with a statement of the value of merchandise claimed to have been inclosed in some of them and amounts of money claimed to have been inclosed in others; the total value of the merchandise being \$153.99, and the total amount of the money being \$416.49—altogether, \$570.48. These several letters, as will be seen in the stipulation, the senders

would have testified were duly mailed at the places named, and the addressees would have testified were never received, and it is also further shown in the stipulation that in the due course of transit they would have passed through the hands of Hammel or through the hands of the other postal clerks associated with him in the conduct of his business. It was not shown definitely that Hammel took any one or more of these particular letters, but by reference to the stipulation filed it will be observed that it contains this statement in regard to the facts to be shown by Hammel himself:

"And it is further stipulated and agreed that the said Charles W. Hammel, if produced by and on behalf of the plaintiff as a witness, and if examined as a witness in this cause, would testify that during the time said letters referred to in the list hereunder written disappeared from the mails, he, the said Hammel, took from the mails passing through his hands or accessible to him in the regular performance of his duties as railway postal clerk letters believed by him to contain money or useful merchandise and opened such letters and converted the money or merchandise in them to his own uses, and that the number of letters so taken by him exceeds the number of letters referred to in the list hereunder written, but that he, the said Hammel, cannot say whether or not any of the letters referred to in the list hereunder written were among those so taken by him, as aforesaid."

The trial judge, upon whom also devolved the duty of ascertaining the facts, treated the testimony of the witnesses as set out in the stipulation as facts found, and thereupon he held as a matter of law that the plaintiff was not entitled to recover. Judgment was rendered accordingly, and the assignment of error which we are to consider is substantially an exception to this ruling. There were two points insisted upon by the defendant below, either of which it was contended would defeat the United States in this action. The one was, substantially, that as the government was under no obligation to refund to the senders of letters nor to the addressees the sum or sums lost by them or the value of articles lost through the mails, and although it may have been shown that money or valuable articles were lost, even if the loss was traced to the unfaithful conduct of Hammel, such loss could not be considered in estimating plaintiff's damages. This contention of the defendant was based upon propositions of law which it was insisted applied in determining the right of a bailee to sue a third person to recover the possession of property bailed, or for damages on account of it, etc. The court readily disposed of this proposition adversely to the defendant, in which decision we heartily concur. The other point was the contention by the defendant that none of the letters specifically set out in the list attached to the stipulation had been traced to the custody of Hammel, and that there was not sufficient evidence to show that any of these letters went into his hands, or that he purloined any of the articles said to have been contained in the letters or any of the several sums of money described as having been sent enclosed in letters. In considering this last proposition the court very properly, as we think, recited the law conferring upon the judge authority to direct a verdict, and the court concluded that, if the case was being actually submitted to a jury, the evidence tending to show that Hammel had purloined any of the particular letters described in the list was not sufficient to authorize the

jury to find as a fact that he did, and it was upon this view of the case that the court entered judgment for the defendant. As this is the point which we deem to be of importance, we repeat what the trial judge said in respect to that question:

"Hammel worked on the railway postal cars operated between New York City and Washington, D. C. One of the items of mail on which this suit is based is proved to have been mailed at New London, Conn., addressed to a person in Waycross, Ga. Other items are proved to have been mailed in Philadelphia, Pa., addressed respectively to persons in Baltimore, and there are in all 120 items included in the claim on which this suit is brought. As to any one of these items, is there any evidence, with all the inferences that a jury could justifiably draw from it, sufficient to support a verdict for the plaintiff that the court would sustain? I am of opinion that there is not. Such a verdict would be clearly wrong in the judgment of the great majority of ordinarily reasonable and fair men.

"Even allowing his testimony full weight in support of the plaintiff's hypothesis that the defendant is liable, Hammel cannot identify any one of the letters as having been taken by him. Each one of those items of mail enumerated in the stipulation was handled by and accessible to many post office employes and subject to possible theft, loss, or destruction by each of them; but because these items in the course of proper transmission through the mails would have passed through the hands of Hammel or been accessible to him, and because he admits that he stole from the mail during the period when these letters disappeared, it is sought to hold the surety on his bond responsible for the loss of the letters. The evidence is too inclusive to support the suit.

"The law does not presume the guilt of a person, but it does not follow that in such a case as this Hammel is to be considered as the only thief then in the employ of the post office department. The letters on which the claim is made might have been stolen, lost, destroyed, or miscarried before or after they were accessible to Hammel, or may have been taken by others on the mail car with him."

We are not inclined to controvert this position, but it is our opinion that it applies exclusively to the question of special damages, and the court, exercising the province of the jury, had the right to determine that there was no sufficient evidence to authorize a finding in favor of such damages. There is, however, we think another view of this case, and that is that one of the conditions of the bond was that Hammel should faithfully discharge all the duties and trusts imposed on him as a railway postal clerk in the service of the Post Office establishment of the United States, and in the declaration it is alleged that during the time that Hammel was in the service as a railway postal clerk, and during the time for which said bond was given, he failed and neglected to discharge all the duties and trusts imposed on him as such railway postal clerk by law and the rules and regulations of the Post Office Department, etc., and although the testimony may not have been sufficient to authorize a finding that he took any one or more of the letters particularly described in the list attached in the stipulation, yet it was shown, taking his testimony to be true, that during the time covered by the bond, whilst serving as a railway postal clerk, he "took from the mails passing through his hands or accessible to him in the regular performance of his duties as railway postal clerk letters believed by him to contain money or other useful merchandise and opened such letters and converted the money or merchandise in them to his own use." If these were facts, in every instance Hammel

committed a breach of the condition of the bond sued on. With information in the possession of the prosecuting officers of the United States of this character concerning the conduct of Hammel, it was their duty to bring a suit upon the bond, and, when such state of facts was shown to exist, we think the law clearly contemplates that a breach shall be declared which would entitle the United States to recover the amount of the bond, to be discharged, however, upon the payment of such special damages as may have been proven to exist. In the absence of proof of special damages, the recovery upon the amount of the bond would necessarily be remitted to a nominal amount in order to carry the costs in favor of the United States.

The judgment of the Circuit Court is therefore reversed, in order that a new trial may be granted and further proceedings taken in accordance with the views we have herein expressed.

Reversed.

KER v. BRYAN.

(Circuit Court of Appeals, Fourth Circuit. July 28, 1908.)

No. 808.

1. **TRESPASS—RIGHT OF ACTION—POSSESSION OF PLAINTIFF.**

The wrongful possession of property by a trespasser does not oust the possession of the rightful owner so as to divest the latter of his right to maintain an action based on the subsequent unlawful entry of another than the original wrongdoer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trespass, § 62.]

2. **ADMIRALTY—ATTACHMENT—PROCESS—VALIDITY—AUTHORITY TO ISSUE.**

A monition and order for attachment issued in a suit in rem in admiralty, to which the name of the clerk and the seal of the court were affixed by a person temporarily in charge of the office, but who was neither clerk nor deputy, was void, and possession of the vessel taken by the marshal thereunder was that of a mere trespasser.

3. **TRESPASS—ACTION—DEFENSES.**

While a marshal was in possession of a vessel under a void process, defendant, as collector of the port, placed and kept an inspector on board for the purpose of detaining the vessel under orders from the Secretary of the Treasury. *Held*, that the unlawful possession of the marshal constituted no defense to an action by the owner of the vessel against defendant to recover damages for her alleged unlawful detention.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trespass, § 62.]

In Error to the Circuit Court of the United States for the District of South Carolina, at Charleston.

J. P. K. Bryan (M. C. Butler, on the brief), for plaintiff in error.

Ernest F. Cochran, U. S. Atty. (T. W. Bacot, Asst. U. S. Atty., on the brief), for defendant in error.

Before PRITCHARD, Circuit Judge, and WADDILL and BOYD, District Judges.

BOYD, District Judge. This is a civil action brought in the Circuit Court of the United States for the District of South Carolina, at Charleston, originally by William W. Ker, a citizen and resident

of the state of Pennsylvania, against George D. Bryan, a citizen and resident of the state of South Carolina, collector of the port of Charleston. Since the commencement of the action, William W. Ker has died, and Roxana S. Ker, executrix of his last will and testament, has been made party plaintiff. In the action the plaintiff in error here, who was the plaintiff below, seeks to recover damages from George D. Bryan, collector of the port of Charleston, the defendant in error here, who was the defendant below, for the alleged wrongful seizure and detention of the American steamship *Laurada*, a merchant vessel of the United States of the burden of 899 tons, registered at the port of Philadelphia, which said steamship was owned by the plaintiff. Plaintiff's cause of action is set forth specifically in the third and fourth paragraphs of the complaint filed, which are as follows:

"(3) That on the 16th day of November, 1895, the said steamship *Laurada* being in the port and harbor of Charleston, proceeding, with her officers and crew on board, in the due fulfillment of her freight engagements as a merchant vessel of the United States, the said George D. Bryan, claiming to act as collector of the port of Charleston, and in the name of the United States, unlawfully seized, and caused to be seized, the said steamship *Laurada*, and under an alleged authority and direction of the government of the United States unlawfully and wrongfully detained the said steamship *Laurada* at the Custom House Wharf in the port and harbor of Charleston, in the district of South Carolina, and refused to allow said steamship to proceed in the due fulfillment of her freight engagements for the space of 21 days, to wit, from the 16th day of November, 1895, to and inclusive of the 6th day of December, 1895.

"(4) That all such acts and doings of the said George D. Bryan, claiming to act as collector of the port of Charleston, and under an alleged authority and direction of and in the name of the government of the United States, were without warrant of law, and all such alleged authority and direction of the United States government were null and void."

And the plaintiff thereupon asked damages in the sum of \$5,000. The defendant, in his answer, sets up substantially, only two defenses; the first being outlined in paragraph "Third" under the head of "First Defense" and the second in paragraph "Third" under the head of "Second Defense." These two paragraphs are as follows:

"(1) That he denies each and every other allegation in the said complaint contained, except as hereinafter stated. That true it is that, acting under instructions received from the Secretary of the Treasury of the United States of America, this defendant caused one of the inspectors to go on board the *Laurada* and formally take possession of charge of said vessel, and that he kept her in his custody and under his control for 21 days, but this defendant was then informed and verily believes that the said *Laurada* was about to depart from the United States with arms, munitions of war, and men, constituting a military expedition, and was intended by her owners to commit hostilities upon the subjects and property of the island of Cuba, a colony of the kingdom of Spain, with which the United States was at peace, and that there was probable cause for such detention of the said vessel.

"(2) That true it is this defendant, acting under instructions from the Secretary of the Treasury of the United States, caused the steam vessel *Laurada* to be formally detained by placing an inspector on board; but this defendant alleges that no injury or damage resulted to the plaintiff thereby, the said *Laurada* then being in the custody of the marshal, under a libel issued out of the District Court for the district of South Carolina, in the suit of John E. Ker & Co. against the steamship *Laurada*, that said vessel was seized under said libel on the 15th day of November, A. D. 1895, and was not

released by him until the 18th day of December, A. D. 1895, and this defendant submits that any damages sustained were by reason of such detention, and did not result from the act of this defendant."

We will consider, in disposing of this case here, only the last defense, above stated, for it was upon the testimony and facts in relation thereto that the trial judge directed a verdict for the defendant. The facts are, substantially, as follows: The steamship Laurada, which was owned by the original plaintiff in this action, W. W. Ker, had anchored in the port of Charleston, S. C., and whilst there, on the 15th of November, 1895, John E. Ker and John E. Ker, Jr., partners doing business under the firm name of J. E. Ker & Co., at the city of New York, and at Montego Bay, and other places in the island of Jamaica, filed a libel and complaint in the District Court of the United States, at Charleston, against the steamship Laurada, her engines, boiler, tackle, etc., and against all persons intervening for their interests therein and against Samuel Hughes, the master of the vessel, wherein the said libelants sought to recover damages against the said Laurada, based upon the alleged violations of the terms of a charter party, set forth in the libel. On the date of the filing of the libel, to wit, the 15th day of November, 1895, a monition and order for attachment was issued in the name of the President of the United States of America and directed to the marshal of the district of South Carolina, commanding the marshal to attach the said ship or vessel, her tackle, etc., and detain the same in his custody until the further order of the court respecting the same and give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of the libel, and that they be and appear before the court, etc. This monition and order for attachment was signed by the proctors for the libelants and upon its face appears to have been issued by E. M. Seabrook, clerk of the District Court of the United States of South Carolina, per Julius Seabrook, deputy clerk, to which was also affixed the seal of the United States District Court of South Carolina.

The testimony which was introduced at the trial, and which was uncontradicted, shows: That E. M. Seabrook, the clerk of the United States District Court, at Charleston, on the 15th of November, 1895, the date on which this monition and attachment purports to have been issued, was out of the district, in Atlanta, Ga., attending his father, who was sick, and that Julius Seabrook, a brother of the clerk, and who was deputy clerk, was also on that date in Atlanta with his brother, attending the sick father; that the names of the clerk and the deputy clerk were written by a younger brother by the name of J. D. Seabrook, and the seal which appears upon the paper was affixed by him. It is further shown that J. D. Seabrook was in the clerk's office at the instance of the deputy, Julius Seabrook. The father being in Atlanta sick, the clerk, E. M. Seabrook, had gone to attend him, and Julius Seabrook, the deputy, was unexpectedly called by his brother to come to Atlanta, and in this situation he asked the other brother, J. D. Seabrook, to stay in the office of the clerk and file papers, if any came in, and the last-named, under

these circumstances, wrote the names of the clerk and deputy clerk, and affixed the seal to this monition and attachment. He had never been appointed or qualified as deputy clerk, and, so far as appears from the record, had not undertaken to act as such in any instance, except in the issuance of the monition and attachment in question.

After some intermediate proceedings in the libel case, it came on to be heard on the 5th of December, 1899, when the following decree was entered:

"John E. Ker & Co. v. Steamship Laurada.

"Libel in Rem.

"This cause came on to be heard before the District Court of the United States for the District of South Carolina, on the records, pleadings, and proof herein. Whereupon, it is now ordered, adjudged, and decreed that the libel herein be dismissed for want of jurisdiction of the court in rem in this cause and process herein being void."

It further appears in the record of the libel proceeding that on the 20th of November, 1895, the counsel for the Laurada addressed the following letter to George D. Bryan, collector of customs, at Charleston, S. C.:

"We are informed that you are detaining the steamer Laurada on behalf of the United States. We are desirous that she shall forthwith proceed and therefore beg to inquire if she may do so now, as we do not wish to advise in conflict with the instructions of the government of the United States. We request an early reply."

The collector, who is the defendant below and the defendant in error here in the present action, on the same date returned this answer:

"Your favor of this instant at hand, and in reply I beg to say that you are correctly informed in that I am detaining the steamer Laurada on behalf of the United States. I could not permit her to proceed, as indicated in your letter, as my instructions are to detain her."

At the close of the testimony the trial judge, in response to a request of the counsel for defendant, directed a verdict for the defendant, to which counsel for the plaintiff duly excepted. A judgment was entered against the plaintiff in accordance with the verdict, to which the plaintiff also excepted, and the case is before us upon these exceptions. It is unnecessary, in our opinion, to treat severally of the errors assigned by the plaintiff. It is sufficient to note the legal proposition upon which the court based the decision. We quote from the instructions given by the court the following:

"As a mere question of law it seems to me that the plaintiff has no case, that the ship was not in the possession of the defendant collector of the port, but was in the possession of the marshal, and it appeared to be lawful process; and if she was in the possession of the marshal, then she could not have been in the possession of the defendant (collector), and the defendant (collector) therefore is not responsible. * * * The simple question here is whether or not the marshal had possession; if the marshal had possession, then the collector did not. Undoubtedly, upon the proof, the marshal did have possession of the ship, and the government gets out in that way."

These instructions were severally and duly excepted to by the plaintiff's counsel, and the case is before us to determine whether or not there is error.

The collector of the port of Charleston, as has been stated, sent his inspector aboard the *Laurada* the day after the marshal took her in custody, and the possession of the two was simultaneous from that time until the vessel was released by the collector. Thus, the sole question is whether the possession of the marshal first obtained protects the collector in this action which is brought against him by the owner of the ship to recover damages for an alleged trespass. The principles of law in regard to actions of trespass are well settled, and the rule is the same both as to realty and personal property. The person who undertakes to maintain his action must, at the time when the act which constitutes the alleged trespass is committed, either have the actual possession in him of the thing which is the subject of the trespass, or must have a constructive possession in respect to the thing being actually invested in him, with the right to immediate possession. This latter doctrine is well declared in *Wilson v. Haley Live Stock Company*, 153 U. S. 39, 14 Sup. Ct. 768, 38 L. Ed. 627, in which the court holds:

"A count in trespass *de bonis asportatis*, for the taking and detaining of personal property, can only be supported on the theory that the plaintiff was either its owner or entitled of right to its possession at the time of the trespass complained of."

In the final disposition of this case by the trial court, no question was made as to the ownership of this vessel by the testator of the present plaintiff, nor is there any presented in the arguments or briefs submitted to this court. Then the original plaintiff being the owner, did he at the time have the possession of his vessel, or did he have the right to immediate possession by reason of the wrongful custody of the marshal? In other words, was the marshal there as a trespasser? In disposing of the libel case, as is shown by the decree, which is incorporated above, the court declared that the process therein was void. Counsel for the defendant makes the point that this decree was by consent and was *inter alios acta*, and that it therefore can have no effect upon the present case. So far as the rights of the parties to that particular action are concerned, we admit this position to be true; but this decree is not relied upon in that view here. It is only in support of the position that the process under which the marshal took custody of the vessel was void and therefore conferred no authority upon him to take possession of the ship. However, aside from this decree, the facts being admitted as to the circumstances under which the monition and attachment was issued, this court we think has the right to determine as to whether or not it was a void process, and in our opinion it was. The person who signed the name of the clerk and the deputy clerk, and affixed the seal of the District Court of South Carolina to the process, had no authority whatever to do these acts. He was not even an officer *de facto*, and, in our view the process which the marshal had, and under which he took custody of this vessel, had no more legal force and conferred no more legal authority than if it had been issued direct from the office of the proctors, without the intervention of the person who signed it and affixed the seal to it. With this conclusion, it necessarily follows that the custody of the marshal was wrongful.

He was aboard the ship, holding it in custody unlawfully. He was a trespasser. The wrongful possession of property by a trespasser does not oust the possession of the rightful owner so as to divest the latter of his right to maintain an action against the subsequent unlawful entry of another than the original wrongdoer.

In the case of *Van Brunt v. Schenck*, 11 Johns. (N. Y.) 377, it was held that:

"Where A.'s vessel is seized by B. under the United States internal revenue laws, and C., with the consent of B., makes use of the vessel, A. cannot maintain trespass, because B.'s possession was lawful, and A. was therefore not in possession at the time of C.'s trespass."

This is undoubtedly the law, and if the possession of the *Laurada* by the United States marshal, at the time the collector took possession, had been lawful, we would not hesitate to concur with the trial judge in his ruling that the action of trespass against the collector could not be maintained; but, as we have stated above, the possession of the marshal was not lawful, and therefore the right of property and the immediate right of possession was in the owner, and, if the collector took possession unlawfully or wrongfully, the owner can maintain his action against him, and it was error, in our opinion, for the trial court to hold that the possession of the marshal, under the circumstances, protected the collector and deprived the owner of the vessel of this right. We do not intend by this opinion to deprive the defendant of any right to contest the real ownership of the vessel, or to set up by way of defense the bona fides of his action in seizing the vessel, the probable cause which may have existed at the time, or any other legal defense. We only decide that the possession of the marshal does not shield the defendant, nor was it a legal ground upon which to direct a verdict against the plaintiff.

The judgment of the District Court of South Carolina is reversed, and the case is remanded for further proceedings in accordance with the views expressed in this opinion.

Reversed.

CAMP v. LAKE DRUMMOND CANAL & WATER CO.

(Circuit Court of Appeals, Fourth Circuit. July 21, 1908.)

No. 775.

WATERS AND WATER COURSES—ACTION TO DETERMINE WATER RIGHTS—LACHES—ACQUIESCENCE IN USE OF WATERS OF LAKE.

In 1784, the Governor of Virginia, pursuant to an order of council made in 1763, executed a grant of lands in the Dismal Swamp to a trustee for the Dismal Swamp Company, then a voluntary association, but afterward incorporated. In 1787, the Legislature chartered the Dismal Swamp Canal Company and authorized it to procure a supply of water for its canal by means of a cross-canal from Lake Drummond in the Dismal Swamp; the charter providing that "the said lake, so far as the waters thereof shall be necessary for the purposes aforesaid, shall be and is hereby vested in the proprietors of the said canal." In 1812, the cross-canal was constructed; an inquisition having been appointed on application of the Dismal Swamp Company, upon whose lands the lake was situated, to determine the value of the lands taken by such cross-canal,

which has ever since been maintained. *Held*, that the Dismal Swamp Company acquiesced in the appropriation of the waters of the lake by the canal company under the grant made in its charter, and, whatever its own rights therein may have originally been, it could not, nor could its grantees, after the lapse of 95 years, question the right of the canal company to take so much of said waters as might be necessary or useful for the purposes of its canal, nor maintain a suit in equity to enjoin such use.

Appeal from the Circuit Court of the United States for the Eastern District of Virginia, at Norfolk.

Robert M. Hughes and James H. Corbitt (Peatross & Savage, on the brief), for appellant.

Theodore S. Garnett and Theodore S. Garnett, Jr., for appellee.

Before PRITCHARD, Circuit Judge, and PURNELL and DAYTON, District Judges.

DAYTON, District Judge. William N. Camp, plaintiff below, and appellant here, on September 10, 1902, filed his bill against the Lake Drummond Canal & Water Company, a corporation, alleging in substance himself to be the owner of a tract of about 50,000 acres of land in Norfolk and Nansemond counties, Va., conveyed to him July 1, 1901, by the Dismal Swamp Land Company, which land was in part covered by a body of water known as "Lake Drummond," extending back into the forest on the sides and having no banks or natural outlets, but two artificial ones. The first of these artificial outlets is described as a large ditch on the northwest, wholly on the land of plaintiff and known as "Jericho Canal," formerly used by the owners of the land as a means of floating logs from the lake to the point of shipment. The second artificial outlet is described as a ditch of small size, about 4 to 6 feet wide and from 1 to 1½ feet in depth on the eastern side, extending from said lake to the canal of the defendant company. It is charged that the defendant is the owner of a canal extending from the southern branch of the Elizabeth river, in Virginia, to the head of the Pasquotank river, near South Mills, N. C., passing about 3½ miles eastward of Lake Drummond, and that near a century ago, when this canal was first dug by the predecessor of the defendant, the Dismal Swamp Canal Company, this small ditch from the eastern side of Lake Drummond was built to this canal without condemning in lawful manner; but as the water taken from the lake was inconsiderable, and but a small portion thereof was in contemplation of being taken, the owners of Lake Drummond did not object, but permitted the taking and use of the water to the extent contemplated and made possible by the size and depth of the original ditch. It is then alleged that the defendant company, successor of the Dismal Swamp Canal Company, has greatly enlarged, deepened, and lowered the bed of its main canal, thereby requiring a much greater volume of water and have likewise already widened and deepened this eastern ditch from Lake Drummond and are about to so widen and deepen it as to practically draw off the entire water supply from the lake. The use of this lake is set forth to be very valuable to plaintiff as a means of floating the

valuable cypress, juniper, gum, and pine timber which clothes the land, and serious and irreparable damages, it is charged, will accrue to plaintiff by reason of the withdrawal of the water as contemplated by the defendant company. An injunction was prayed restraining the defendant from widening or deepening the ditch, from drawing off or diminishing the quantity of water from the lake or lowering its water level. To this bill the defendant entered its demurrer, alleging the plaintiff's remedy, if any, to be at law and not in equity, and, without waiving this demurrer, filed its answer denying all the material allegations of the bill. To this answer general replication was entered, a mass of testimony was taken, and upon final hearing, on March 13 1906, the court below found the cause to be for the defendant and dismissed the bill.

In determining this appeal we do not deem it necessary to enter into a consideration of the conflicting testimony to ascertain whether the improvements made by the defendant company has or has not reduced the natural water level of Lake Drummond. Nor do we deem it necessary, no matter how fascinating the consideration might be, to discuss the legal rights of riparian owners to the waters of a natural pond or lake like this, for we are convinced that, independent of these considerations, the decision of the court below must be upheld for another reason, about which there can be little doubt or controversy. On December 1, 1787, the Legislature of Virginia incorporated the Dismal Swamp Canal Company. Among other provisions in this act were these:

"Sec. 16. And whereas, it is represented that the waters of the lake in the Dismal Swamp, commonly called Drummond's Pond, may be useful for a supply of water to the said canal.

"Sec. 17. Be it enacted, that the said lake, so far as the waters thereof shall be necessary for the purposes aforesaid shall be and is hereby vested in the proprietors of the said canal, and it shall and may be lawful for the said president and directors, or a majority of them, to open, if they shall find it expedient, a cross canal from the lake to the principal canal, for the purpose of drawing thence a supply of water; and for executing this work and keeping it in repair they shall have the same power which they are authorized to exercise in opening the principal canal. And it shall not be lawful for any person whatsoever so to cut off or divert the course of those waters which now flow from the westward into the said lake, as to prevent their continuing to fall into it."

Under this distinct legislative grant, in 1812, this canal company undertook the work of digging this ditch, feeder, or cross-canal from the lake to the main canal. Thereupon the Dismal Swamp Land Company (plaintiff's vendor) appeared before Robert Brough and Stephen Wright, two justices of the peace of Norfolk county, Va., by its president and directors, and represented:

"That the (canal) company's cross-canal from the lake to the principal canal, for the purpose of drawing from thence a supply of water, is intended to pass through land belonging or said to belong to —, and no agreement hath been made with the others (owners) thereof."

Upon which representation a warrant was issued by these justices to the sheriff of the county requiring him to summon 18 inhabitants of the county, of property and reputation, not related to the parties

or interested, to meet on the lands on August 4, 1812, to value the same according to law. The sheriff executed this writ, 18 inhabitants, so summoned, did meet on the lands and reported under oath that they had "viewed the lands * * * through which the cross-canal leading from Drummond's Pond to the main Dismal Swamp Canal, which lands belong or are said to belong to ———, which said land is the width of 300 feet and containing 124½ acres (giving the boundaries as disclosed by a survey that day made by them) and the said jurors do value the said land at one cent. per acre, the quantity or proportion belonging to each individual to be hereafter ascertained." This inquisition was returned to court at Norfolk and ordered recorded.

It is undisputed: That this ditch, feeder, or cross-canal was thereupon dug in this year by the Dismal Swamp Canal Company and has been used from that day to this; that all the rights, privileges, and franchises of this company passed first to the Norfolk & North Carolina Canal Company, and from that company, by sale on July 30, 1892, to the defendant, the Lake Drummond Canal & Water Company.

The origin of the Dismal Swamp Land Company, from whom plaintiff derived his title, is of historical interest. On November 3, 1763, William Nelson, George Washington, Samuel Gist, and others entered into an agreement to undertake the securing of a grant from the commonwealth of Virginia of a large body of land in the Dismal Swamp, and by the agreement to fix the interests of each therein if the grant should be obtained. This resulted in a grant to Nathaniel and William Nelson, sons and devisees of William Nelson, deceased, executed by Benjamin Harrison, then Governor of Virginia, of 40,000 acres, on October 20, 1784, based upon an order of Council dated November 1, 1763, to William Nelson, Sr., "and others as members of the Dismal Swamp Company." This company seems to have been given a charter by the Legislature in 1814, which was modified by another legislative act approved February 13, 1877. Thus it appears that by grant in 1784 the title to the land passed from the commonwealth to the Nelsons as trustees for the Dismal Swamp Land Company, then a voluntary association of individuals, afterwards constituted a corporation, and that afterwards the Legislature of the state in 1797 vested in the canal company the waters of the lake "so far as the waters thereof shall be necessary" for its purposes. The question as to what rights to the water vested in the land company under the grant, and what under the legislative act in the canal company, might have caused a very interesting controversy in 1812, when this cross-canal was built. It can no longer be so. Time and the action of the parties themselves have long since settled it. If the land company had any superior right to this water and to dispute or to deny the legislative grant of it, it was plainly its duty to do so within a reasonable time. Laches in asserting such claim in a court of equity can be asserted here in defense, just as effectively as in the hundreds of other instances where equity so promptly recognizes it as a complete bar. Certainly, where the public interests are involved, as they are here, in support of the maintenance of this

work of internal improvement, we should not any the less hesitate to recognize this defense; but not only laches clearly appears, but complete acquiescence in this legislative act also appears. If not, why did the Dismal Swamp Company apply for the inquisition to assess the value of the land to be taken from it and others upon which to dig the ditch without asserting any claim of damages for the water to be taken? Then was the time to assert such right, if any existed, not now after the lapse of 95 years of acquiescence. Nor can it be said that the canal company must be limited in the taking and using of this water to the amount they have heretofore used. It did not undertake originally to take it under such conditions, but under the terms of the legislative act. No right remained in the land company to dictate the amount to be taken. It knew at the time, and during all these years, that the canal company was taking under the legislative grant, and it knew the terms of that grant. It had at the time to either acquiesce in the grant, subordinate its superior right, if it was superior, to it, or contest it within a reasonable time. It clearly concluded to do the former, and it is now entirely too late for it or its vendee to deny that:

"The said lake, so far as the waters thereof shall be necessary for the purposes aforesaid, shall be and is vested in the proprietors of the said canal. * * * and it shall not be lawful for any person whatsoever so to cut off or divert the course of those waters which now flow from the westward into the said lake, as to prevent their continuing to fall into it."

The decree of the court below is affirmed.
Affirmed.

PENNSYLVANIA STEEL CO. et al. v. NEW YORK CITY RY. CO. et al.
(WATERBURY et al., Interveners). MORTON TRUST CO. v. METRO-
POLITAN ST. RY. CO. (WATERBURY et al., Interveners).
GUARANTY TRUST CO. OF NEW YORK v. SAME.

(Circuit Court of Appeals. Second Circuit. May 19, 1908. On Motion to Amend, May 29, 1908.)

No. 265.

RECEIVERS—ISSUANCE OF RECEIVERS' CERTIFICATES—RECEIVERS FOR LESSOR AND LESSEE.

Where common receivers have been appointed for two insolvent street railroad companies, one of which is the owner of property which is leased to the other by a lease which requires it to pay the cost of maintenance and operation, the court may properly authorize the receivers in their capacity as receivers of both companies to issue receivers' certificates and make the same a preferred lien on the property of both, where necessary to keep the same in operation for the benefit of the creditors of both; the rights and priorities of all persons interested to be subsequently adjusted without affecting the prior lien of their certificates.

Appeal from the Circuit Court of the United States for the Southern District of New York.

J. Parker Kirlin, for Metropolitan St. Ry. Co.

Bronson Winthrop (L. C. Kranthoff, Frederick Geller, Bronson Winthrop, and C. T. Payne, of counsel), for Morton Trust Co.

Davies, Stone & Auerbach (Brainard Tolles, of counsel), for Guaranty Trust Co.

Masten & Nichols (William M. Chadbourne, of counsel), for receivers.

Charles E. Rushmore, for preferred contract creditors.

Byrne & Cutcheon, for Pennsylvania Steel Co.

William J. Wallace, for certain creditors.

Before COXE, and WARD, Circuit Judges, and HOLT, District Judge.

WARD, Circuit Judge. This is an appeal from the order of the Circuit Court authorizing the issuance of receivers' certificates to the amount of \$3,500,000. The property in the custody of the court consists of a congeries of street railways owned by or leased to the defendant the Metropolitan Street Railway Company, and operated as its lessee, by the defendant the New York City Railway Company, subject to various liens, particularly to a mortgage dated February 1, 1897, to secure the payment of bonds to the amount of \$12,500,000 to the Guaranty Trust Company, as trustee, upon a part of the premises, and to a subsequent mortgage March 21, 1902, upon the same property and other property to secure the payment of outstanding bonds amounting to \$16,604,000 to the Morton Trust Company, as trustee. Under the lease the New York City Railway Company is bound to maintain the property, pay all taxes, charges, rents, and other expenses, together with a dividend amounting to 7 per cent. on the capital stock of the defendant the Metropolitan Street Railway Company.

September 24, 1907, Adrian H. Joline and Douglas Robinson were appointed receivers of the New York City Railway Company and afterwards, October 1, 1907, receivers of the Metropolitan Street Railway Company.

We have no doubt of the prime importance of continuing the operation of the property as an entirety, and to that end of the necessity of raising funds by means of receivers' certificates, and, as a necessary corollary, of giving the certificates a lien prior to the claims of the general creditors of both companies and to the mortgagees above mentioned, in order to secure their marketability.

The justification of displacing liens is the preservation of the property upon which they exist, and, when but one common debtor is involved, the preference affects only the lien creditors because the debtor, owing all his debts alike, is indifferent to the order in which they are paid. When, however, as here, there is a lessee defendant and an owner defendant, both of whom are insolvent, though it may be proper to displace for the common benefit liens upon both of the properties, still it is also proper to determine whether inter se the debt of the lessee should be imposed upon the lessor or the liens on the lessor's property be displaced for the benefit of strangers to the lien creditors, viz., the lessee and its creditors.

The rights to be adjusted are those of: (a) The lessee's creditors, of whom the four-month creditors claim a preference; (b) the lessee's stockholders; (c) the lessor's lien creditors; (d) the lessor's general creditors; (e) the lessor's stockholders.

We think the difference of the parties can be reconciled by a modification of the order providing that the certificates shall be issued by the receivers in their capacities as receivers of both companies and shall be given a preference out of the net income and property of the lessee and out of the net income of the lessor, in case it shall operate the property, and out of all other property owned or leased by the lessor covered by both mortgages aforesaid, in order to insure the marketability of the certificates. The ascertainment of the rights and priorities inter se of all persons interested in the premises are reserved, to be finally adjudicated, as provided in the order modified by inserting the provisions underlined as follows:

Ordered, that the prayer of said petition and supplemental petition be, and it hereby is granted so far as is hereinafter set forth, and the said receivers *in their capacities as receivers of each company* be, and they hereby are, authorized to issue their certificates of indebtedness to an amount not exceeding \$3,500,000 upon the terms and conditions hereinafter set forth.

Said certificates to the amount of the principal and interest thereof shall constitute a lien upon all the property, of every nature and description, of the defendant Metropolitan Street Railway Company *and upon the net income of the defendant the New York City Railway Company and its other property*, and upon all equipment and other property heretofore purchased and acquired by the said receivers, and upon all equipment and other property that may be acquired or provided by means of the said certificates of indebtedness or the proceeds thereof, and upon all net earnings and income, which may hereafter result from the operation of the properties in charge of the *said receivers as receivers of either company*, which lien shall be prior to the lien of the mortgages named in said petition, namely: The general and collateral trust mortgage dated February 1, 1897, made by Metropolitan Street Railway Company to the Guaranty Trust Company of New York, trustee, and to the refunding mortgage dated March 21, 1902, made by Metropolitan Street Railway Company to the Morton Trust Company, trustee.

In the event of the enforcement of the lien of said certificates of indebtedness against the property aforesaid, or any part thereof, or the earnings or income thereof, the said property and the said earnings or income, for the purpose of the adjustment of the rights of the parties to the above-entitled causes *and of all other persons interested*, with respect to each other, but without prejudice to the right of the holders of said certificates to the full benefit of the lien hereby created, as above set forth, shall be marshaled and applied as follows; and in the following order, to the satisfaction of the principal and interest of said certificates of indebtedness, to wit:

(1) The fund primarily chargeable with the payment of the principal and interest of said certificates of indebtedness shall be: (a) The net earnings and income heretofore realized or which may hereafter re-

sult from the operation by said receivers of the properties of the defendant Metropolitan Street Railway Company, *either in their capacity as receivers of the New York City Railway Company or as receivers of the Metropolitan Street Railway Company*; and (b) all equipment cars, rolling stock, and other tangible property which the said receivers *in either of said capacities* have acquired or may hereafter acquire by means of such earnings or income or of the proceeds of the receivers' certificates hereby authorized.

(2) To the extent that the principal and interest of said certificates of indebtedness shall not be paid out of the earnings and income of said property in the possession of the receivers *in either of said capacities*, the same shall be paid out of the property of the Metropolitan Street Railway Company which is not subject to the lien either of the general and collateral trust mortgage dated February 1, 1897, or of the refunding mortgage dated March 21, 1902, above more particularly referred to, or from proceeds of sale of said property.

The form of certificate to be amended in accordance with this opinion.

We think the lien creditors have had their day in court so far as the issuance of the certificates is concerned. The order authorizing them is narrower than the petition and restricts the application of the proceeds to property which is covered by both mortgages. It expressly regulates the rights of the lien creditors in relation to the application of the proceeds upon the properties leased by the Metropolitan Street Railway Company. Though no conditions are expressed in respect to the application of the proceeds upon the property owned by the Metropolitan Street Railway Company covered by both mortgages, it is to be assumed that the receivers will apply to the Circuit Court for instructions when any considerable amount is involved, and that the court will require notice to be given to the lien creditors whenever it is proper to do so.

The order as modified is affirmed.

On Motion to Amend Order for Mandate.

Charles E. Rushmore, for J. D. Crimmins et al.

Davies, Stone & Auerbach (Brainard Tolles, of counsel), for Guaranty Trust Co.

Bronson Winthrop, for Morton Trust Co.

Byrne & Cutcheon, for Pennsylvania Steel Co.

J. Parker Kirlin, for Metropolitan Steel Co.

Masten & Nichols (William M. Chadbourne, of counsel), for receivers.

PER CURIAM. Certain contract creditors of the New York City Railway Company who have intervened and been made parties now move that the order for the mandate heretofore granted be amended by providing that the provisions as to marshaling the property subject to the lien of the certificates be stricken out of the order of the Circuit Court. The rights and priorities of all persons interested in the premises can be more intelligently adjusted with larger information in the future than they can now, and we therefore amend the order for the

mandate by further providing that the provisions in the original order of the Circuit Court as to the marshaling of the property subject to the lien of the certificates be stricken out, and that in place thereof there be inserted a clause as follows:

"The court reserves the right to adjudicate and determine the rights and claims of all the parties to the above-entitled causes and of all creditors of New York City Railway Company and of Metropolitan Street Railway Company as against each other, with respect to the properties and any part thereof of said two companies, and to adjust all matters of difference as to their respective priorities of payment and subrogation, but without impairing or affecting the lien of the certificates against the said properties."

The order of the Circuit Court is further amended by making the certificates bear interest at not exceeding the rate of 6 per cent. per annum, instead of at the rate of 6 per cent. per annum.

Let the order be entered and mandate issued forthwith.

UNITED STATES v. SCHERING & GLATZ (two cases).

(Circuit Court of Appeals, Second Circuit. June 8, 1908.)

Nos. 4,182, 4,186.

CUSTOMS DUTIES—CLASSIFICATION—SYNTHETIC CAMPHOR—"CAMPHOR, CRUDE."

The classification of synthetic camphor should be determined by the same considerations as of natural camphor, and where, measured by the principal tests, it still retains impurities that bring it far below the standard of refined camphor, and closely resembles the crude natural product, it is subject to classification as "camphor, crude," under Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 515, 30 Stat. 197 (U. S. Comp. St. 1901, p. 1682), rather than as "camphor, refined," under section 1, Schedule A, par. 12, 30 Stat. 152 (U. S. Comp. St. 1901, p. 1627).

Appeal from the Circuit Court of the United States for the Southern District of New York.

On appeal from a decision of the Circuit Court for the Southern District of New York, affirming a decision of the Board of General Appraisers, G. A. 3,263 (T. D. 26,995), reversing a decision of the collector assessing the merchandise in question as refined camphor, under Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 12, 30 Stat. 152 (U. S. Comp. St. 1901, p. 1627), which is as follows: "Camphor, refined, six cents per pound." The importers insist that the merchandise is entitled to free entry under section 2, Free List, par. 515, 30 Stat. 197 (U. S. Comp. St. 1901, p. 1682), which is as follows: "Camphor, crude."

J. Osgood Nichols, Asst. U. S. Atty.

Comstock & Washburn (Albert H. Washburn, of counsel), for importers.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. The Board of General Appraisers found the merchandise to be crude camphor.

Additional testimony was taken in the Circuit Court and, after argument, the same conclusion was reached there. A careful consideration of the record convinces us that the contention of the importers, that the merchandise in question is crude camphor, is established by a preponderance of testimony.

We are convinced that the merchandise is not refined camphor, its melting point, concededly, is lower than that of refined natural camphor, not only, but is also lower than that of various samples of crude natural camphor. Being camphor for tariff purposes—of this, under the authorities, there can be little doubt—it closely resembles crude natural camphor and, after the impurities have been removed, it resembles refined natural camphor. "The natural camphor pure and the synthetic camphor pure will have the same melting point."

We are not impressed with the belated contention that the merchandise is a chemical compound. That it is such a compound is, in a sense, true, but it is also true of the natural product for, chemically, they have the identical formula and there seems to be hardly a disagreement upon the proposition that the synthetic article is camphor. Several of the expert witnesses were unable to tell the two apart. That synthetic camphor may be refined is not disputed; indeed an exhibit of such camphor was introduced in evidence and it approximates closely to the refined natural camphor just as the crude article corresponds to the crude natural camphor. The importers concede that their refined synthetic camphor should pay duty but they ask for the crude article the same consideration which is shown to the crude natural product.

Natural camphor of a distinctly higher grade than the merchandise in suit has, for years, been given free entry as crude camphor.

If the removal of impurities be necessary to convert the one from the crude to the refined state, why should not the same test be applicable to the other?

One of the government witnesses testified as follows:

"Q. If you can, by the process of sublimation of a synthetic article such as camphor, raise the melting point from say 162 to 175 or 176 degrees, that would convey to your mind as a chemist the conviction that you were dealing with a crude synthetic product, would it not?

"A. Yes, sir.

"Q. And that the resulting article obtained after the process of refining or sublimation showed a melting point of 175 or 176 degrees was the refined synthetic product; that would be true, wouldn't it?

"A. Yes, sir."

We are impressed with the proposition that refined camphor, whether natural or synthetic, is camphor from which the impurities have been removed and that camphor not subjected to this process is crude camphor. It seems to us plain that, measured by all the principal tests, the merchandise in question still retains impurities which bring it far below the standard of refined camphor. If not crude camphor then there is no such thing as crude synthetic camphor, as we are here dealing with it in the crudest form in which it is imported.

We deem it unnecessary to add further to the discussion of the questions involved found in the opinions below.

The decision of the Circuit Court is affirmed.

NOTE.—The following is the opinion of Platt, District Judge, in the court below:

PLATT, District Judge. The merchandise in dispute is "synthetic camphor." This is produced abroad under a patented process from the oil of turpentine, and is in no wise connected with the camphor made from the leaves and

branches of the camphor tree, which has been the subject of tariff legislation ever since 1824. It has crept into our commerce long since the passage of the act of 1897, and therefore could not eo nomine have been in the mind of the Legislature. It is made by a secret process, and our knowledge of the product can only come from physical examination and chemical analysis. It has, however, now come to be known in trade as "camphor" and is used as a substitute for camphor. Under *Pickhardt v. Merritt*, 132 U. S. 252, 10 Sup. Ct. 80, 33 L. Ed. 353, I suppose it must be classified as "camphor," although such treatment leads us into the quagmire of this issue.

Exhibits A and 1 are from the product in suit. Exhibit 2 is presented by the importer, and shows a synthetic camphor which has only slightly affected commerce in this country. The manner of its making is shrouded in darkness. The importer concedes it to be "refined." The government concedes that Exhibits A and 1 are not refined to the extent of responding to the test of the United States Pharmacopœia, but insists that such a test must be confined to the medicinal use of camphor; that the use of camphor in the arts is greatly in excess of its use as a medicine; and that if it is so far refined that it can be used in manufactures in the condition imported, it ought to pay duty. It is conceded that crude camphor cannot be put to any use, and for that reason it was put upon the free list in the act of 1897. The celluloid industry is very large, and when its owners use crude natural camphor they refine it upon their own premises. If they can use this merchandise without refining it, the problem is solved.

The melting and boiling points of crude camphor are undoubtedly important tests in discovering the line of demarcation between crude and refined camphor. It would seem, however, that since 90 per cent. of the imported camphor is used in the manufactures and arts and only 10 per cent. in medicines, it would be unnecessary to find all the limitations of the Pharmacopœia present in a substance before it could be classified as refined camphor for tariff purposes. If the large quantities used in manufacturing celluloid in its different forms can be satisfactorily used in a less refined state than that devoted to medicinal purposes the tests which will pass the former should be enough.

If the evidence showed the merchandise in dispute to be entirely fit for use in the condition in which it is found when imported, it ought to pay duty. The government insists that the testimony establishes that fact, but, upon careful reading, I cannot so find. It seems to require further treatment before it is thought fit for use. Therefore it cannot be said to be refined.

The government acquiesced in a decision of the Board in 1902 (G. A. 5,243 [T. D. 24,151]), which classified an importation of natural camphor from Formosa as crude, and a like product has been coming in since then free. That merchandise was in a pretty fair condition of purity, with a high melting and boiling point, and quite clean looking. It would be unfair to levy tribute on such artificial camphor as that in issue, and permit such a product as the improved Formosa to come in free.

This merchandise is on the edge of being a chemical compound, but if we are to discuss it under the camphor paragraphs, it is not possible for me to find sufficient warrant for reversing the Board. Indeed, the testimony as to the use of the merchandise as imported was far stronger before the Board than it now stands before the court.

The decision of the Board is affirmed.

JOHNSON v. VIRGINIA-CAROLINA LUMBER CO.

SMITH v. SAME.

(Circuit Court of Appeals, Fourth Circuit. July 17, 1908.)

Nos. 806, 807.

1. CONTRACTS—VALIDITY—OPTION.

An option, to be enforceable, must be under seal or be supported by a valuable consideration.

2. SAME—ACTION—FAILURE TO PERFORM.

Defendant entered into a contract by which it gave the right for 60 days to plaintiff to sell certain property owned by defendant at not less than a stated price, plaintiff to have all over such price that he could obtain; defendant agreeing to quote such price to all purchasers as he should name. Plaintiff transferred the option, and the transferees attempted to make a sale until long after the time limited had expired, and secured a man to look at the property; but he refused to buy at the price named by them, and they so notified defendant, which thereafter sold to him at a smaller price than that named in the option. *Held*, that plaintiff had no right of action to recover on a quantum meruit for services rendered, having failed to fulfill the conditions which alone entitled him to payment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 1207-1215.]

In Error to the Circuit Court of the United States for the Eastern District of Virginia, at Norfolk.

Edward R. Baird, Jr., for plaintiffs in error.

R. T. Thorp and Jno. N. Sebrell, for defendants in error.

Before PRITCHARD, Circuit Judge, and BOYD and DAYTON, District Judges.

DAYTON, District Judge. These two cases grew out of the same transaction. By consent of counsel the second was determined upon the testimony adduced in the first, and they may very properly be disposed of together here.

On January 10, 1906, T. H. Barrett, L. W. Thorpe, V. D. Thorpe, G. P. Vick, and J. G. Majette were associated together as partners under the firm name of the Virginia-Carolina Lumber Company, and as such were the owners of a lumber plant and certain timber rights, situate in Nash and Franklin counties, N. C. On that day A. R. Smith went to Mr. Barrett, the president of the company, and informed him that he believed he could effect a sale of the property through G. Fred Johnson. Thereupon two conditional contracts or options were executed by Barrett, as president, on behalf of the company; the one granting to Johnson, or his assigns, "for a period of 60 consecutive days (said 60 days to commence at the time we consent to let you, or your assigns, commence to examine the property hereinafter mentioned) the privilege to, at any price not less than \$145,000," sell the said plant and timber holdings. This option to sell then provides for the terms of payment, if sale be made, and for the sale of the logs and lumber on the yards in such event, and then stipulates:

"We hereby agree to quote any price you may name (and no price except that which you name) for the aforesaid property to any prospective purchaser

you may bring us, provided that price is not less than \$145,000, and we further agree that we will not sell to him, directly or indirectly, at any time, the aforesaid property without your consent."

The further provision is then made that Johnson was to have all over \$145,000 for which he might sell the property, to be added by him in the sale to the cash payment required. The second contract was with Smith, and simply provided that, if a sale of the property was made by Johnson under the conditions of the writing just referred to, the company would pay him (Smith) out of the cash payment \$5,000.

On March 24, 1906, Johnson by writing gave to the Mason-Miranda Company of Norfolk, Va., the privilege of selling the property upon conditions substantially the same as those contained in his option to sell from the lumber company, limiting, however, such privilege to April 15, 1906, unless the Mason-Miranda Company should have a prospective purchaser examining the property by that time. Johnson notified Barrett, president of the lumber company, that the Mason-Miranda people were the ones through whom he hoped to sell the property. On April 7th following the Mason-Miranda Company gave to Frank J. Saxe, a New York broker, an option substantially in the terms of theirs from Johnson, and Saxe secured Tremaine to make an examination of the property with a view to purchasing it. This examination by Tremaine commenced on April 12, 1906, as Saxe by telegram notified the Mason-Miranda Company, and it was completed before May 7, 1906; for on that day Saxe notified the Mason-Miranda Company that Tremaine absolutely declined to pay the \$165,000 asked for the property and Saxe surrendered his option. On May 10th, in reply to a letter from Miranda, Saxe states Tremaine refused to give more than \$140,000. The Mason-Miranda Company notified Barrett, president of the lumber company, of this state of affairs. Subsequently Saxe notified Barrett that Tremaine and his parties refused absolutely to deal at any price through middlemen, and that he had sent them direct to him, to see if they could negotiate. Of this the Mason-Miranda Company was notified by Barrett. Such negotiation was had between Tremaine and Barrett that the property was sold to Montgomery for \$135,000; Barrett generously allowing \$4,000 of this sum to be paid to Saxe and \$1,000 to the Mason-Miranda Company for their services, with which they expressed themselves satisfied.

Thereupon Johnson instituted his action of assumpsit against the defendant lumber company, claiming 10 per centum of the gross sale price, or \$13,500, and Smith instituted a like action, claiming the \$5,000 provided for in his contract with its president, Barrett. Upon trial the court below directed the juries in each case to find for the defendant company, and judgments were rendered for the defendant in accordance with such verdicts. To these judgments these writs of error have been taken to this court.

It seems to us clear that the mere statement of facts shows that the action of the court below was absolutely right in each case. The original so-called option by Barrett on behalf of the defendant gave to Johnson only the right or privilege to secure a purchaser and sell

to him the property at a price not less than \$145,000, and he was to have for his effort only the amount above this sum that he could sell for, and this only on condition that he made a sale. It gave him no interest in the property. It did not prevent the defendant from selling at any time and at any price to any one other than to a prospective purchaser presented by Johnson, his agents or assigns. It was not under seal, was without consideration, and could not be enforced in equity. An option must be supported by a valuable consideration, unless it is under seal. *Graybill v. Brugh*, 89 Va. 895, 17 S. E. 558, 21 L. R. A. 133, 37 Am. St. Rep. 894; *Cummins v. Beavers*, 103 Va. 230, 48 S. E. 891, 106 Am. St. Rep. 881; *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94; *Hanly v. Watterson*, 39 W. Va. 214, 19 S. E. 536. At the most it was but a permission to Johnson to sell, and could have been terminated at any time by notice. Johnson could give the Mason-Miranda Company no better right than he had. He simply turned over his right to sell to them, and they in turn did the same to Saxe. The latter made an abortive effort to sell, failed, and gave the effort up. No sale was ever effected by Johnson, or any of his agents or assigns, within either the time or the terms set forth in this license to him to sell. Nor is it contended that any such sale could have been made by him or them which was prevented from consummation by the defendant. On the contrary, it is expressly shown that the whole combination utterly and completely failed to make any such sale. It is absolutely sure that they were to have nothing unless they did sell. They expressly undertook to work for nothing unless they sold within the time and for more than \$145,000. To permit them to come under such conditions and recover upon quantum meruit for work and labor done would violate every principle of contracts. Smith is in no better plight. His contract was conditional upon Johnson selling for \$145,000, which Johnson did not do and could not do.

The judgments in these cases must be affirmed, with costs in each case in favor of the defendant.

Affirmed.

NATURAL FOOD CO. v. WILLIAMS.

(Circuit Court of Appeals, Seventh Circuit. April 14, 1908.)

No. 1,398.

PATENTS—SUIT FOR "INTERFERENCE"—CEREAL CUP.

There is no "interference," within the meaning of Rev. St. § 4918 (U. S. Comp. St. 1901, p. 3394), between the Perky design patent, No. 25,318, for a design for a cereal cup, which is cylindrical in form, and the Williams patent, No. 820,899, for a shredded wheat biscuit made in the form of a cup, but which is nearly hemispherical in shape, having a rounded bottom.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 4, p. 3711.]

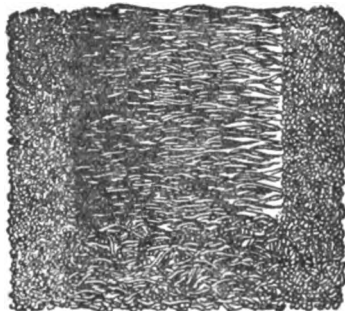
Appeal from the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois.

Section 4918, Rev. St. (U. S. Comp. St. 1901, p. 3394), provides that:

"Wherever there are interfering patents, any person interested in any one of them, or the working of the inventions claimed under either of them, may have relief against the interfering patentee and all parties under him by a suit in equity against the owners of the interfering patent."

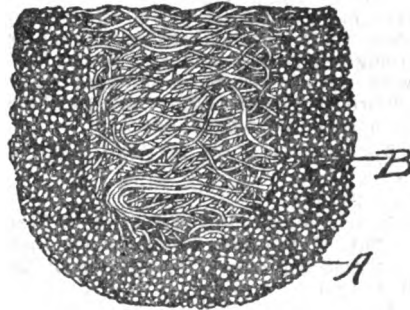
Appellant, as owner of design patent No. 25,318, which was issued on March 31, 1896, to Perky, for a "design for a cereal cup," filed a bill against appellee as owner of mechanical patent No. 820,899, which was granted to him on May 15, 1906, for a "shredded wheat biscuit," alleging that there was interference between claim 1 of the Williams patent and the single claim of the Perky patent. Appellee's demurrer was sustained, and the bill was dismissed for want of equity.

The bill exhibits both patents. The Perky "invention relates to a certain new and original design for edible cups, * * * and it consists in the novel form and configuration thereof. * * * The leading feature of the design consists in a cylindric cup having a large central circular cavity, which is seen to extend to within a short distance of its lower end, and whose side walls and bottom present externally and internally a rough and fibrous interstitial appearance, showing superposed masses or layers of threads or filaments which are so disposed that the threads or filaments of inner layers or portions are partially visible through the surface layers or portions, as shown in the drawings." What is claimed is: "The design for a cereal cup, substantially as herein shown and described." In vertical section the design is pictured thus:



Williams says in his specification: "The object of my invention is to provide a biscuit of pleasing appearance that shall have many advantages over biscuits heretofore in use. With this end in view, suitable food materials are

converted into filamentary form and then made into cup-shaped biscuits. * * * Whatever the material, the filaments are assembled in the form of a cup, A, preferably having all its walls of approximately the same thickness, which may be varied as desired, and, as appears from the drawings, the filaments are so arranged that although they interlace by passing toward and away from the interior of the cup the general course of nearly all of them is around the cup in various directions, the result being that the structure has a peculiar nest-like appearance while an axial section shows principally filament ends." The specification then proceeds to describe how this cup-shaped biscuit may be made. Claim 1 reads: "A cup-shaped biscuit made up of interlaced cereal filaments whose general courses are around the cup in various directions, forming a nest-like structure." The drawing of the Williams cup in vertical section is as follows:



Appellant's bill contains averments that Williams "applied for his said patent with the intention of covering and appropriating the structure and design protected by your orator's said patent"; "that simply a reading of the specification of the Williams patent and the comparison of the same with the specification of your orator's said design patent shows conclusively that the two things and structures identified by both of said patents are one and the same thing"; and "that the first claim of the Williams patent substantially identifies and stands for the single claim of your orator's design patent."

Charles K. Offield, for appellant.

Lysander Hill, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

BAKER, Circuit Judge (after stating the facts as above). Appellant's averments of identity and consequent interference are unavailing against the demurrer if their falsity appears from an inspection of the patents.

Passing appellee's contentions that the Perky patent is void on its face and therefore cannot supply a basis for any kind of suit in equity, and that interference can never properly be declared under section 4918 between a design patent and a mechanical patent, owing to their difference in character, we think it sufficient in this case to say that we find no interference in fact. The form which Perky claimed was beautiful and the form which Williams said was useful are radically different in their appeal to the eye, for in one the dominant line is straight and in the other curved.

The decree is affirmed.

NATIONAL TUBE CO. v. AIKEN.

(Circuit Court of Appeals, Sixth Circuit. July 11, 1908.)

Nos. 1,765, 1,766.

1. PATENTS—INVENTION—TRANSFER OF DEVICE TO NEW ART.

The taking of a device from one industry and its application to a new use in another may constitute patentable invention when the original inventor never designed nor actually used it for the purpose to which it was later applied.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 81.]

2. SAME—AGGREGATION OF ELEMENTS.

The mere bringing together of old elements, which in their new places do no more than their original work and do not co-operate with other elements in doing something new and useful, is not invention; but, if they co-act with each other in a new and unitary organization so as to produce a more beneficial result than by their separate operation, it may constitute a patentable combination.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, §§ 27-29, 48.]

3. SAME—UTILITY OF DEVICE.

That a machine shall produce an original result is not necessary to patentability; but, if the new arrangement increases the effectiveness of the old by increased product or by lessening the cost, the fact affords evidence of invention.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 80.]

4. SAME—"PATENTABLE COMBINATION."

Where the elements brought together in a new organization co-operate to produce a single practical and useful result, it constitutes a patentable combination, and it is not important whether they act simultaneously or successively.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, §§ 27-29.

For other definitions, see Words and Phrases, vol. 6, p. 5234.]

5. SAME—INFRINGEMENT—APPARATUS FOR COOLING AND STRAIGHTENING METAL PLATES.

The Aiken patents, No. 450,360, for an apparatus for conveying and cooling metal plates, and No. 492,951, for an apparatus for straightening metal plates, which embodies the substantial features of the earlier patent with additional devices, constituting a true combination, and not a mere aggregation of elements, were not anticipated, and both disclose patentable invention. Also, *held* infringed.

Appeal from the Circuit Court of the United States for the Northern District of Ohio.

For opinion below, see 157 Fed. 691. See, also, 159 Fed. 1023.

James I. Kay and J. Snowden Bell, for appellant.

Marshall A. Christy, for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge. These two appeals have been heard together, as they were in the court below. The first case, No. 1,765, was for an infringement of patent No. 492,951, issued March 7, 1893, to the appellee, Henry Aiken. The other involves the infringement of patent No. 450,360, issued April 14, 1891, to the same inventor. The defendants in each suit are the same, and the infringement is a single structure which infringes both patents. The defenses are that pat-

ent No. 450,360 is anticipated by expired patent No. 369,154, issued August 30, 1887, to the same inventor, and that the latter patent, No. 492,951, includes no improvement constituting patentable invention over No. 450,360 and is for a mere aggregation. The court below sustained both patents and found both infringed. The opinion was by Tayler, District Judge, and is reported in 157 Fed. 691.

Both patents are for apparatus relating to the making of metal plates by rolling mills. The patent of 1893, upon which the first suit was brought, is entitled "An apparatus for straightening metal plates." The invention is described by the patentee in his specifications as "mainly" consisting:

"In the combination with a straightening press for the plates, of a conveying table or carrier which leads up to the straightening press lengthwise thereof, so as to bring the plates from the rolls to or in close proximity to the press; and also in the combination with devices, of a transfer mechanism adapted to shift the plates from the conveying table to the press."

The conceded fact is that the combination of this 1893 patent includes the entire device of the 1891 patent, with the addition of an interposed improved straightening press with suitable appliances for its operation in connection with the two parallel feeding and conveying tables. The 1893 patent is to that extent tributary to the 1891 patent, for it is not possible to use the entire device without using that of the earlier patent. The evidence, indeed, shows that the entire apparatus of the 1893 patent was conceived before either patent issued; but the inventor, having an order for a mill which did not desire the straightening press, made and patented those parts of his invention which covered his improved conveying and cooling tables, being the subject of his 1891 patent, and later applied for and obtained the patent of 1893. This is, however, not a matter of vital importance, for if the combination of the latter patent is a new combination and not a mere aggregation, and the results are new and useful in a patentable sense, the patent will stand, though every element is old. Nevertheless, it is difficult to justly estimate the advantages of the apparatus of 1893 without distinguishing between those which are attributable alone to that part of the device which is covered by the earlier patent and those which result only from the added straightening press. This comes about because the inventor divided his invention instead of patenting his entire invention in one patent. This division has also lent color and seriousness to the contention that the addition of a straightening press to the device of 1891 constitutes an aggregation and not a true mechanical combination. The solution of this question of aggregation will be facilitated if we shall first understand the device of the 1891 patent.

Aiken's first step in this matter of improving the methods for cooling hot metal plates is shown by his method patent of 1887. The patent has long since expired, and its only importance lies in the contention that the apparatus described therein for operating under Aiken's method, and the statements of the patentee as to a proper mechanism, constitute a disclosure which would enable any one skilled in the iron rolling business to have made the apparatus covered by Aiken's 1891 patent. The specifications of the 1887 patent disclose the prior methods for cooling plates. The patentee says:

"It has been a common custom heretofore to place these plates one on top of another in piles on the floor of the rolling mill or on cars as they come hot from the rolls, and to permit them to remain in such position until cool enough to be handled, when they were taken to the shears to be trimmed. As they are not rolled to a uniform size, but vary greatly in dimensions, the edges of some of the plates in the piles will extend beyond the edges of others, so that the center of the pile is built up solidly of hot plates, while the projecting edges of the larger plates are exposed more or less to contact with the atmosphere, which can gain no access to the middle portions of such plates. The result is that they cool unequally, and the edges become warped and distorted, and internal strains are produced which tend to weaken the plates and injure their quality. Such plates also require more shearing on this account, which produces a larger percentage of waste. When the plates are placed singly on the floor to cool, they are also liable to warp and buckle, owing to the fact that the air cannot obtain free access to the under side."

The method which Aiken proposed to substitute for the old and clumsy method was, as stated in the single claim of his patent, that of conveying the hot plates singly "through the atmosphere upon moving surfaces, where they are exposed to the atmosphere on all sides; the points of support constantly changing. * * *" To illustrate how this method might be carried out, he points out that, when the metal sheets or plates are delivered in the usual way from the rolls upon the usual rolling mill feeding table, there should be provided "adjacent to the table, upon which the plate is delivered after the last pass, and preferably in line with said feed table, * * * a roller table of considerable length, terminating preferably at or near the shears." "This roller table," he says, "is a series of rollers at suitable distances apart operated by proper mechanism." An apparatus which he constructed before applying for his patent is shown and described. That apparatus was made for and long operated in the Homestead Rolling Mill. It was longitudinally a monster, 300 feet long, requiring, of course, very great space. One end connected with the usual feed table upon which the plates were first delivered from the rolls. The other terminated at the shears, where the jagged edges were to be cut off and the plates given the shape desired. Somewhere between the feed table and the shears, and after the plates had stiffened, they were to be stopped, and the lines marked to be followed by the shears. The operation, as he described it, was this:

"The plate, which usually leaves the rolls at a dull, red heat, is conveyed by the rollers of the feed table, c, to and delivered on the table, d. The rollers, f, being revolved at a slow speed, carry it slowly along the table to the shears, e. In its progress the plate is exposed to the air on all sides, and never being allowed to remain stationary it has no opportunity to bend or buckle by its own weight, even if at first hot enough to do so. The lines of impingement upon the rollers are constantly changing, and at most occupy but a small portion of the under surface, so that the underside of the plate is for all practical purposes as much exposed to the cooling influences of the air as the upper side. The result is that the plate cools uniformly on all sides, and the tendency to warp, buckle, and set up internal strains is obviated. If the plate is not sufficiently cooled when the end of the table is reached, the rollers may be reversed, and thus the plate be carried back and forth until sufficiently cooled. If the rolling is continued in the meanwhile, this reverse motion may be kept up until another plate comes from the rolls, then the forward motion may be resumed to receive the new plate. Usually there are a number of plates upon the table at a time, and there is sufficient intermission between the deliveries of the plates from the rolls to allow of considerable reverse travel, if necessary. In figure 3 I show a

plate, a, traveling over the table. It is not necessary that the table, d, should connect with the feed table, c. It may be at another place, and the plates be conveyed to it by any suitable means. Nor is it necessary that it should lead to the shears, but the economy and convenience of such an arrangement is obvious. Practical experience has demonstrated that my invention prevents buckling and warping and renders less trimming necessary."

In addition to the great space longitudinally required for a plant such as shown in the 1887 patent, impracticable in many mills, the tonnage capacity of such a mechanism was necessarily limited by its length. It could cool no more plates having a width of 30 inches than it could of plates of twice that width. As plates of varying width are rolled, it was economically important that the tonnage capacity of the apparatus for cooling and shearing should not be diminished when narrow sheets were to be rolled. To meet these objections, Aiken designed the apparatus of the 1893 patent, but divided his invention, as before stated, so as to include in his first patent only the improved arrangement for carrying and cooling such plates. The patent of 1891 is entitled a "Table for conveying and cooling metal plates." The patentee, in his specifications, says:

"The object of my invention is to provide means for conveying plates from the rolls to the shears at which their edges are trimmed, and for cooling them in their transit in such manner as to prevent them from warping and becoming distorted in shape, as they do when placed on the mill floor and allowed to cool there."

The apparatus described and illustrated comprises two conveying tables provided with driven rollers and extending substantially parallel to each other in opposite directions, one table leading from the rolls, and the other to the shears, with transfer mechanism adapted to transfer the plates from one table to the other. The patent says:

"The plates are moved along these tables by the transfer mechanism, preferably step by step, so that they cool gradually with both surfaces exposed to the air and are delivered at the shears in condition to be trimmed."

The claims are for a combination with "rolls adapted to roll metal plates and a rolling feed table," of conveying tables adjacent to and independent of the feed table, adapted to receive the metal plates therefrom, with transfer mechanism adapted to transfer them from the first to the second table. A short statement of this invention is that the inventor divided the long carrying table of the 1887 patent into two parts, placing the two tables adjacent and parallel to each other, and provided a transfer mechanism by which the cooling plates might be slowly transferred from one to the other. It may not seem a particularly long or important step in the art, but the results are shown to have been highly beneficial in the saving of time, labor, and space. The new arrangement of the cooling tables with traveling transfer chains between and connecting made the tonnage capacity for cooling and shearing uniform, whether the plates were wide or narrow, for the sheets or plates when partly cooled were delivered sideways onto the traveling transfer chains, and then onto the second table. Thus the capacity was the lateral and not the longitudinal space of the apparatus.

The suggestion, quoted above from the specifications, that the first of the cooling tables of the patent need not connect with the feed table,

or lead to the shears, but that the plates might be conveyed to it by "any suitable means," is said to be a suggestion of parallel tables; but, if so at all, it is a long shot and points out none of the advantages of such an arrangement nor of the means for transferring plates while cooling. Nor was the intimation calculated to induce effort in that direction, for the patentee concludes by commending the economy and convenience of the connection he has adopted as the best. Certain it is that, however obvious the advantages of the new arrangement may now appear, no one made it or seemed to think of it until Aiken designed the mechanism of his 1891 patent.

The Aiken method patent of 1887 is the only prior patent which describes any mechanism for conveying and cooling long, thin plates of hot metal. That was a first and useful step in the development of apparatus for that purpose; but its advantages were limited, as it could treat simultaneously no more narrow plates than wide ones, and, second, by the great space such a plant required for operation. It is true that the patentee does not specifically mention this first advantage, but it is one inherent in the form and operation of his apparatus and is one of those advantages which is included in his statement, that, aside from a saving of space, his apparatus "is otherwise of great convenience." To provide for the transfer from one table to another of such long, thin, hot plates, and at the same time continue a uniform cooling without distortion, involved an adaptation of methods of transfer to the purpose desired which was not so simple as to justify the contention that he displayed only the ordinary skill of a mechanic. Speaking of this arrangement, Mr. Bentley, one of the appellant's experts, says that Aiken—

"makes use of this arrangement to receive the plates as they come red hot from the rolling mill on the feed table; then to lift and transport them laterally by the chains at such slow rate that the plates will become cooled in transit; then delivers them to the second set of feed rolls at the opposite end of the chain conveyor; and finally propel them by the second set of feed rolls to the shears where they are to be cut up in the desired lengths."

Thus the function of the transfer mechanism is in part to clear the first table, making room for succeeding plates by continuing the cooling process by the slow backward and forward movement of the conveying chains. True that the patent states of the first cooling table that the "plate may be carried back and forth by rotation until it stiffens"; but this is only a step toward cooling, for that is continued upon the traveling chain conveyors in the space provided for its occupancy until dropped upon the second table to be there further cooled, and all this without manual handling and so uniformly as to avoid warping. The reference to sundry sawmill patents, showing conveying tables and driven chains extending between them for transferring logs or lumber from one table to the other do not show anticipations. There is little analogy between the problem involved in conveying and transferring rigid, cold bodies from one conveying table to another, and that presented when the subject is long, flexible sheets of hot metal, which must be cooled uniformly and without warping while the carrying and transferring is going on. Cooling by exposure to the atmosphere involves constantly changing points of support. The log sawing art taught little or nothing that was pertinent either

in respect to the construction or arrangement of conveying tables or the proper mechanism for transferring such hot plates from one table to another. We must not be misled by the apparent resemblance between a device taken from one industry and applied to a new use in another when the original inventor never designed or actually used the device for the purpose to which it has been put.

In *Potts v. Creager*, 155 U. S. 597, 607, 15 Sup. Ct. 194, 198, 199 (39 L. Ed. 275), Justice Brown said:

"Indeed, it often requires as acute perception of the relation between cause and effect, and as much of the intuitive genius which is a characteristic of great inventors, to grasp the idea that a device used in one art may be made available in another, as would be necessary to create the device *de novo*. And this is not the less true if, after the thing has been done, it appears to the ordinary mind so simple as to excite wonder that it was not thought of before."

In *Western Electric Co. v. La Rue*, 139 U. S. 601, 11 Sup. Ct. 670, 35 L. Ed. 294, a patent was upheld where one took a torsional spring, such as had been previously used in clocks, doors, and other articles of domestic furniture, and applied it to telegraph instruments; the application being shown to be wholly new. Nevertheless, the general rule undoubtedly is that it is not invention to apply an old device to a new use which involves no change in mode of application, as in *Stearns & Co. v. Russell*, 85 Fed. 218, 29 C. C. A. 121; but in that case the function of the pill dipping device in picking up and holding pills by suction was precisely the same as where it was employed in picking up and holding pieces of iron, cloth, or paper, and no structural change was needed to adapt it to doing with pills what it had before done with other materials.

In *Heaton-Peninsular Button-Fastener Co. v. Elliott Button-Fastener Co.* (C. C.) 58 Fed. 220, a principle was laid down which we think applicable to the claim that the invention of the sawmill patents referred to is an anticipation. In that case Justice Brown said:

"Doubtless, a patentee is entitled to a monopoly of his invention for all purposes; but where it is designed for a particular purpose, and another has taken it, and, by certain changes in its construction, has adapted it to an entirely different purpose, the evidence of its original adaptation for such new purpose ought to be reasonably clear and convincing to deny the improver the benefit of a patent for such new adaptation."

In *Topliff v. Topliff*, 145 U. S. 156, 12 Sup. Ct. 825, 36 L. Ed. 658, it was said:

"It is not sufficient to constitute an anticipation that the device relied upon might by modification be made to accomplish the function performed by the patent in question, if it were not designed by its maker, nor adapted, nor actually used for the performance of such functions."

In *Potts v. Creager*, 155 U. S. 597, 606, 15 Sup. Ct. 194, 198 (39 L. Ed. 275), speaking of the adaptation of an invention in one branch of industry to use in another, the court said:

"But where the alleged novelty consists in transferring a device from one branch of industry to another, the answer depends upon a variety of considerations. In such cases we are bound to inquire into the remoteness of relationship of the two industries, what alterations were necessary to adapt the device to its new use, and what the value of such adaptation has been to the new industry. If the new use be analogous to the former one, the court will undoubtedly be disposed to construe the patent more strictly, and to

require clearer proof of the exercise of the inventive faculty in adapting it to the new use, particularly if the device be one of minor importance in its new field of usefulness. On the other hand, if the transfer be to an industry but remotely allied to the other, and the effect of such transfer has been to supersede other methods of doing the same work, the court will look with less critical eye upon the means employed in making the transfer. Doubtless, a patentee is entitled to every use of which his invention is susceptible, whether such use be known or unknown to him; but the person who has taken his device and, by improvements thereon, has adapted it to a different industry, may also draw to himself the quality of inventor."

The most that can be said about these sawmill patent references, as well as those which show methods of handling and transferring hot masses or billets of metal, such as the Daniels patent, No. 369,503, is that they teach something in respect to the means for handling or transferring materials in which neither warping nor distortion is to be guarded against, and rapidity of movement therefore desirable, but nothing of any high degree of pertinency when the material to be carried or transferred consists of long, flexible, red-hot sheets of metal, which must be uniformly cooled in course of travel without warping and by atmospheric exposure. None of the patents referred to show or describe a slow step by step transfer or carrier. Indeed, in the billet pusher patents, rapidity of movement to avoid cooling was essential. The reference to both class of patents is too remote to deprive the patentee of the benefit of his invention in adapting to his use mechanism from other arts which was never designed or used for the purposes of the patent in suit.

We come now to the patent of 1893. The specifications state:

"The object of my invention is to provide convenient apparatus for plate-mills, by which the metal plates, after they have been delivered from the rolls, can be straightened and removed from the straightening press, without the difficult and tedious hand labor heretofore employed in straightening and handling them."

The nature of the invention is then generally stated as follows:

"To this end my invention consists mainly in the combination with a straightening press for the plates, of a conveying table or carrier which leads up to the straightening press lengthwise thereof, so as to bring the plates from the rolls to or in close proximity to the press; and also in combination with such devices, of a transfer mechanism adapted to shift the plates from the conveying table to the press. It also consists in an improved straightening press and in certain other combinations and features of construction hereinafter described. The advantages of my invention will be appreciated by those skilled in the art. It results in a saving of labor and time in the straightening of the plates and thus is a means of economy and profit to the manufacturer."

It is contended: That the patentee has here brought together the carrying tables and transfer devices of his first patent and placed between his tables a straightening press by means of which the hot plates are straightened as an independent incident of their travel from the rolling mill feed table to the shears; that no new or useful result is accomplished, and no invention involved in the juxtaposition of the parts; that, in short, the device is a mere aggregation in which the old devices do in their place the work they did before being brought together. The mere bringing together of old elements which in their new places do no more than their original work and do not co-operate

with other elements in doing something new and useful is not invention. *Thatcher Heating Co. v. Burtis*, 121 U. S. 286, 7 Sup. Ct. 1034, 30 L. Ed. 942; *Richards v. Chase Elevator Co.*, 158 U. S. 299, 15 Sup. Ct. 831, 39 L. Ed. 991. We have applied the same principle more than once, *Campbell Printing-Press & Mfg. Co. v. Duplex Printing-Press Co.*, 101 Fed. 282, 41 C. C. A. 351; *Goodyear Tire & Rubber Co. et al. v. Rubber Tire Wheel Co.*, 116 Fed. 363, 53 C. C. A. 583; *Johnson et al. v. Foos Mfg. Co.*, 141 Fed. 73, 72 C. C. A. 105.

If, however, the adaptation of old and separate elements, so that they co-act with each other in a unitary organization, involves the exercise of something more than the skill of an ordinary mechanic, the result may be patentable, if a more beneficial result is effected than by the separate operation of the parts. *Thatcher Heating Co. v. Burtis*, 121 U. S. 286, 295, 7 Sup. Ct. 1034, 30 L. Ed. 942; *Overweight Elevator Co. v. Vogt Machine Co.*, 102 Fed. 957, 43 C. C. A. 80. So if a new combination and arrangement of old elements produces a new and beneficial result, as to greatly increase the productive efficiency of a machine, it is evidence of invention. *St. Louis Flushing Co. v. American Flushing Co.*, 156 Fed. 574, 84 C. C. A. 340; *Muller v. Tool Co.*, 77 Fed. 621, 23 C. C. A. 357; *Star Brass Works v. General Electric Co.*, 111 Fed. 398, 400, 49 C. C. A. 409; *Loom Company v. Higgins*, 105 U. S. 589, 26 L. Ed. 1177.

We are not impressed with the argument that the combination claims of this patent show a mere juxtaposition of the different parts there assembled. The claims are not for a combination of the earlier patent with any straightening press, however made or combined. They are for a combination of the conveying tables and transferring apparatus of the earlier patent with a specific, improved straightening machine, by specific means, pointed out as elements co-operating to produce a specific operative arrangement, the whole combined as and for the purposes described. The invention as described need not be set out in detail. First, there is a conveying table, comprised of feed rollers, driven by suitable gearing, which extends out from the table of the plate rolling mill. Second, extending parallel to this table is the bed of the straightening press, having a flat top on which the plate to be straightened is laid and at the edge is a rib or shoulder, against which the edge of the plate is forced to remove the irregularities and curves usual in such plates as received from the rolls, and to reduce the edge to a straight line. Opposite the flange are a series of simultaneously movable heads, by which the successive plates are confined and straightened. Third, on the opposite side of this straightening press, and parallel therewith, a second conveying table upon which, after cooling and straightening, the plates are deposited, and by which they are carried to the shears to be cut into suitable lengths. Fourth, transfer mechanism extending clear across the machine from one table to the other and through specially provided gaps in the straightening bed, consisting of a series of vertically movable and horizontally traveling transfer chains.

The place of the straightening press in the old art was in line with the feed table. To place it between the parallel tables of the Aiken apparatus involved changes essential to its effective operation there which

appear to us to be beyond the ordinary skill of a mechanic. Now that it has been done, it may seem a matter of easy solution; but Aiken first saw the benefit to be derived from taking it out of the line of the feed rolls and placing it alongside. In that place the plates reached it before becoming too rigid and while plastic enough to be edgewise straightened. In that place it was advantageously placed to permit a step by step operation to go on; the straightened plate giving way to succeeding plates as they came from the feeding table. The result is a unitary mechanism which has saved time and labor and has gone into general use as the standard cooling and straightening mechanism for metal plates and sheets. That a machine shall produce an original result is not necessary to patentability. If the new arrangement increases the effectiveness of the old by increased product or by lessening the expense, the fact affords evidence of invention.

In *Loom Co. v. Higgins*, cited above, it was said:

"It was a new and useful result to make a loom produce 50 yards a day where it had never before produced more than 40; and we think the combination by which this was done, even if these elements were separately known before, was invention sufficient to form the basis of a patent."

In *Star Brass Works v. General Electric Co.*, 111 Fed. 398, 400, 49 C. C. A. 409, 411, the change between the new and the old mechanism consisted only in changing the familiar contact spring or brush from one place and putting it in another, in a trolley structure. In that case, Judge Day, now Mr. Justice Day, speaking for this court, said:

"Is this invention, or only the obvious improvement which would suggest itself to a mechanic skilled in the art? It is too well settled to need extended citation of authorities to support the proposition that a new combination of elements old in themselves, producing a new and useful result, entitles the inventor to the protection of a patent. *Loom Co. v. Higgins*, 105 U. S. 580, 591, 26 L. Ed. 1177. It may be true that Anderson has only taken the familiar contact spring or brush, and placed it in a protected position; but this change seems to have made the difference between a defective mechanism and a practical method of attaining the desired end. Where, as in this case, the departure from the former means is only small, yet the change is important, the doubt as to whether the inventive faculty has been exercised is to be weighed in view of the fact that the device in question has displaced others which had previously been employed for analogous uses, and this may decide the issue in favor of invention."

The argument that the straightening press does not act simultaneously with the other devices included in the combination, if true, is not enough to defeat the patent. If that device is so arranged with the other devices made elements in the combination as that each part co-operates to produce a single practical and beneficial result, it is not important that that final result shall have been produced by a simultaneous or successive action of the combined elements. *Sanders v. Hancock*, 128 Fed. 424, 63 C. C. A. 166; *Stilwell-Bierce & Smith-Vaile Co. v. Eufaula Cotton Oil Co.*, 117 Fed. 410, 54 C. C. A. 584; *Forbush v. Cook*, 2 Fish. Pat. Cas. 668, Fed. Cas. No. 4,931.

Neither of the patents in suit cover mere aggregations, and in our judgment fall clearly within the principle of the cases last cited.

The decree sustaining the patents must be affirmed.

WARREN STEAM PUMP CO. V. BLAKE & KNOWLES STEAM PUMP WORKS.

(Circuit Court of Appeals, First Circuit. June 10, 1908.)

No. 746.

1. PATENTS—INVENTION—MERITS NOT CLAIMED IN PATENT.

Where a patented structure in fact contains a new mode of operation and produces new results, the failure of the patent to state these merits does not prohibit the court from taking them into consideration in determining the question of patentable novelty, nor does it limit the scope of the invention; but the patentee is entitled to the benefit of all of the advantages which such structure possesses over prior structures intended for a similar purpose.

2. SAME—DIFFERENT USES OF STRUCTURE.

Where a patented pump was designed primarily for use as an air pump, the fact that it may also be used as a combined air and water pump, or as a water pump, and that such uses are claimed, does not deprive the patentee, in determining the question of invention, of the weight which should be given to the merits which attach to the use of the pump as an air pump.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 241.]

3. SAME—INFRINGEMENT—AIR PUMP.

The Whiting & Wheeler patent, No. 526,913, for a pumping machine intended for use in pumping the air and water from the condenser of a steam engine, and comprising a vertical twin-bucket air pump directly driven by an independent engine, was not anticipated and discloses invention, especially in view of the utility, efficiency, and extensive commercial use of the structure which at once largely displaced those of the prior art. The Hall & Gage patent, No. 522,938, for a special valve movement for use in such pump, also, *held* valid, and both patents *held* infringed.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

For opinion below, see 155 Fed. 285.

George L. Roberts and Frederick P. Fish (J. Lewis Stackpole, on the brief), for appellant.

C. J. Sawyer (M. B. Philipp, on the brief), for appellee.

Before COLT, PUTNAM, and LOWELL, Circuit Judges.

COLT, Circuit Judge. This bill was brought for the infringement of two patents for improvements in pumping engines, the Whiting & Wheeler patent, No. 526,913, dated October 2, 1894, and the Hall & Gage patent, No. 522,938, dated July 10, 1894. The application for the Whiting & Wheeler patent was filed January 18, 1892, and the application for the Hall & Gage patent was filed June 10, 1892. The Hall & Gage patent is for an improvement on the Whiting & Wheeler structure. The Circuit Court held the patents valid, and that the defendant's pumping engine infringed. The fundamental question upon this appeal is whether the patents are void for want of invention in view of the prior art.

The patents relate to the type of pumping engine known as the "air pump," which is used for withdrawing the water and air from a steam

engine condenser for the purpose of maintaining a vacuum in the condenser.

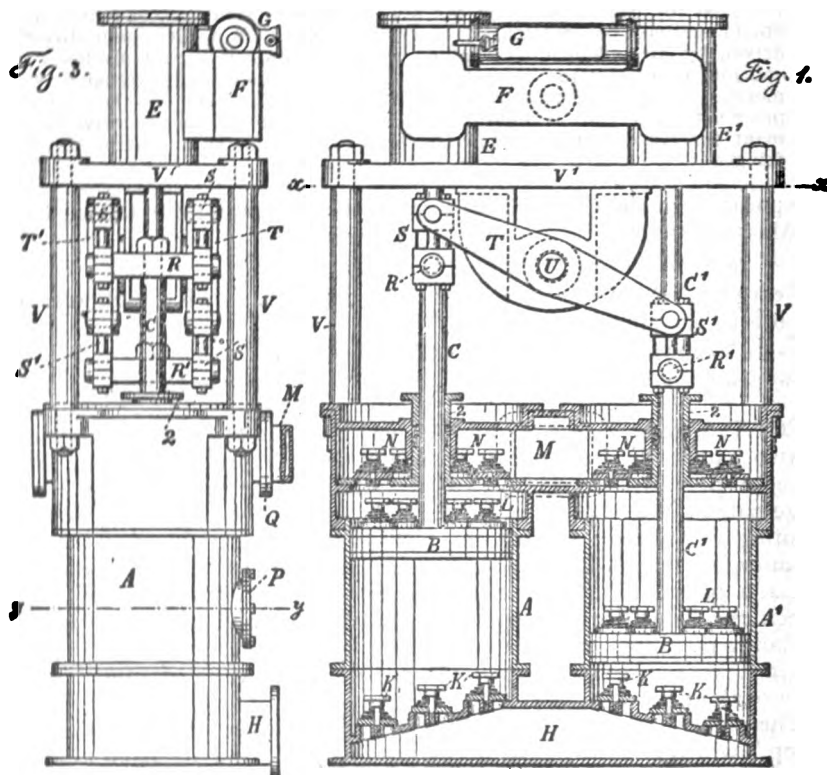
The Whiting & Wheeler specification begins by stating that it is advantageous in steam vessels to make use of an independent engine to drive the air pump, and then follows a statement that the object of the invention is to apply a direct-acting engine to the air pump or combined air and circulating pump in such a way as will secure economy of space and accessibility of the different parts:

"With engines employed upon steam vessels it is advantageous to make use of a separate engine to drive the 'air pump,' in order that the vacuum in the condenser may be maintained independently of the movement of the main engine, and in war vessels especially it is of great importance to have the engines and machinery in as compact a space and as light as possible. The circulating water that passes through the condenser can also be advantageously pumped by the same independent engine that operates the air pump.

"The object of our invention is to apply a direct-acting engine to the air pump or combined air and circulating pump in such a manner that the whole will occupy very little space and at the same time to furnish facility for access to the valves and other parts of the pumping engine."

The specification then refers to the drawings:

"Figure 1 is an elevation partially in section of our improvement applied to a vacuum pump or as it is usually termed in marine engine practice an 'air pump.' * * * Figure 3 is an end elevation."



The specification then proceeds to describe the general structure shown in the drawings, comprising the air cylinders, frame, buckets, valves, walking-beam, links, etc., referring to the features of accessibility, the permanent and rigid connection between the engine and the pumps, the direct action of the steam cylinders upon the pump buckets, and the unifying action of the walking-beam.

The specification then proceeds:

"Hence we are able to make this pumping engine very compact and uniform in its operation and entirely independent of the main engine."

The specification further says:

"Single and compound engines being well known are available with the present improvements, and in instances where only a vacuum is required, both cylinders, A and A', are fitted with the proper buckets and valves for maintaining the proper vacuum, and in cases where a water circulating pump is required, both cylinders, A and A', may be used for pumping water, and where it is desired to combine in one engine an air pump and a water circulating pump, one cylinder, A', may be for water, and the other cylinder, A, for air.

"In pumps that have heretofore been made with an engine elevated above the walking-beam and pump, the piston or plunger has been adapted to forcing water. In pumps that are used with a condenser, especially those fitted into vessels, it is important to have the buckets move vertically, and there is usually but little head room for the engine.

"By our present improvements the lifting buckets and valves work vertically, and the inlet water way being below and between the pumps, but little space is occupied and the engine piston rods being coupled direct to the rods of the lifting buckets, the vacuum pump and engine are brought into the smallest possible space, and the walking-beam being between the engine and pump, renders the action uniform because the buckets are hung by tension from the ends of the beam and their actions balanced as nearly as possible by the two engines acting simultaneously and directly on the rods of the buckets, but at the two ends of the beam and controlled by it. Hence the operations of the vacuum pump are more reliable than heretofore and the conditions of use are the reverse of those in the ordinary direct-acting force pump."

The claims are as follows:

"1. The combination with the two vertical pump cylinders and their lifting buckets and valves, of direct-acting steam cylinders and pistons with their piston rods in line and connected to the rods of the buckets, a frame and columns connecting with the pump cylinders and on which frame the steam cylinders are directly connected, a walking-beam between the pump and the engine and a pivot for the same upon a bearing extending down from the frame, and link connections at the respective ends of the walking-beam to the cross-heads of the piston rods for unifying the action of the engine directly upon the lifting buckets substantially as set forth.

"2. In a direct-acting pumping engine, the combination with a pair of pump cylinders having lifting buckets and valves and valves in the lower part of the pump cylinders, of steam cylinders and piston rods connecting the buckets of the pump and the pistons of the engine, a walking-beam between the pump cylinders and the steam cylinders, links connecting the ends of the walking-beam with the piston rods, and a frame extending up from the pumps and to which the steam cylinders are directly connected and which frame also supports the pivots of the walking-beam substantially as set forth.

"3. The combination in a pumping engine of two vertical pumping cylinders, buckets and rods for the same, a frame upon the pump cylinders, and steam cylinders directly connected to and supported by the frame, the piston rods of the engine being in line with and directly connected to the rods of the pumps, a walking-beam between the pump and the engine and links connecting the

walking-beam and the cross-heads of the piston rods, the parts being arranged so that the links are in the same plane or nearly so as the piston rods at the termination of the respective strokes substantially as set forth."

It may be noticed that claim 2 is substantially like claim 1, while claim 3 is somewhat more limited.

Prior to the Whiting & Wheeler invention, vertical bucket air pumps were controlled by the main engine or by a crank and fly-wheel or by a water circulating pump.

Looking now at the drawings of the Whiting & Wheeler patent in connection with the specification and claims, it may be observed:

First. These drawings show a vertical twin bucket air pump.

Second. This pump is independent of the main engine; in other words, it is not attached to or controlled by the main engine.

Third. This pump is actuated by a separate direct-acting engine.

Fourth. This pump is not controlled by a crank and fly-wheel.

Fifth. This pump is not controlled by a water circulating pump.

Sixth. The action of this pump is controlled by the pressure of steam in the steam cylinders.

Seventh. The walking-beam unifies the action of the pump buckets.

Eighth. The engine is located directly above the walking-beam and the pump cylinders.

Ninth. The piston rods of the steam cylinders are in line and connected with the rods of the buckets.

Tenth. There is a rigid frame with columns connecting with the pump cylinders, upon which frame the steam cylinders are directly connected.

Eleventh. There is a walking-beam between the pump and the engine, which is pivoted upon a bearing extending down from the frame, and there are link connections at the ends of the walking-beam to the cross-heads of the piston rods.

To summarize: The structure shown in the drawings is a vertical twin bucket air pump actuated by a separate direct-acting steam engine. It is an absolutely independent air pump, in that it is not controlled by the main engine, or by a crank and fly-wheel, or by a water circulating pump, but is controlled by the pressure of steam in the steam cylinders; and, further, it is a structure which is compact, accessible, and of comparative simplicity.

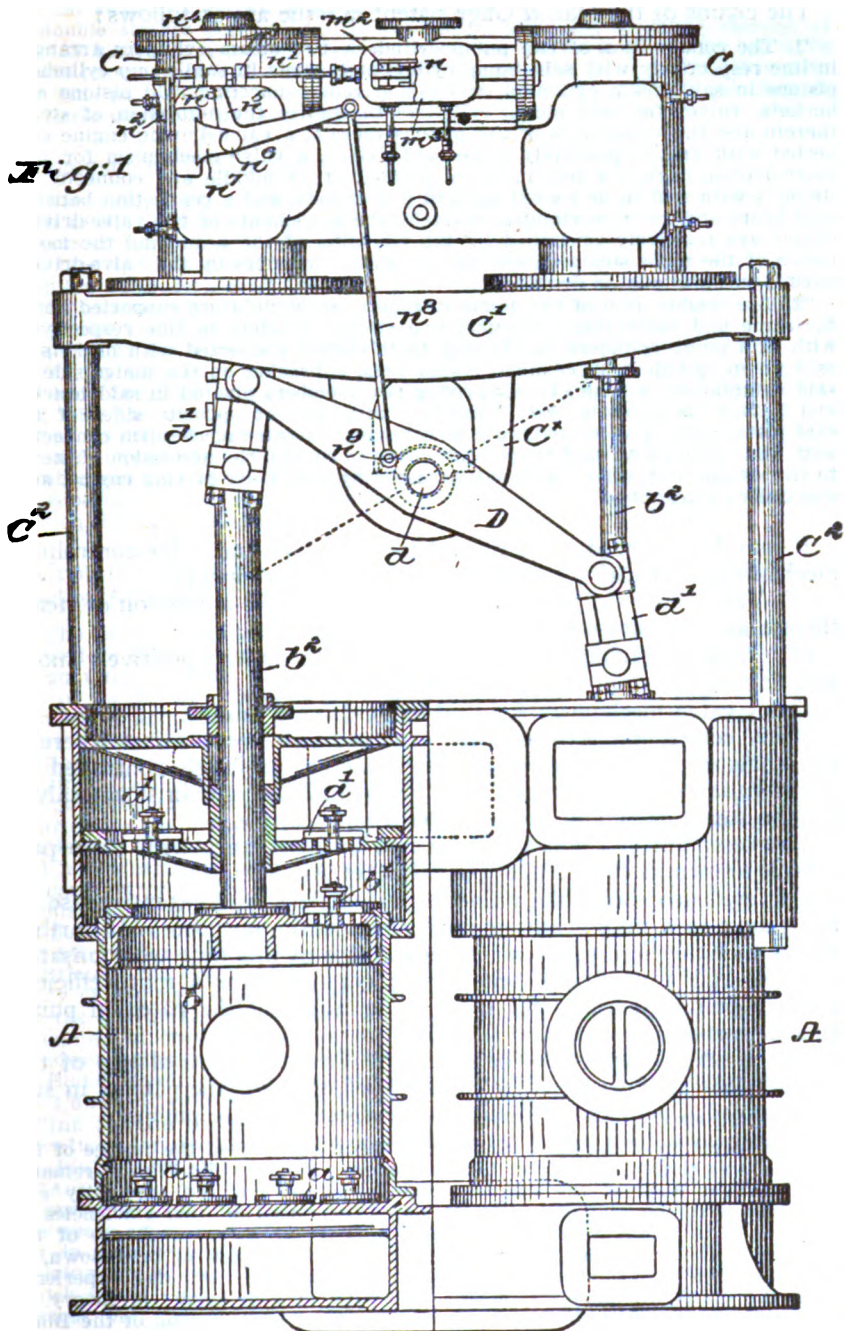
The Whiting & Wheeler patent does not show or describe any special form of valves or valve-controlling mechanism for the steam engine. The specification says:

"We have represented a steam chest at F and valve chests at G, and we remark that the valves and the devices for actuating the steam valves may be of any desired character, so long as they are positive in action, i. e., without 'dead center,' and do not require to be further represented or described."

The Hall & Gage patent in suit covers these valves and valve-controlling mechanism in combination with the Whiting & Wheeler air pump. The specification says:

"This invention has for its object to simplify and improve the construction and operation of what is known as a twin air pump, but what is herein designated a pumping engine.

"Figure 1 of the drawings represents in elevation, partial section, an air pump embodying this invention."



The claims of the Hall & Gage patent in issue are as follows:

"1. The combination of two pump cylinders, two steam cylinders arranged in line respectively with said pump cylinders, buckets in said pump cylinders, pistons in said steam cylinders, and piston rods connecting said pistons and buckets, valves for said steam cylinders to control the admission of steam thereto and the movements of the pistons therein, a valve-driving engine connected with and to positively move said valves, a valve mechanism for said valve-driving engine, a rocking beam pivoted at its middle and connected at its ends with and to be rocked by said piston rods, and a connection between said beam and valve mechanism whereby the movements of the valve-driving engine are positively controlled by the vibration of the beam and the movements of the main steam valves for the steam cylinders by the valve-driving engine, substantially as described.

"2. The combination of two pump cylinders, an entablature supported above the same and sustaining thereupon two steam cylinders in line respectively with said pump cylinders and having their pistons connected with buckets in said pump cylinders by common piston rods, a bracket on the under side of said entablature, a beam, D, comprising two members pivoted in said bracket and having its opposite ends connected with and at opposite sides of the said piston rods, a valve-driving engine having its valve mechanism connected with and operated by said beam, and valves to control the admission of steam to the steam cylinders respectively actuated by said valve-driving engine, substantially as described."

It may be observed, with respect to the valves and valve-controlling mechanism, that claim 1 includes the following elements:

(1) Valves for said steam cylinders to control the admission of steam thereto and the movements of the pistons therein.

(2) A valve-driving engine connected with and to positively move said valves.

(3) A valve mechanism for said valve-driving engine.

(4) A connection between the beam and valve mechanism whereby the movements of the valve-driving engine are positively controlled by the vibration of the beam and the movements of the main steam valves for the steam cylinders by the valve-driving engine.

The complainant's pump, constructed in accordance with these patents, is known as the "Blake Twin Bucket Air Pump."

The evidence shows the immediate acceptance and extensive use of this pump as a high-grade pump for condenser purposes. It further shows that the high-grade air pumps in use at this time were unsatisfactory, that a need was felt among engineers for a more efficient vacuum pump especially for marine use, and that the patented pump at once met the need.

In the official report of the Board of Trial on the trial trip of the Minneapolis, published in November, 1894, the year the patents in suit were issued, Commander Willits said respecting these pumps:

"The operation of the main air pumps simply emphasized the justice of the claim of this class of pumps for highest honors. Not only did they do remarkably efficient duty at the smallest cost in power, but the regularity and certainty of their action and their low speeds conduced to other efficiencies by reducing to a minimum all anxiety on the part of those in charge of the running of the machinery regarding their possible stoppage or breakdown, or of sudden and excessive change of speed. Those who have had experience with the crank air pumps (however well they may be made, in theory, to operate) cannot fail of comfort in the knowledge of the adoption of the Blake

vertical twin cylinder air pump for our latest cruisers. Here, at about only 15 double strokes per minute, these pumps maintained a steady vacuum of over 25 inches, at a cost of but little more than 30 horse power for all three double pumps, and with the main engines aggregating over 20,000 horse power. This power of air pump is only about one sixth ($\frac{1}{6}$) of one per cent. of the horse power of the main engines."

Commander Willits also testified in this case as follows:

"The opinion expressed in this article regarding the efficiency and excellence of the twin air pump noted was based upon its very superior performance in comparison with anything we had ever had before the introduction of this type in other naval vessels. For many years since the beginning of the adoption of modern machinery, prior to which the air pumps were generally of the attached character on horizontal engines (frequently horizontal piston air pumps, double-acting), we had been trying to get an efficient independent air pump, in the sense of a pump detached from the main engine entirely. As far as my knowledge goes from the time I graduated and up to the trial of the New York, which was just prior to the Minneapolis, we had been wrestling with the matter, and had made several attempts to secure a desirable pump, resulting in the production of both the crank and fly-wheel combined air and circulating pump and crank and fly-wheel independent pump, but nothing had been at all satisfactory. It was in this comparison and in noting its superiority, both in power economy and in every other respect, that the opinion therein was based."

Upon this point Mr. Bourne, chief engineer of the complainant, testified as follows:

"The twin air pumps referred to have come into general use on shipboard, as well as in power plants on land, wherever high-grade machines and high vacuum are required. These pumps have been very generally used in the vessels of the United States navy; a very large number of the most important battleships and cruisers, as well as revenue cutters, torpedo boat destroyers, being so fitted. Some of the most important of these vessels are the following battleships and cruisers: Massachusetts, Indiana, Iowa, Georgia, Nebraska, Virginia, Louisiana, Minnesota, Kansas, New York, Brooklyn, Columbia, Minneapolis, Colorado, Pennsylvania, West Virginia, Maryland, Tennessee, Charleston, and others. In addition to being used in the navy, these pumps are largely used in the merchant marine in many of the largest ocean-going and lake steamships and in a very large number of important ferryboats and in many large tugboats and dredges, and in very many well-known steam yachts. Some of the best known ocean-going steamships fitted with these twin air pumps are the Kaiser Wilhelm der Grosse, Hamburg, Princess Irene, Koenig Albert, Deutschland, New York, Philadelphia, La Lorraine, La Savoie. In addition to the extensive use of these pumps on shipboard, as above outlined, many of the largest electric-light and electric-traction power plants throughout the United States are fitted with these pumps, on account of the extreme reliability of these pumps and the avoidance thereby of any danger of loss of power, which is of great importance in these plants. Altogether, the George F. Blake Manufacturing Company and its successors, the complainant, have built and sold over \$1,000,000 worth of these twin air pumps.

"Int. 51. Can you give the court any idea of how rapidly these pumps were introduced, or what favor they met with when they were first introduced by the Blake Company?

"Ans. These pumps, when first introduced by the Blake Company, sprung at once into popularity; a large number of sales being made even in the first few years after the first pump was built. These pumps met with especial favor in naval vessels, as the government engineers and designers had been striving for a long time to design or get hold of an independent air pump which would satisfactorily meet their needs. The earlier cruisers and naval vessels, built prior to the introduction of the Blake twin air pump, were

fitted with various kinds of air pumps; a large number of them being of the fly-wheel type. None of these earlier air pumps were satisfactory, and many might be called failures. The introduction of the twin air pump completely met the demand of the naval engineers for a satisfactory independent air pump, which is evidenced by the large number of this type of pump sold for naval vessels during the first few years after the pump was introduced; the larger vessels built at that time being almost universally supplied with this pump.

"This pump has become so widely known and given such general satisfaction as to have become the standard type where a high-grade air pump is desired and high vacuum is to be maintained."

To the same effect is the testimony of complainant's expert, Freeman:

"They early secured the attention of engineers, and such favorable attention that they have largely replaced all other forms of air or vacuum pumps for marine service, and have been largely adopted by the United States and foreign navies for war vessels, and they are also in extensive use in stationary power plants where a high vacuum and efficient service are required."

The evidence further shows that among the practical results secured by this pump were a high vacuum, efficiency, reduction in power consumed, reliability, slow speed, lightness, and compactness of structure.

The evidence further shows that these pumps possessed several special advantages:

First. The air pump automatically adjusts itself to the varying conditions of the condenser; the speed varying with the amount of air and water coming from the condenser, and the pump slowing up in case of gulps of water coming over, so as to avoid shock and strain. This automatic adjustment aids greatly in maintaining a high vacuum and preventing damage to the pump.

Second. The speed of the pump, apart from this automatic adjustment, may be readily regulated to the speed which is found best suited to the running conditions of the condenser and engine with which the pump is used. The speed is not dependent upon crank and fly-wheel operation, nor upon the speed of a circulating pump.

Third. The movement of the buckets is controlled by the pressure in the air pump cylinders, so that, the pressure being small at the beginning of the stroke, on account of the air in the cylinders, a jump of each bucket during the first part of the stroke takes place, this jump being very quick and extending through a large portion of the stroke, until the bucket strikes the water on the down stroke, or the water strikes the head valves, if these be used, on the up stroke, when the bucket slows down and moves very slowly during the rest of the stroke. This jump is of importance in securing a high vacuum, by acting to open the valves in the bucket quickly, and thus getting the air out of the condenser quickly.

Respecting the advantages of this jump action, Mr. Freeman testifies as follows:

"When in action, the pump operates differently from the ordinary pump; the peculiarity of the operation being that during the first part and usually the greater part of its stroke it moves very quickly, and during the latter part of its stroke it moves very slowly. This peculiar action results, in part, from the fact that the pump is not operating upon a fluid of uniform density like

water, but upon two fluids, air and water, which differ greatly in their physical properties. Not only is the air much less dense than the water, but it is compressible, and very much rarefied, as it comes from the condenser together with the water, and where the condenser is a surface condenser the volume of the water is very small as compared with the volume of air, which in its rarefied condition is to be pumped out of the condenser so as to maintain a proper vacuum therein. By reason of the quick movement of the pump buckets during the first part of their strokes, an especially efficient withdrawal of the air and water from the condenser is effected, thus enabling a materially better vacuum to be maintained in the condenser with a given size pump than would otherwise be the case."

Upon this point Mr. Bourne testifies:

"In addition, the two buckets connected by a beam take advantage of the fact that during the first part of the stroke of an air pump the pump piston or bucket is compressing the air which has come in from the condenser with the water, and during the latter part of the stroke is pumping nearly solid water. On account of this condition existing in the air cylinder, a direct acting air pump makes the first part of its stroke at a much higher velocity than it can make the latter part, as during the latter part it is handling water, and the moving parts meet with a considerable resistance, whereas, during the first part of the stroke, comparatively little resistance is met. At the instant the pump bucket brings up on the water the speed of the moving parts is materially and suddenly checked. Now, on account of this high velocity or jump action during the first part of the stroke, the pump valves open more quickly and more widely than would be the case if the pump piston made its stroke at a comparatively uniform velocity throughout. Pump valves, as is stated, opening more quickly and wider, the water and air, particularly the latter, are taken out of the condenser more quickly, due to this jump action, than would be the case if this did not occur. The air coming into the condenser with the steam from the low pressure cylinder tends to become thoroughly mixed with same and to expand to many times its original volume. It thus becomes essential to get this air out of the condenser before this expansion has taken place or has progressed to an appreciable extent."

Upon the same point Commander Willits testifies:

"The 'jump,' as you call it, at the beginning of each upward stroke of a direct-acting vertical single-acting bucket pump, is due to the vapor and space unfilled by solid water between the bucket and the head valves, and the moment the water strikes the head valves or vapor is compressed to the point of lifting these valves, the action of the pump is steadied. The advantage also gained by this jump is that it seats the bucket valves quickly and sharply, preventing any back drain which might occur with a slow-seating valve, and opens the suction valve in the suction chamber, or foot valves, as they are called, at once, and gives ample time for the refilling of the lower part of the pump barrel with water from the condenser. I consider this quick initial motion as of very considerable advantage in the above respect."

The defendant's witnesses do not contradict in any substantial way the foregoing testimony as to the commercial use, practical results, and special advantages, of the Blake twin bucket air pump, nor do they deny that these advantages are due in large measure to the embodiment therein of the Whiting & Wheeler invention.

At this time, or before the introduction of the complainant's pump, the prior art disclosed two general types of vertical bucket air pumps; those which are attached to and controlled by the main engine, and

those which are controlled by a separate engine, and which are known as independent air pumps.

The prior art also disclosed two types of independent vertical bucket air pumps; the crank and fly-wheel type, and the combined air and water circulating pump.

There also existed in the prior art wholly independent horizontal double-acting piston air pumps.

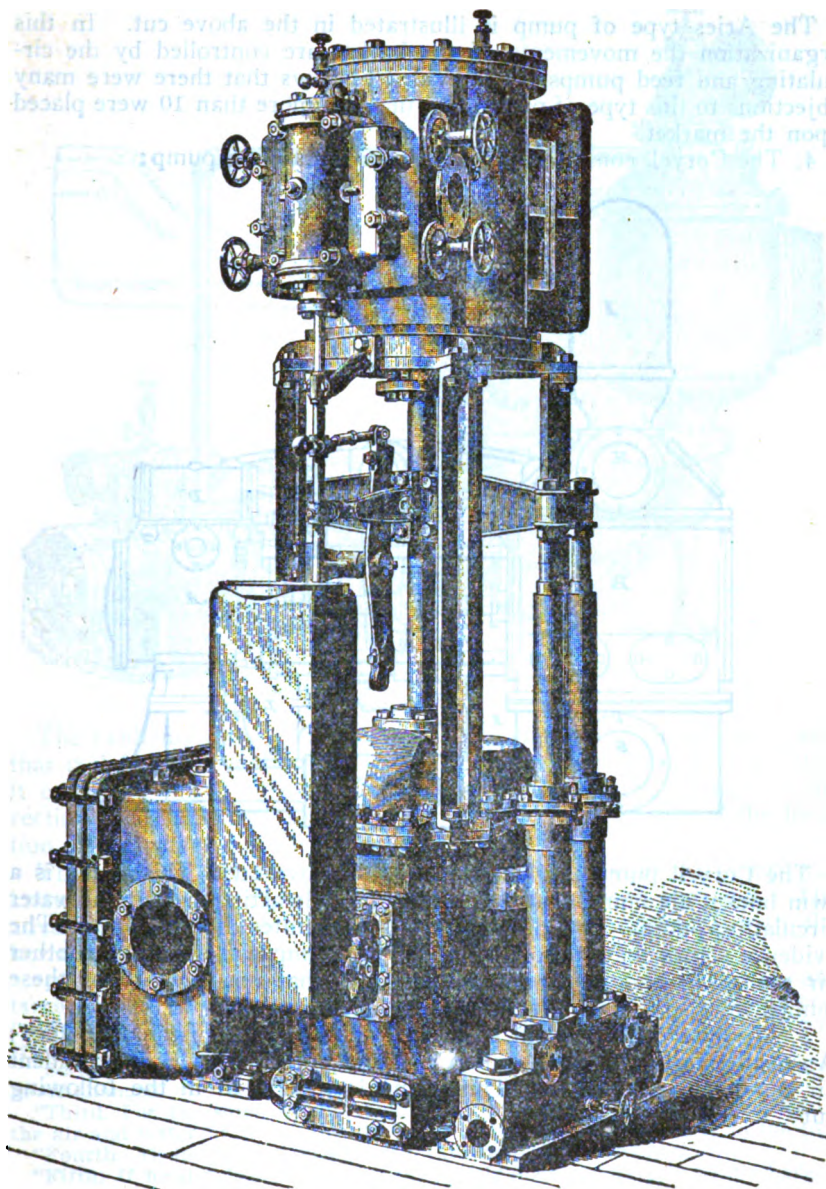
A brief consideration of these several prior types of air pumps is necessary in order to understand their bearing upon the patents in suit.

1. Attached vertical bucket air pumps controlled by the main engine: This seems to have been the common type of high-grade air pump before the Blake twin bucket pump. It is admitted that there were serious objections to this class of pumps, among which it is only necessary to mention that the movements of the pump are controlled by the movements of the main engine. As the Whiting & Wheeler patent says:

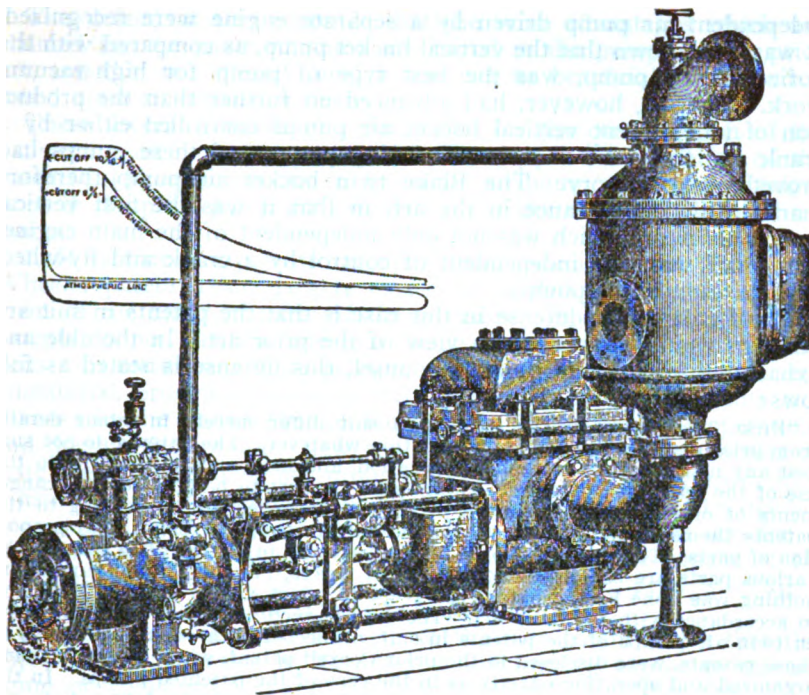
"It is advantageous to make use of a separate engine to drive the air pump, in order that the vacuum in the condenser may be maintained independently of the movement of the main engine."

2. Independent crank and fly-wheel vertical bucket air pumps: In this type of pumps the steam cylinder acted on the pump through a crank and fly-wheel. In other words, the movements of the buckets were controlled by a crank and fly-wheel. The evidence shows that there were objections to this class of pumps, and that comparatively few were made and sold. Among the objections were high and constant speed, inability to adapt itself to varying conditions of load, and irregularity in the vacuum action.

3. The Aries combined air, water circulating, and feed pump:



163 F.—18



The evidence shows that this was a comparatively cheap pump, and that it did not meet the demand for a high vacuum pump; also, that it contained many objectionable features, such as the change of direction and churning of the fluid, the lack of valve sealing, the location of the valves outside the cylinder, etc.

The evidence further shows that the vertical bucket air pump was known as the best type of air pump for condenser purposes. The advantages of the vertical bucket air pump, as compared with the horizontal air pump, are stated as follows:

"First. The inlet valves can be placed much lower, thus decreasing the distance that the water from the condenser has to be lifted, and frequently permitting this water to drain into the suction chamber of the pump, thus contributing to a higher vacuum.

"Second. The direction of flow of the air and water through the pump is never changed.

"Third. For the same reason there is no churning and mixing together of the air and water by which the air might be prevented from rising to the top.

"Fourth. All the vapors tend to rise, thus helping the vacuum.

"Fifth. If head valves are employed, the air does not have to be discharged against atmospheric pressure. "This is very important in assisting to obtain a high vacuum."

"Sixth. The valves are all well sealed, being covered with water, which prevents the leakage of air back to the condenser.

"Seventh. The valves can be made more accessible."

From this review of the air pump art it appears that at the time of the inventions covered by the patents in suit the advantages of an

independent air pump driven by a separate engine were recognized. It was also known that the vertical bucket pump, as compared with the horizontal air pump, was the best type of pump for high-vacuum work. The art, however, had advanced no further than the production of independent vertical bucket air pumps controlled either by a crank and fly-wheel or by a circulating pump, and these pumps had proved unsatisfactory. The Blake twin bucket air pump therefore marks a distinct advance in the art, in that it was the first vertical bucket air pump which was not only independent of the main engine, but which was also independent of control by a crank and fly-wheel or by a circulating pump.

The fundamental defense in this case is that the patents in suit are void for want of invention in view of the prior art. In the able and exhaustive brief of defendant's counsel, this defense is stated as follows:

"First. The pumps of the patents in suit differ merely in minor details from prior pumps and involve no invention whatever. The patents do not suggest any new result or method of operation, and none such is involved in the use of the patented structure. The patents purport to be only for rearrangements of old features; the merit of these rearrangements, according to the patents themselves and in fact, residing only in shape, strength, and proportion of parts. The pump is said to be compact and to occupy little space. The various parts are said to be convenient of access. Even in these particulars nothing was done by the patentees except to select and to arrange from and in accordance with the prior art. The precise vertical bucket positively driven twin air pumps of the patents in suit, connected by a walking-beam as in those patents, were disclosed in the prior Coryell patent, where they are found organized and operating exactly as in the case of the patented pumps. In the patented construction the Coryell vertical bucket positively driven twin air pumps are simply driven in a different way from that shown in Coryell, namely, in exactly the way in which the 'Aries' pump, the Chiswick pump, and all the many direct-acting self-supporting pumps in the record were driven. Being self-supporting vertical pumps, the patented pumps were, of course, incorporated in a suitable frame, which was that almost invariably employed in the art for a self-supporting pump.

"Second. The patents in suit are absolutely anticipated by the Chiswick pump. The pumps of the patents in suit are the same as the Chiswick pump, except for insignificant details of frame construction which the defendant does not use. Certain additional features appearing in the Chiswick pump do not affect its complete identity with the patented pumps for all the purposes of this case.

"Third. The only possible way of saving the patents is to limit them to minute details of construction which the defendant does not use. The wrapper and contents of the earlier patent show that it was the intention of the applicants and of the Patent Office that that patent should be so limited. The prior art requires such limitation as to both patents. The defendant's pump does not have these details of construction, and therefore does not infringe."

There is the further defense that, if the alleged jump action in the patented pumps when used as air pumps had any advantage which was not present in the prior art, the patents cannot be so construed as to give them any benefit from this consideration, in view of the fact that the patents describe the invention and structure as equally involved when the pump is used as a combined air and water pump, or as a water pump; in other words, that patentability cannot be supported by the alleged merits of the patented pumps when used only as air pumps.

The defendant also contends that the same advantages which are claimed for the patented pump are found in the pumps of the prior art, and that the alleged jump action has no beneficial effect, and is based upon an erroneous theory.

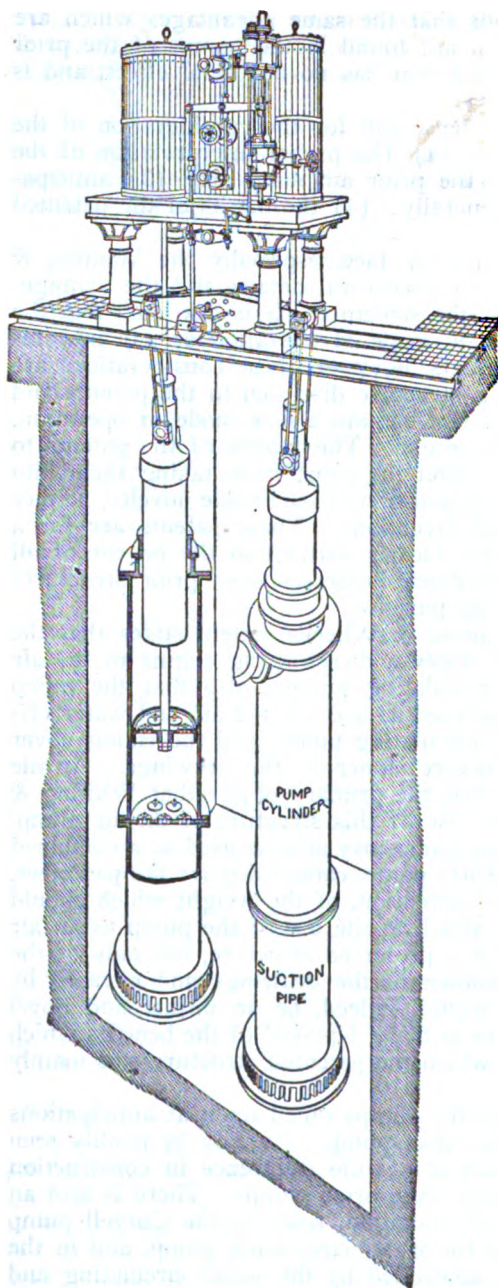
These several grounds of defense call for the consideration of the patents in suit in four aspects: (1) The proper interpretation of the patents; (2) anticipations in the prior air-pump art; (3) anticipations in the prior pump art generally; (4) the merits of the patented pump.

1. It is true the patents on their face, especially the Whiting & Wheeler patent, relate largely to structural details and the arrangement of the different parts of the structure. It is also true that the patents do not mention any new mode of operation or any new results. In construing these patents, however, these considerations are immaterial, provided the pump structure disclosed in the patents and covered by the claims does in fact contain a new mode of operation, and does in fact produce new results. The failure of the patents to state these merits does not prohibit the court from taking them into consideration in determining the question of patentable novelty, neither does it limit the scope of the inventions. These patents are for a structure, and the patentees are clearly entitled to the benefit of all the advantages which that structure possesses over prior structures intended to accomplish a similar purpose.

It is also true that the Whiting & Wheeler patent states that the object of the invention is "to apply a direct-acting engine to the air pump or combined air and circulating pump," also that the pump "cylinders, A and A'," may be used as a combined air and water circulating pump, or as a water circulating pump, and the claims cover these several uses of the structure shown in the drawings. At the same time there is no doubt that the primary object that Whiting & Wheeler had in mind was the use of this structure as an air pump. This being so, the fact that the pump may also be used as a combined air and water pump, or as a water pump, cannot deprive the patentees, in determining the question of invention, of the weight which should be given to the merits which attach to the use of the pump as an air pump. This is not the case of a preferred structure, but only of the use to which the structure shown in the drawings and covered by the claims may be put. It would, indeed, be an unjust and novel doctrine to hold that a patentee is to be deprived of the benefits which may characterize the use for which the patented structure was mainly designed.

2. In the prior air-pump art the pumps relied upon as anticipations are the Coryell pump and the Aries pump. As may be readily seen from the foregoing cuts, there is a wide difference in construction between the patented pump and these prior pumps. There is also an essential difference in mode of operation, since in the Coryell pump the air pump is controlled by the water circulating pump, and in the Aries pump the air pump is controlled by the water circulating and feed pumps.

3. In the general pump art the defendant relies mainly on the Chiswick pump as an anticipation. This pump is illustrated in the following cut:



The Chiswick pump is a large bucket and plunger pump used for pumping sewage, and it belongs to an entirely different type of pump from the air pump. The construction of a sewage pump and the construction of an air pump for the condenser of a steam engine manifestly present very different problems. The Chiswick sewage pump, in our opinion, would not have afforded any suggestion as to the way to solve the problem of a high-grade independent air pump for vacuum purposes. Further than this, viewed merely as a structure, the Chiswick pump differs in important particulars from the patented pump, as may be seen by a comparison of the drawings which are given above.

While it may appear that the separate elements of the three claims of the Whiting & Wheeler patent and the first two claims of the Hall & Gage patent, broadly speaking, are found in the Chiswick pump, yet it is also true that these claims, when read in connection with the drawings and specifications of the patents, cover a pump structure which is not found in the Chiswick pump or in any of the numerous prior pumps shown in this voluminous record.

Upon a comparison of the Chiswick and other prior pumps with the Whiting & Wheeler structure, it may

be said that the real essence of the Whiting & Wheeler invention does not reside in the separate elements which make up the subject-matter of the claims; in other words, it does not reside in the two

vertical pump cylinders with their buckets and valves, nor in the direct-acting engine, nor in the frame, nor in the walking-beam pivoted upon a bearing extending downward, nor in the link connections, nor does it reside in the features of compactness and accessibility; but the real essence of the invention is found in the fact that Whiting & Wheeler were the first to embody in a structure a vertical twin bucket air pump in combination with a direct-acting engine, in which structure the movements of the pump buckets are not controlled by the main engine, nor by a crank and fly-wheel, nor by a water circulating pump. This is the really important novelty of the Whiting & Wheeler patent, when viewed in the light of the prior art.

And with respect to the Hall & Gage patent, it may be said that the essence of the invention consists, first, in a system of valves and valve-controlling mechanism for two steam cylinders placed side by side, which is different from anything shown in the prior art, and second, in the combination of this valve mechanism with the Whiting & Wheeler twin bucket air pump, whereby certainty of action and reliability in the operation of the pump are secured.

4. As to the merits of the patented pump, the defendant, as we have already said, has failed to meet the complainant's proofs. The immediate acceptance and extensive commercial use of these pumps are not questioned. Nor do the defendant's witnesses undertake to contradict by satisfactory testimony the evidence with respect to the high vacuum and other practical results secured by these pumps, and the special advantages they possess in the way of automatic adjustment, speed regulation, and the utilization of the jump action. If it be true, as contended in the defendant's brief, that the same practical results and the same advantages characterize the pumps of the prior art, these facts should have been established by clear and satisfactory proofs. The inherent weakness of the defense is that the merits of the complainant's pump remain substantially unchallenged upon the record.

The defendant's brief discusses at length the jump action. It is said that the jump action was always present in independent air pumps, that the full jump action was undesirable and was always prevented, and that the patents in suit seek to control the jump action. As to these contentions, the defendant is clearly right. In prior independent air pumps it was deemed necessary to control the full jump action, and the patents in suit seek to control it. There is, however, this important difference: Among the means employed in prior independent vertical bucket air pumps to control the jump action were the crank and fly-wheel and the water circulating pump, while in the pump of the patents in suit these means of control have been discarded, so that we have a greater degree of jump action in the patented pump than in these prior pumps. The whole question therefore of the jump action, in this case, resolves itself into the inquiry whether the freer jump action, or the greater degree of jump action, in the complainant's pump, is in fact an advantage.

The counsel for defendant in their brief undertake to show that this jump action cannot have any beneficial effect. The difficulty with this argument is that the defendant has introduced little or no evi-

dence to support it. In other words, the defendant has introduced no substantial testimony to contradict the full and positive evidence of complainant's witnesses to the effect that in the patented pump the initial quick movement of the buckets, or the first part of the jump action, opens the valves quickly, and thereby secures a higher vacuum. In the absence of testimony contradicting this action of the complainant's pump, it is not for the court to disregard this evidence, and to hold that this feature is based upon an unsound theory. We must decide this case upon the record which is before us. In this connection, however, we may say that there seems to be much weight in the reasons given by complainant's witnesses in support of the theory of the advantages derived from this jump action in the patented pump.

In looking at the prior pump art as illustrated in this record, it may seem a comparatively simple thing to take the old twin bucket air pump of the Coryell patent and combine with it a direct-acting engine located above it. It may also seem a comparatively simple thing, in view of the prior art, to supply a reliable and efficient valve movement for this structure. But it must be remembered that Whiting & Wheeler were the first to devise such a structure, and that Hall & Gage were the first to devise a valve mechanism specially adapted to that structure, and that it was by these means that the problem of a high-grade air pump was successfully solved.

In an art so highly advanced as the pump art, where all the elements which enter into the construction of a pump may be said to be old, where most conceivable conditions of use have been presented to engineers, and where the art exhibits the greatest variety of form and structure, it is impossible, in many cases, as an abstract proposition, to draw the line between invention and the skill of the designer. There is, however, strong evidence of invention, where we have presented the circumstances such as exist with respect to the patents in suit, namely, a demand for a more efficient air pump, the failure of previous efforts to meet this demand, the immediate success of the patented device, and its great utility. It may also be observed that, if the construction of a successful independent vertical bucket air pump by the elimination of the crank and fly-wheel and the circulating pump as means of control was within the knowledge of any skilled pump designer, it is remarkable that such a pump was not built as soon as it appeared that the existing pumps were unsatisfactory. Again, it may be said that these patents belong to the class which the patent law was designed to protect, inasmuch as they cover a device which is new and useful, and which immediately met a public want. For these reasons we are of the opinion that these patents involved the exercise of the inventive faculty, as distinguished from mere mechanical skill. If, however, in view of the prior art, there is any doubt upon this question of invention, that doubt must be resolved in favor of the patents by reason of the utility, efficiency, and extensive commercial use of this air pump.

Upon full consideration of this case, we agree with the conclusions of the Circuit Court that the claims of the Whiting & Wheeler patent

and the first two claims of the Hall & Gage patent cover valid combinations, and that the defendant's pump infringes these claims.

The decree of the Circuit Court is affirmed, and the appellee recovers its costs of appeal.

HILLARD V. REMINGTON TYPEWRITER CO.

(Circuit Court, S. D. New York. July 24, 1908.)

PATENTS—ANTICIPATION—IMPROVEMENTS IN TYPEWRITER ESCAPEMENTS.

The Hillard patents, No. 554,874 and No. 580,281, cover related improvements in typewriters, the essential feature of each being the use of a beveled dog escapement, and are void for anticipation by a machine made by one Diss in December, 1890, which contained an escapement having every essential feature of those of the patents.

In Equity. Action for infringement of certain claims of patents numbered 554,874, dated February 18, 1896, and 580,281, dated April 6, 1897, both issued to the complainant herein and both relating to improvements in typewriting machines. Patent 580,281 was held valid and infringed in *Hillard v. Fisher Book Typewriter Co.* (C. C.) 151 Fed. 34, affirmed (C. C. A.) 159 Fed. 439, certiorari refused by Supreme Court February 24, 1908. No. 554,874 has never been adjudicated.

John C. Kerr and Thomas Ewing, Jr. (Thomas B. Kerr, of counsel), for complainant.

Henry D. Donnelly (William A. Redding and Wm. F. Bissing, of counsel), for defendant.

HOUGH, District Judge. Both patents in suit relate to a small but essential part of typewriter mechanism, viz.: the escapement, and the connection between them is so close that, in so far as either patent is related to defendant's alleged infringement, each reveals the other. The patent already adjudicated (580,281) may be conveniently called the "repulser" patent, and the other similarly denominated the "camming back" patent. This intimate connection between the two inventions is avowed and has been considered by the courts, and, although the repulser idea was fully disclosed in the earlier camming back application, it has been held by the Circuit Court of Appeals proper to "carve out of" the earlier application the repulser thought, and to reserve it as the subject of a subsequent patent.

The opinion of the trial court on the repulser patent sets forth with sufficient fullness the claims and specifications thereof. Although some claims alleged to be here infringed were not specifically adverted to in the Fisher Case, it seems unnecessary to again set forth the language of the patent, inasmuch as it is admitted that the substance of the repulser invention as construed in the reported case is found in defendant's alleged infringing machine, which is the well known and widely used Remington typewriter No. 6. The gist of Hillard's invention was found by the Circuit Court of Appeals to be "the employment of the mainspring which had previously been used to move the paper carriage only, to move the escapement rocker and key levers back to their

normal positions after the finger key is depressed by the stroke of the operator," and what the court believed to be new with Hilliard, and therefore entitled to protection, was "the utilization of the mainspring for the purpose described." It is by this interpretation of the repulser patent that the Remington No. 6 must be judged.

The application for the camming back patent was filed May 13, 1892, renewed November 21, 1894, and thereafter very extensively changed and amplified. Of the claims alleged to be infringed by the Remington No. 6, the following may serve as examples:

"9. In a typewriter escapement, two engaging and disengaging members, one of which can be spaced forward step by step with respect to and under control of the other, and means for spacing the first-mentioned member backward by the impact of the said other member, substantially as described.

"10. In a typewriter escapement, the combination of a rack which can be spaced forward step by step with respect to and under control of a dog, and means for spacing the rack backward by the impact of the dog, substantially as described."

Both claims were added after November, 1894.

This patent was not directly involved in the Fisher Case, but was considered by the court, which declared that the essence of the invention covered by it was the patentee's "buckle joint and the cam for camming the carriage back." The buckle joint was made just as prominent in the repulser patent as it was in the camming back patent, yet it was held by the lower court, and no exception taken to the finding by the appellate tribunal, that the joint was not of the essence of that invention, and defendant could not escape infringement by avoiding its use. The train of reasoning which in the Fisher Case eliminated the buckle joint from consideration is applicable here.

But with respect to the camming back patent, it is further urged by defendant that the original application for that patent disclosed no means of camming back the paper carriage, but only of camming back the spacing dog. So far as I am able to comprehend the vague and elusive language of the original application for the camming back patent, I believe this to be true; but it is also true that, when Hilliard filed that application in 1892, he was at pains to say that he did not limit himself to combining his "carriage retracting mechanism" with any particular let-off mechanism, etc., and, since the whole of the voluminous evidence submitted shows clearly that these inventions are really one, it does not seem to me proper to give to the camming back patent any less broad and generous interpretation than has been accorded to the repulser patent by the Circuit Court of Appeals.

It having been held therefore that the repulser patent is to be understood in a broad sense and without reference to the particular construction shown and described in the application therefor, so that the patent covers and includes any typewriter construction wherein carriage propelling power acts to return the members of the escapement and the parts connected therewith including the finger keys and type bars to their normal positions, it must be held by a parity of reasoning that the camming back patent covers and includes any typewriter construction whereby the rack and attached paper carriage can be spaced forward step by step with respect to and under control of a

dog, and spaced backward by the impact of said dog. It is, of course, obvious that varying the construction by attaching the dogs to the paper carriage while separating the rack therefrom is a mechanical equivalent not preventing infringement.

The scope of Hillard's patents having been thus fixed either by controlling decision or analogy thereto, the relation of defendant's escapement to that invention requires statement. This litigation is singular, in that there does not exist, and never has existed, any commercial machine made or sold by or for complainant and presenting his own embodiment of his own ideas. So far as the business world is concerned, these are paper patents, and counsel and witnesses alike have reasoned backward from the defendant's alleged infringing machine and pointed out therein, not imitations of anything that complainant ever made, but reproductions of ideas said to be discoverable in defendant's claims and specifications.

Following this method, it is found that the Remington machine No. 6 has what is known as a "star wheel" escapement. The teeth of this wheel successively engage with the dogs, and the motion permitted to the teeth by such successive engagements is by well-known methods passed on to the paper carriage, which is always subject to the tension of the mainspring. The star wheel is admittedly an immaterial variation from the older method of permitting the dog faces to engage directly with the rack teeth. In the position of rest a tooth of the star wheel rests on the face of the dog, which is indifferently called "stepping," "spacing," "loose," or "limber" by the witnesses. In the commercial machine the working face of the stepping dog is beveled, but mainly for purposes of clearance, and such bevel is not related to the questions discussed further than that the presence, absence, or degree thereof affects the "drop." Upon the depression of the letter key, the stepping dog is retracted or rocked toward the operator. The spoke of the star wheel in detent cannot move until the stepping dog is clear. When this occurs the wheel tooth is brought in contact with the other dog, indifferently called the "rigid" or "holding" dog. This release of the stepping dog and engagement of the wheel tooth with the rigid dog occurs before the letter key is fully depressed, and it is obvious that the length of stroke necessary for disengagement from the stepping dog and engagement with the rigid one is a matter capable of adjustment by varying the width of one dog or the other or the relation of the key lever to the rocker connected with the dogs. If the operator strike a smart or sharp blow upon the key lever, the operation of printing will be complete at or almost infinitesimally near the moment of contact between star tooth and rigid dog, for the effect of such smart blow is to "kick up" the letter carrying arm against the platen and effect printing with a slight key depression. This is true of all lever machines of the Remington type.

If, however, even after such smart blow be given, pressure on the key be continued until it is depressed to its utmost, or nearly so, the rigid dog is further retracted by the operation of the key lever on the dog rocker, and the star tooth brought into more forcible contact with the beveled face of the rigid dog, which bevel presents an inclined plane perpendicular to that of carriage movement, and at an

angle to the line of such movement of approximately 35 degrees in the Remington No. 6. This angle, however, varies widely in the models exhibited and illustrating the development of the art. The effect of this continued pressure upon the key lever, and consequent movement of the beveled rigid dog against the star tooth, is, in simple language, to force the star tooth up hill, i. e., up the inclined plane of the bevel, thereby moving the star tooth in such a direction as to force the paper carriage in a direction opposite to the pull of the mainspring. This backward movement of the paper carriage is "camming back," and it is also indicative of "repulsion," if it is not the "repulser effect" itself. That is, one effect of pressing back the paper carriage against the mainspring pull is to produce a back pressure at the letter end of the key lever, because that lever is being used to push against the mainspring pull. The result of this is that an operator too careless or inexperienced to give just the proper "staccato" blow to the key lever is reminded by the back push on said lever that it is time to let go, for the operation of printing is, or ought to be, complete. In other words, the "repulser effect" is but the difficulty of lifting with a lever, against the weight of paper carriage plus the tension of the mainspring, and plus, also, the friction between the beveled face of the rigid dog and the tooth working upon it. Or, to vary the statement, the movement which is "camming back" and in this type of machine produces repulsion is but the resultant of two forces, one the finger pressure of the operator, and the other the pull of the mainspring. As soon as the finger pressure is removed, the spring of the dog rocker, assisted by "repulsion," if necessary, moves the rigid dog away from the star tooth, the stepping dog having gone forward under the influence of its own spring, engages the next tooth, the paper carriage moves forward by one space, the stepping dog is simultaneously borne back, and the parts are again in their normal position of rest.

This escapement is in every mechanical aspect identical with the escapement long used and known on the Remington No. 2 machine, with the exception of the beveled rigid dog, and this case revolves around the proposition that the use of the beveled dog in such adjustment as to produce the effects called "camming back" and "repulsion" constitute an infringement of both the patents in suit.

How completely Hillard's claims to an inventor's privileges depend upon the bevel of the rigid dog may be illustrated by a reference to the machine found to infringe in the Fisher Case (see Record on Appeal, vol. 3, Exhibits, p. 1611 et seq.), from which I think it clear that the one thing productive of the function of repulsion in the Fisher typewriter, and therefore constituting infringement according to that decision, is the beveled dog, which Judge Ray found to have been introduced into the Fisher machine after "Hillard had introduced his improvement into the Remington machine and it had been adopted by the Remington Company." 151 Fed. 44. In the light of the testimony in this case, the statement that Hillard's improvement "had been adopted by the Remington Company" is a singular one, if it be understood thereby that the Remington Company recognized and admitted the fact that they were using Hillard's invention. It was in July of 1894 that Hillard first saw a Remington No. 6, and upon examining

it "was all taken up with the escapement to the exclusion of everything else as soon as I saw it was provided with a beveled dog." Thus for 14 years at least the defendants have been using this device and denying that it was Hillard's invention; but Hillard's account of his first view of the escapement in suit is a perfect illustration of the central fact in this case, viz., that the beveled dog is the creator both of camming back and repulsion.

The Fisher decisions are controlling authority holding that the "repulser effect" is not a mere function, and, since "camming back" is produced in the Remington machine by the operation of the same elements in the same way, it must follow that "camming back" also is not a function; but it equally follows that, if the beveled dog which, in the use presented, produces these two "inventions" (as complainant's brief calls them), was put to the same use and made productive of the same results by some one other than Hillard, and before he did so, Hillard is not the first inventor. But before taking up the question of priority, the utility of camming and repulsion may be considered. If these two qualities could be separated in the Remington machine, it would I think be proper to disregard wholly the camming back patent as suggesting nothing useful.

It is plain that camming does occur in this machine upon the slow full stroke of the key lever and correspondingly ample movement of the rack or dog rocker. It is equally plain that such camming does not and cannot begin until the movement of dog or rack has progressed so far as to compel retraction of the paper carriage as a resultant of the finger force at the lever end and the spring tension on the carriage; but observation of the numerous models submitted is convincing that, with a machine so mechanically adjusted as to deserve commercial success, camming back does not occur in useful service; not because it cannot, but because it ought not, for, by the stroke of any operator worthy of employment, printing is finished and the carriage ready for final acceleration by one letter space before the parts containing the necessary bevel are in a position to cam. If the key pressure be unnecessarily continued and camming thereby produced, it is clear that the paper carriage must during the time of one stroke, which prints one letter in one letter space (i. e., one-tenth of an inch), be started, retarded, stopped, backed, and again started during the time required to make one letter of the 30 to 50 words a minute to be expected from a very moderate performer. Camming back may, and I think does, assist in preventing learners from blurring on the Remington form of machine; but a workman who cams back the paper carriage is unfit for his work, and I believe with counsel for defendant that camming back does not occur with the "printing stroke"—that is, a stroke which prints anything worth having.

That the repulser effect is useful is not denied; but I think it more accurate to say that what is useful and desirable is the short, quick stroke, the "staccato" blow so often mentioned in the evidence. Repulsion does not create this, for short, quick blows can be just as well given to machines without the beveled dog and incapable of repulsion, e. g., the Remington No. 2; but repulsion does assist the operator in limiting the length of the stroke given, by rendering it

more difficult to prolong the stroke unnecessarily. There is much testimony repeated in this case from the Fisher Case, but there not denied, regarding the painful difficulty of operating machines without repulsion and the deformities resulting to the hands of women working much with the nonrepulsive machine. I think this testimony is grossly exaggerated, if not wholly untrue, and is entirely met by the testimony introduced for the defendant herein, and it neither advances nor commends the complainant's case with any one accustomed to the commercial use of typewriters from the time of their general introduction. By admission of utility in the repulser effect at least, and prior holdings of novelty and invention in complainant's use of the mainspring to assist in producing repulsion and camming, this litigation narrows to the issue of priority, on which defenses are urged not advanced in the Fisher litigation.

I do not think it useful to elaborately digest the testimony on this point. Much acrimony has been displayed by some of the witnesses, and accusations of bad faith too freely made. In May, 1894, Hillard affixed a beveled dog escapement on a Remington machine and left it for examination at defendant's office. In the following July he saw a Remington No. 6 substantially identical with the one produced on this hearing, and he has doubtless ever since believed that the defendant stole his escapement. I believe the truth to be, however unfortunate for Hillard, that he was reducing his ideas to practice at the same time that similar ideas were being embodied in the new type of machine then about to be put forth by defendant. It is proved that beveled dogs substantially identical with those of which Hillard complains had been put on the Remington No. 6 certainly in April, 1894, and probably in March, 1894, and had been publicly sold. The alleged theft was impossible.

The original application for the camming back patent, which, as previously noted, revealed both thoughts of Hillard's, was filed in May, 1892. In December, 1890, one Diss, a mechanic in the Ilion factory of defendant's predecessors, made, operated, and exhibited to other persons skillful in mechanics, a Remington machine of the No. 5 or swinging rack type, which he sent to defendant's New York office for testing and approval. The escapement of this machine is in every essential mechanical feature identical with that of the No. 6 alleged to infringe. The most strenuous efforts have been made to show that this is a made-up machine, and that it could not have existed in its present shape in December, 1890. It is sufficient to say that in my judgment these efforts have failed, and that this so-called Diss machine, if first made now, would be an infringement of the patents in suit as construed by the Fisher Cases, and as made in December, 1890, is a complete anticipation thereof, so far as the claims here in suit are concerned.

Nor is Diss's machine either an abandoned experiment or something made without thought of the improvements real or fancied now found in it. It is true that the entire machine, for reasons which had nothing to do with the escapement, did not meet with approval; but the beveled dog did meet with a limited approval and a persistent though limited sale through the Boston agency of defendant's pred-

ecessors, down to the time that the No. 6 Remington became the leading product of defendant company, and, unless the testimony of several intelligent and unimpeached witnesses is to be wholly disbelieved and regarded as willfully dishonest, the results now called "repulsion" and "camming back" were observed, understood, and commented upon—"repulsion" with favor, and "camming back" with disfavor. It is true that the prime object of the beveled dog escapement manufactured by Diss in 1890 was speed, but that also was Hillard's purpose throughout the whole of his experiments, for, as he said to his sister in 1891, the object of his invention was "to make a springy action and to make the machine write fast."

Complainant seeks to break the force of the Diss anticipation by presenting as the first embodiment of the inventions in suit a beveled rack which he made and applied to a Remington No. 2 in the autumn of 1890. The history of this rack is singular, and the corroborative evidence regarding the time of its construction and the results said to have been obtained from or observed in it by Hillard extremely weak. It is, however, my opinion from repeated readings of Hillard's testimony in this and the Fisher Case, and observation of him through a protracted argument, that he is an honest, though somewhat fanatical, man. I believe he did make this rack, but do not think that it can be regarded as an embodiment of the patent claims now in litigation. Hillard himself has deposed that it is not "the beveled dog alone that solves the problem," and it is equally true that a beveled rack alone does not do so. There is no evidence presented persuasive of the vital finding that not only did Hillard make this rack and use it and experiment with it, but that he in the fall of 1890 adjusted it or operated it in connection with other elements so as to produce the results for which he has had one patent upheld.

If there ever was an abandoned experiment, Hillard's beveled rack of 1890 seems to be one. He dismantled it, put it away in a box, continued his experiments, and in September, 1891, declared in writing:

"My invention consists in a dog for typewriters. My invention was perfected and placed on the Remington typewriter, and I wrote with it at 4 a. m. September 2d, having spent the night making the dog."

In the face of this declaration, I do not see how he can now advance the rack of the previous year as an embodiment of the inventions in suit, although it is true that, upon close investigation of the machine which has recently received that rack, both "camming back" and "repulsion" can be observed as occurring in a somewhat feeble manner.

When the complainant was engaged in an interference with Cash (the patentee so much referred to in the Fisher suit), he did not mention his 1890 rack. It is now said that it was not necessary to mention it in that proceeding, because Cash carried his thoughts back to 1886; but it remains true that, when testifying in that interference, Hillard purported to tell the whole story of his experiments with typewriter escapements, and he likewise began with 1886, but made no mention of the rack of 1890. The conclusion is irresistible that he himself has first thought of that rack as an embodiment of his cherished ideas, under the exigencies of this litigation, and of the dangerous anticipation by Diss first shown in this case.

It is finally urged by complainant that, however important is the beveled rigid dog, the marrow of his contention is, not that he was the first to produce a beveled dog escapement, but that he was the first to devise one having certain characteristics. The only characteristics to which he can refer are "repulsion" and "camming back." His expert declares, pursuing this line of thought, that "the great value of the repulser effect of the mainspring is due to the time that it operates, namely, about the instant of printing," and it is further asserted that "the beveled dog alone is not the agent of camming back and repulsion; that dog must be arranged and co-related with other parts in the escapement in a certain way to produce those results." This is as much as to say that the machine capable of camming back and repulsion must be properly adjusted and mechanically arranged in order to operate. So must any other machine. It is possible in any form of machine produced, of the Remington type, to change the adjustment and co-relation of the parts so as to make it inoperative. The stroke can be entirely altered by tightening or loosening the universal bar, and the rack and dogs can be so arranged as to prevent the rack teeth or wheel teeth from striking the bevel at all; but it has never been decided that either of these patents protect a certain adjustment of mechanical parts or a function or result obtained from such adjustment.

The final question seems to me whether the machine made by Diss in 1890, as he made and designed it, used and exhibited it, did produce the same results in the same way as does the Remington No. 6. I think it did, and that the reasons why it did so were completely understood by several persons who saw and examined it and would have been capable of reproducing it had occasion arisen. Complainant's own statement of his position on this point is instructive. He declares that in May, 1894, he had and left at one of defendant's offices—

"a Remington typewriter equipped with a single feed beveled dog escapement which solved the problem. That was my invention. My escapement on that machine was arranged to start the carriage feed prior to the printing and with a slow blow to push it back again. Thus, while my escapement releases the carriage to move its feed prior to the printing, thus adapting it to the requirements of speedy operators, it held the carriage under control at the instant of printing, and it therefore differed fundamentally from the beveled dog escapements described by defendant prior to May, 1894, as well as from the beveled dog escapements"

—sold and used by defendants in New England and above referred to. And his counsel claim that:

"Defendant's escapements released the carriage to perform an uncontrolled part of its feeding movement during the depression of the key."

This is the essence of complainant's case as put by himself. He cannot deny that there were beveled dogs before 1894, and I believe he entertains honest doubts whether there were not beveled dogs before he thought them out; but the fundamental difference as late as 1894 between his beveled dog and all others was that he did not release the carriage (as did other mechanics) to perform "an uncontrolled portion of its feeding movement during the depression of the key." This reduces his contention to the meaning of the word "uncontrolled." If

by "uncontrolled" is meant the ability of the paper carriage to travel a certain distance under the influence of the mainspring tension before it encounters any stoppage or resistance to that motion, every escapement except one wherein the faces of the two dogs are wholly in the same plane in the normal position of rest releases the paper carriage for an uncontrolled feed instantly, i. e., on the down stroke of the key lever. If the faces of the two dogs are not in the same plane, there will be a "drop," and such drop is uncontrolled while it lasts. If the face of the rigid dog is beveled, the carriage will travel uncontrolled until the rack tooth strikes the bevel. It is entirely possible to conceive of an escapement which holds the carriage under control at all times; but the beveled dog escapement does not do so, and cannot do so, if the bevel is used at all. It would be possible to adjust the machine so that the rack tooth passed from the plane face of one dog to the plane face of the other, not touching the bevel; but such an adjustment would deprive the bevel of all use. Nor does the use of the phrase "single feed" advance the discussion. It is admitted that this name was invented for the purposes of this case. It is apparently used in contradistinction to "divided feed"; but the divided feed escapement is a well-known and old device not involving the use of beveled dogs at all and depending entirely upon the adjustment of the drop. Hillard's device of 1894 as reproduced by himself is no more a "single feed escapement" (whatever that means), than is any other beveled dog escapement wherein the bevel is used to produce speed and incidentally and necessarily repulsion, and may also produce camming back, in the hands of an operator who does not understand his business.

The bill is dismissed.

HOGAN v. WESTMORELAND SPECIALTY CO. et al.

(Circuit Court, E. D. Pennsylvania. July 27, 1908.)

No. 31.

PATENTS—INVENTION—SALT DREDGE.

The Hogan patent, No. 752,903, for a dredge for salt or pepper, having a celluloid cap, was not anticipated and discloses patentable invention, as applied to a dredge for salt, although the only new feature of the device is the substitution of celluloid for other materials previously used in making the cap; it being shown that celluloid possesses a property which prevents the salt from absorbing moisture and becoming caked. Also *held, infringed.*

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 23.]

In Equity. On final hearing.

See 145 Fed. 199.

Charles Howson and E. M. Marble, for complainant.

Wm. A. Jones and Howard P. Denison for defendants.

J. B. McPHERSON, District Judge. This action is brought to restrain the infringement of letters patent No. 752,903, granted to the complainant on February 23, 1904. The invention, as stated in the specification, relates to "dredges for salt, pepper, flour, etc., but

more particularly for salt, and has for its prominent object the production of an article of the character described, which, while being simple and efficient in construction, also involves features of hygiene and cleanliness not heretofore presented by articles of this class."

The specification proceeds as follows:

"With the above and other purposes in view, the invention, primarily comprehends a dredge consisting of a body of nonmetallic material, the neck of which is provided with molded threads and a cap, the latter in one piece and wholly of celluloid, said cap having a depending screw-threaded flange, the thickness of the material forming the said flange and the character of its connection with the rest of the cap being such as to result in a certain amount of flexibility enabling a proper engagement of the flange with the threaded portion of the nonmetallic body irrespective of lack of uniformity in the threads of either part, a characteristic generally present in articles where the threads are produced by a molding operation.

"Practice has demonstrated that where two glass or vitreous articles are molded with threads for mutual engagement, the nonuniform character of the threads resulting from the molding operation renders the connection of such parts by their threads extremely difficult. This may be obviated to some extent by making the threads relatively coarse and the engaging portion of one of the parts sufficiently ample to facilitate its taking over its companion; but such expedient would manifestly preclude a tight fit. Another remedy would be to grind the threads after they have been molded, so as to render them accurate; but such recourse would be both tedious and expensive and not warranted in the production of a cheap class of articles. Hard rubber might be employed in the formation of a dredge-cap, and when the dredge-cap was so constituted it would avoid some of the serious features of metal. Moreover, a hard rubber cap might be made to possess the flexibility required on account of irregularity in the threads of the engaging parts; but were such cap employed in connection with a salt dredge even the comparatively small percentage of hydrochloric acid evolved would be sufficient to unite with the sulphur in the rubber composition and ultimately result in the disintegration of the latter and consequent injury of the cap.

"By my invention I avoid all the objections noted and secure important advantages not hitherto obtained. Certain novel structural features and combinations of parts are also embodied in my improved dredge, which features and parts, as well as those previously alluded to, are clearly referred to in the subsequent detailed description."

Figures 1 and 2 of the drawings are then explained in detail:

"Referring now more particularly to Figs. 1 and 2, A indicates the body portion of the dredge, which body portion is of a noncorrosive material, and preferably of vitreous character, such as glass. This body portion may be of any suitable shape or configuration and includes an upper circular neck, a, shown as being externally screw-threaded contiguous to its upper end. The cap, B, of the dredge is embodied in a single piece of celluloid and comprises the flat top, b, having a series of perforations, b', and a depending annular flange, b'', screw-threaded to engage the threads of the neck, a. I prefer to make the cap, B, of the thin shell-like character illustrated, so that the variations of corrugations in the flange, b'', will be present at both the inner and outer sides of the same, such arrangement, together with the shell-like character of such flange, conferring a limited amount of flexibility, sufficient, however, to permit the flange threads to readily accommodate themselves to the threads on the neck for securing a positive engagement and close fit irrespective of any lack of uniformity in the threads of either part. This flexibility will be promoted to a considerable extent by reason of the curved character of that portion, b, of the flange which merges in the flat top, b. The plain character of the top, b, imparts considerable strength to the cap, but practically presents a substantially rigid portion capable of serving as a fulcrum for the flange while undergoing yielding movements due to its flexibility. Another distinct advantage a cap of celluloid has over a dredge-

cap of glass, or similar vitreous material, is that in molding the article of the last-mentioned material it will be found difficult to produce the openings, b, of the required smallness and number, and at the same time of uniform circular contour, while the comparatively thin top of the celluloid cap admits of the formation of all the openings with circular accuracy during the operation of molding."

The specification concludes as follows:

"By making the cap with a shell-like flange in which the thread corrugations or variations are impressed entirely through the same, in addition to securing the flexibility heretofore adverted to, the cap can be used in connection with either an externally or internally threaded flange; conditions of proportions being suitable.

"It will be appreciated from the foregoing description that a dredge embodying my invention is extremely hygienic, of finished and attractive appearance, and highly efficient, as well as comparatively inexpensive. The lightness of weight of the improved article, when considered with respect to dredges wholly of glass or other similar vitreous material, is appreciable. Such reduced weight also constitutes a favorable factor in the shipment of large quantities of these dredges. Due allowance being made on account of its limited thickness, and bearing in mind its several novel advantages, the cap used in my improved dredge is quite durable."

The claims are four in number, and it is asserted that all have been infringed:

"1. A two-part dredge comprising a body of noncorrosive material having integrally an upper threaded portion and a cap made wholly of a material insensible to the emanations from the salt; said cap embodying a top containing perforations and a flexible threaded flange, the latter in direct engagement with said threaded body portion.

"2. A two-part dredge comprising a body of noncorrosive material having integrally an upper threaded portion, and a thin shell-like cap made wholly of celluloid; said cap embodying a top containing perforations and a flexible threaded flange, the latter in direct engagement with said threaded body portion.

"3. A two-part dredge comprising a body of noncorrosive material having integrally an upper threaded portion and a cap made wholly of celluloid; said cap embodying a top containing perforations and a thin flange having threads impressed through the thickness thereof, and in direct engagement with said threaded body portion.

"4. A two-part dredge comprising a body of glass having an upper portion with molded threads and a thin shell-like cap made wholly of celluloid; said cap embodying a top containing perforations and a flexible flange having threads impressed through the thickness thereof and a direct engagement with said molded threads of the body portion."

The novelty of the invention set forth was denied by demurrer, and defendant's position was sustained by the Circuit Court; but the Court of Appeals reinstated the bill, on the ground that the lack of patentable novelty did not sufficiently appear upon the face of the bill, and that the decision of this question should therefore be deferred until final hearing. This ruling on appeal has, I think, been justified by the proofs that have been taken, by which, as it seems to me, the novelty of the invention within a narrow range has been satisfactorily established. It is undoubtedly true that the two portions of the dredge and the method of uniting them are old, and that the sole novelty of the patent consists in the use of celluloid as the material for the cap; but the testimony seems to bring this use within the exception to the general rule that substitution of material does

not constitute invention. The reasons for this conclusion are so clearly stated by the solicitor for complainant that I cannot do better than to give a somewhat extended quotation from his brief. It should be added that the passage about to be quoted is supported by the testimony, and that its statements are scarcely controverted by the defendant:

"The general rule that substitution of material imports no patentable invention is, however, subject to the very important exception that when, as a result of the substitution, new properties are given to the device, or new or greatly improved results are obtained, then the substitution imports patentable invention. This exception to the general rule is stated as follows in Walker on Patents, as embodying the substance of numerous leading court decisions, including those of the United States Supreme Court:

"If the substitution of materials involved a new mode of construction, or if it developed new properties or uses of the article made, it may amount to invention. And substitution of materials may constitute invention where it produces a new mode of operation or results in a new function or in the first practical success in the art in which the substitution is made. So, also, where the excellence of the material substituted could not be known beforehand, and where practice shows its superiority to consist not only in greater cheapness and greater durability, but also in more efficient action, the substitution of a superior for an inferior material amounts to invention." Walker on Patents, § 29.

"In this dredge, the celluloid cap has the very important function never before performed by a salt dredge, of insulating the salt against atmospheric moisture and thereby preventing caking of the salt in the base and against the underside of the cap, and clogging of the holes in the cap.

"Salt is an extremely deliquescent material; that is to say, it takes up moisture from humid air with avidity. This is a matter of common observation. When it becomes damp, it tends to form a firm cake, and in saltcellars the result of this absorption of moisture is not only the formation of a solid cake in the base of the cellar, but the formation of another cake against the under side of the cap, and the clogging of the holes in the cap. This also is a matter of common observation. Scarcely a person living in the eastern part of our country can have failed to notice this caking of salt in cellars repeatedly, in the summertime. In fact, this caking of salt is one of the most exasperating of the small annoyances of life. It is also a matter of common knowledge that in the past various ineffective attempts have been made to overcome this caking, mechanically or otherwise, for example, a mechanical agitator, as shown in the Putnam patent, No. 221,099, specially referred to by the defendants.

"Now, celluloid has a singular property of insulating the salt in the cellar from the moisture of the air, and it is able to do this because of an obscure and almost unknown property, possessed by few other substances, and not possessed by metals and glass, viz., that it has practically no surface moisture film, or, as the technical phrase is, layer of adsorbed (not absorbed) moisture. Most substances, including metals and glass, have against their surfaces, under ordinary atmospheric conditions, a more or less thick layer of condensed moisture—too thin, ordinarily, to be perceptible to the sight or touch, but nevertheless present, as will be shown. Sometimes, in very humid weather, or when a cold metal or glass article is taken into warm humid air, this film becomes visible, and the article is then said to sweat; but the layer is nevertheless present, even when invisible, and analytical chemists well know this fact, for they observe that if an apparently dry glass or metal article be weighed on the sensitive balances chemists use, and then be wiped with a dry cloth and immediately reweighed, its weight is quite perceptibly less owing to the fact that the wiping has removed the layer of adsorbed moisture. Some substances, platinum, for example, have also the property of condensing air as well against their surfaces (which is why platinum is used in certain processes as a catalytic agent).

"Complainant's expert, Mr. K. P. McElroy, a chemist of some 17 years' experience in the United States Agricultural Department and the Patent Office, testified fully as to the existence of this moisture film on glass and most other articles (complainant's record, p. 54), and the correctness of his testimony on this point has not been questioned. Also, the well-known chemical authority Thorpe (Quantitative Chemical Analysis [John Wiley & Sons, New York, 1883, 5th Ed.] p. 28) states as follows:

"All substances condense upon their surface a certain amount of air and moisture, the weight of which depends upon their temperature. * * *"

"A platinum crucible when rubbed with a dry cloth and immediately weighed always weighs sensibly less after half an hour's exposure to the air of a balance case, owing to the condensation of the air upon its surface. It is advisable therefore to allow the crucible, if freshly wiped, to remain upon the balance pan or in the case some little time before being weighed."

"The ordinary saltcellar as made prior to the patentee's invention consisted, as shown by various of defendants' exhibits, of a glass base and a metal top, both of which have, to an important degree, the property of collecting on their surfaces layers of adsorbed moisture, and these layers of moisture act as wicks to convey moisture from the external air into the salt within the cellar, in the following manner: Salt in the cellar absorbs from the immediately adjacent walls of the glass base the moisture thereon, and the moisture so absorbed is replaced by moisture from higher up, and finally from the moisture on the surfaces of the metal top, which top in turn abstracts more moisture from the air; the operation being a continuous one and one which, under favorable atmospheric conditions, will soon convert a perfectly dry mass of salt within the cellar into a moist, sticky mass. And there can hardly be a person living in any portion of this country, having, at times, a humid climate, who has not repeatedly observed salt grow moist in this manner, though perhaps few have understood the *modus operandi*. Complainant's expert, McElroy, has explained this action fully (see complainant's record, pp. 54, 55), and his testimony on this point has not been controverted or its truth questioned.

"It will be seen that the old-style metal-capped saltcellar was an admirable instrument for keeping salt wet—just what was most to be avoided. But patentee's celluloid-capped saltcellar is an admirable instrument for keeping the salt dry—just what is most desired. And it keeps the salt dry because, the celluloid cap having practically no absorbed moisture film, there is nothing to feed down moisture to the inner surface of the glass base and the salt therein. The celluloid cap insulates the salt from the moisture of the external air. This is a feature never before embodied in a saltcellar. It is obviously an extremely important feature, for by reason of it a grave objection to prior saltcellars has been overcome. By reason of the substitution of celluloid for metal, as the material of the cap, the saltcellar or dredge has become possessed of a new function never before possessed by saltcellars, thus bringing the invention directly within the rules laid down in the previously quoted extract from Walker on Patents, § 29, and the decision of the Supreme Court in *Smith v. Vulcanite Co.*, 93 U. S. 486, 23 L. Ed. 952, and numerous other decisions, for example, *Frost v. Cohn*, 119 Fed. 505, 56 C. C. A. 185.

"While patentee's celluloid cap performs all the functions of the glass and metal tops of the prior art, yet, since it also performs the additional function of an insulator against moisture, a function never before performed by a dredge top, it is in that respect a new element. The combination, in a dredge, of a body and a top, the latter comprising means for insulating the interior of the dredge against moisture of the external air, is a new combination, producing a new and valuable result, and therefore patentable.

"The fact that celluloid differs from most other substances, in that it has no adsorbed moisture film, is not generally known, and therefore it was not obvious that substitution of celluloid for metal or glass would give this result. The result of the substitution is an unexpected result, highly advantageous in its nature, and therefore for this reason the dredge with the celluloid top is patentable. That celluloid has no adsorbed moisture film is testified to by complainant's expert, McElroy, as within his own knowledge (complainant's record, p. 83), and he cites in confirmation the well-known authority Cross &

Bevan (Longmans, Green & Co., London) pp. 4 and 5, where the following statement occurs: . . .

"The power of attracting water is a property of the cellulose substance itself and is not in any way dependent upon the form in which it occurs. The amorphous modifications of the cellulose obtained by solution and re-precipitation in various ways (*infra*) are equally hygroscopic.

"The phenomenon is definitely related to the presence of OH groups in the cellulose molecule, for in proportion as these are suppressed by combination (with negative radicals to form the cellulose esters) the products exhibit decreasing attractions for atmospheric moisture."

"Celluloid being, in the main, a cellulose ester, as testified by Mr. McElroy (C. R., p. 83), the above-quoted statement is, of course, intelligible enough to a chemist as a statement that celluloid lacks the surface moisture film characteristics of most other substances; but that and similar statements are certainly not enough to make it a matter of common public knowledge among the people at large—makers of saltcellars, for example—that a celluloid cap substituted for the ordinary metal or glass cap would keep the salt dry where a metal or glass cap will not. To the general public any such property of celluloid is new and quite unexpected.

"Mr. McElroy's testimony on this point was not contradicted nor its correctness questioned.

"The complainant, O. K. Hogan, in various portions of his testimony, for example, at the bottom of page 9, complainant's record, also answer to XQ. 70 (C. R., p. 23), has testified that the celluloid top does in fact keep the salt dry, and his testimony on this point is not disputed by the defense. Mr. McElroy testified that even in the damp climate of Washington he had never seen salt caked in the base or against the top of a celluloid-topped saltcellar. The action of the celluloid to insulate against moisture is not referred to in the specification of the patent, but this is not strange, for it is not to be supposed that the inventor would know about the moisture film, or that celluloid is devoid of such a film. Only chemists and a few physicists would be expected to have that knowledge. Very likely the patent solicitor did not know of it either, or the patent office examiner who acted on the application. Nevertheless, in view of the evidence and corroborative publications referred to, the existence of such a film on glass and metal, and its absence from celluloid, cannot be doubted. An inventor is not required to state or know the theory of operation of his invention, or to state or know all its advantages and uses. Walker on Patents, par. 175. And he can claim the benefit of later discovered advantages or improvements. All that is required is that he shall have made an improvement, and that he shall illustrate and describe his improved device so that those skilled in the art may make and use it; and this was unquestionably done."

With these facts in mind, and the further fact that the complainant's saltcellar (to which article the manufacture has been confined) has gone into very general use, and has thus been recognized as producing the beneficial results claimed by the patent, I think it is safe to conclude that invention is shown by the device, and that the bill should be sustained. Infringement is not denied. The defendant manufactures and sells a saltcellar with a celluloid cap that is practically identical with the saltcellar of the complainant, and has made no attempt to defend upon the ground of a substantial difference between the articles.

The principal defense is the prior art. but in my opinion none of the references anticipates the complainant's celluloid cap, to which, as already stated, his invention should be confined. Perhaps, the nearest approach to an anticipation is the picture (without printed text) of the celluloid box for talcum powder shown in the trade catalogues of the Arlington Company for 1899 and 1900; but these were private business circulars and not publications intended for general use.

It was urged, also, at the argument, that the action could not be maintained because the patentee had assigned the patent in August 1905, either wholly or in part, and had not joined the assignee as a party complainant. This position is based upon the following instruments in writing:

"In consideration of money paid to me by Henry H. Hogan of Nepera Park, N. Y., I do hereby lease to the said Henry H. Hogan all my right, title, and interest in and to the patent of U. S. No. 752,903 for an improvement in Salt and Pepper Shakers, granted to me February 23, 1904, the same to be held and enjoyed by the above-named person for the term of six years, as fully and as entirely as they could have been held and enjoyed by me if this lease had not been made; provided that this right, title, and interest is used only in connection with the business and agreement named below: This lease, however, cannot be sold or released without the consent of Oliver K. Hogan, and in case of the death of all the persons named in this agreement without (within?) the six years named this lease and business is to revert to the patentee, Oliver K. Hogan.

"Witness my hand and seal this 24th day of Aug., 1905.

"Oliver K. Hogan."

"I also hereby assign my business and stock at No. 72 Murray St., New York, N. Y., for the term of six years to the following persons, Henry H. Hogan, Albert Z. Hogan, and J. C. Hogan, to be used and managed by them according to their best judgment.

"Witness my hand and seal this 24th day of August, 1905.

"Oliver K. Hogan."

"In consideration of the above lease and assignment, it is hereby agreed that the claims now held against Oliver K. Hogan by Henry H. Hogan, Albert Z. Hogan, Elizabeth E. Hogan, Mrs. Wm. H. Hogan, Alice G. Hogan, and J. C. Hogan shall be paid in full from the profits of said business in gradual payments; and it is also agreed that the said Oliver K. Hogan and Henry H. Hogan, Albert Z. Hogan, Elizabeth E. Hogan, and J. C. Hogan are to receive ($\frac{1}{5}$) one-fifth of the total profits of the said business, the same to be payable weekly or monthly. And it is agreed that O. K. Hogan is to have access to the books for examination upon request. In the event of the recovery of any damages from infringement suits the same is to be divided equally between the following persons, H. H. Hogan, A. Z. Hogan, Oliver K. Hogan, J. C. Hogan, Alice G. Hogan, Mrs. Wm. H. Hogan, J. K. Kestler, and Geo. N. Hogan.

"Witness our signatures this 24th day of August, 1905.

"Henry H. Hogan.

"Albert Z. Hogan.

"J. O. Hogan."

These instruments are obviously a connected whole, and should be construed together. Thus considered, I am of opinion that the patentee did not assign his patent thereby, but merely granted a license to Henry Hogan for the term of six years. If this construction is correct, the bill is brought by the proper party, and the argument now under consideration cannot be sustained.

It remains to say a word concerning the first claim. In the present state of the proof, I am not satisfied that the claim can be supported so as to cover every material insensible to "the emanations from the salt"—whatever the quoted phrase may mean—and I must therefore decline to enter a decree in favor of the validity of this claim. This ruling, however, is to be without prejudice to the complainant's right to raise the question hereafter in another suit. Whether, in view of the restrictive statements contained in the specification, and of the grounds upon which the patent has been held to be good, it can be sus-

tained for any other article than a dredge for salt, need not be decided upon this record. It is a dredge for salt that is manufactured by the complainant, and a dredge for salt that infringes, and to such article the decree will be confined.

A decree may be entered sustaining the validity of the last three claims, and directing the defendant to account.

CRAMER & HAAK v. 1900 WASHER CO.

(Circuit Court, M. D. Pennsylvania. July 27, 1908.)

No. 23, January Term, 1907.

1. PATENTS—INVENTION—USE OF OLD MECHANICAL DEVICES.

Except in inventions of the most primary character new mechanical forms and appliances are not to be looked for, and there may be patentable invention in making use of those which are known in the same or kindred arts by so adapting and combining them as to bring about new or improved results.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 28.]

2. SAME—INFRINGEMENT—WASHING MACHINE.

The Cramer & Haak patent, No. 829,631, for a washing machine consisting of an oscillating tub adapted to be run by power instead of by hand, was not anticipated, and discloses invention. Also, *held* infringed.

In Equity. Suit for infringement of letters patent No. 829,631 for a washing machine issued to C. W. Cramer and H. C. Haak, August 28, 1906. On final hearing.

Henry E. Everding and George W. Ellis, for complainant.

Samuel O. Edmonds and Frederick M. Welsh, for defendant.

ARCHBALD, District Judge. The complainants are the inventors of a washing machine, or tub for washing clothes, particularly adapted and designed for use with a water, steam, or electric motor. Tubs of the class to which it belongs, up to that time, had been actuated solely by hand, being oscillated back and forth by means of a handle fixed to the rim of the tub, or a hand-moved lever with gearing or crank attachment; the motive force in either case being the human arm. But in changing from hand to machine power, the effect at the end of the stroke had to be looked to, which is taken care of without more in the one case, by the natural slowing up on reaching the limit of the operator's arm, but results in a racking jar, unless obviated in some way, when the tub is swung back and forth by the reciprocations of a machine-driven rod. To meet this difficulty, the complainants, having fulcrumed their actuating lever on the pivot of the tub, connect up tub and lever by a spiral spring, which serves not only to cushion the stroke at either end, but, by the extension of the spring under the momentum of the tub, stores up a recoil energy, which starts it on the return, materially relieving the demand on the motor and incidentally removing any liability of a dead center. By the stretching of the spring, also, a long swing of the tub is secured, with a relatively short movement of the motor piston, giving a maxi-

imum actuation, with a minimum expenditure of power, and at the same time making for compactness and economy of structure, by a reduction of the driving mechanism.

It is clear that there is nothing which directly anticipates this in the prior art. The only question is whether it shows an inventive advance. An oscillating tub, of course, was not new, being found in the Ahrends (1888), the several Caslers (1897-1903), the Wearne (1899), and the Fawkes (1904). Neither was a resilient spring, to cushion the tub at the end of the stroke and assist in its recoil, which appears in certain of the Caslers (1898, 1902, 1903), the Wearne, and the Fawkes. Nor was it new to reciprocate the tub by means of a lever, fulcrumed or pivoted concentrically with it, which is to be found in the Ahrends, and one of the Caslers (1899). All therefore, as it is said, that the complainants did, after having examined the different tubs in use, and adopted the oscillating form common to the art, was to provide for its actuation by means of a driving rod, as in the Ahrends, acting upon a lever, fulcrumed on the pivot of the tub, and adapted to be reciprocated by means of a segmental rack, as in one of the Caslers, and connecting up lever and tub by the ordinary draft spring extensively used in numerous mechanical devices, as well as suggestively shown, performing the same functions, in the various Caslers, the Wearne, and the Fawkes. This is a familiar and at times an effective argument, with which to demolish a patent; but its value depends, in any case, upon how far it is borne out. Except in inventions of the most primary character, new mechanical forms and appliances are not to be looked for, and inventors have to be content, in carrying out their ideas, with making use of those which are at hand, in the same or kindred arts, adapting and combining them to bring about new results. That washtubs, as a class, are a legitimate subject for the exercise of inventive talent, is proved—if proof were necessary with respect to so important a domestic article—by the concern which has been manifested, and the many efforts which have been and still are being made by different inventors, as shown by the record, to secure a good one. The person who first devised an oscillating tub was more or less of a pioneer, as to whom those who came afterwards are mere improvers, having introduced a new principle, the agitation of the clothes and the surging of the water about them, by the motion of the tub, being substituted for the action of a rotary scrubber, or the rubbing of the same by hand. So, up to the time of the present invention, so far as relates to oscillating tubs, there was nothing in use but hand power, and, in providing for a change from hand to machine, the complainants have in the same way brought in something new and decidedly useful, practically relegating everything not so operated to the scrap heap. Unless therefore the adaptive changes made necessary thereby were obvious, or suggested by what was already to be found in the same or kindred arts, there is no reason why they should not be accorded the merit of invention.

It is said, however, that, even though the use of machine power may be indicated and provided for in the specifications, it is merely a tub, and not a machine-actuated one, that is patented; the concrete

device and not the idea being all that the complainants are entitled to. But the underlying idea of the patent, as disclosed by the specifications, is a machine-driven tub, and while it may not be declared for in so many words in the claims, or indeed be patentable by itself as being nothing but an abstraction, it is, "in a device of the class described," that the combination which is the subject of the patent is said to consist, which carries it back to the specifications from which it cannot thus be separated. What the complainants invented, in other words, was a washtub adapted to be run by power, instead of by hand. It is that which they unmistakably describe, and which characterizes and gives point to, the invention, and while they may not be able to lay claim to more than the particular form and arrangement of parts for which they have declared, to that at least they are entitled for the purposes specified, if in other respects it shows invention.

Nor can it be successfully maintained, minimizing the complainants' efforts, that all they did was to appropriate and put together already existing appliances, without inventive adaptation, the spring to cushion the stroke and aid in the recoil being old, as well as the pivotally fulcrumed lever, with segmental end, intermeshing with a power driven rack bar, by which the tub is reciprocated. For whatever may be said of the means for directly driving the tub, which so appears, as being both old and obvious, the spring of the patent forms a part of the lever, and thus enters into the actual reciprocation of the tub, assisting to impart motion to it, instead of simply acting as a check upon it, differing entirely in this respect from the various devices referred to above in which a retracting spring is found. So far as the immediate cushioning, and to a certain extent the recoil, are concerned, no doubt the spring operates the same in each, being extended by the momentum or swing of the tub and reacting against it; but in shifting from a hand to a power driven tub it was by no means obvious, and required something more than ordinary mechanical insight, to appreciate that, while retaining the same beneficial effects, the rigidity of the stroke of a power driven rod could be relaxed, as it must be to avoid racking, by hooking up lever and tub by an intermediate spring; a maximum swing with a minimum stroke being at the same time secured, making for economy of parts and motive force enough of itself to sustain invention. It may be that, outside of the spring, nothing can be predicated on the special form of lever adopted, the rest of it, as contended, being a perfectly ordinary and obvious construction, where machine power is to be resorted to; but the spring end connection is certainly new, and the complainants are entitled to rely upon the new and useful results produced by it, as evidence not only that something more than ordinary skill was involved, but of inventive advance over the existing art. The defendants have found it profitable, as we shall see, to adopt it, to help out the recoil springs of the Wearne machine, which, according to Mr. Winans, their mechanical engineer, are not sufficient without it, and have also seen fit to try and protect the combination with a patent, after which it does not altogether lie in their mouths to deny its utility or dispute that it is patentable.

It is said, however, that, even if the patent is valid, the invention is a narrow one, being confined to the specific arrangement shown, on which the defendants do not infringe. There are seven claims to the patent, all but the second and seventh being relied upon, of which the first, although broader than the rest, may be taken as representative:

"1. In a device of the class described, the combination with a pivotally mounted tub, of a lever fulcrumed on the pivot of said tub, means for actuating said lever, and a spring connecting the lever with said tub."

This is fulfilled in terms by the tub which the defendants were manufacturing when the bill was filed, however it may be as to the one which is being now made. The only distinction attempted with regard to it is that, in addition to the spring attachment between the lever and tub, it is supplied with two other twin springs, diametrically opposite to each other, attached at one end to brackets on the standard which supports the machine, and being connected at the other with a stop plate or bar, pivoted concentrically with the tub, the shoulders of which are engaged at each reciprocation of the tub by a lug projecting downwards from the frame or spider on which the tub is carried. The defendants, in other words, employ three springs, where the complainants have but one, having a driving spring to connect up the lever and tub, and two oppositely placed recoil springs to take up the momentum of the tub and start the recoil; the one being operative, as it is said, at one part of the stroke, and the others at the other, but not both at the same time. The function of the two recoil springs is practically the same as in the Wearne patent, which the defendants own, and are therefore entitled to use; but the combination of these with the spring lever attachment of the patent in suit is another matter, and does not avoid infringement because the two are brought together in the one machine. This is demonstrated by observing the effect of dropping out one or the other of them. If the spring end of the lever, for instance, be dispensed with, and the twin recoil springs be retained, there is, of course, no infringement; but, on the other hand, if the twin recoil springs be thrown out, and the spring lever remain, we have the exact structure of the patent, and, having this, how can it be said that the combination of that which is not an infringement with that which is saves the result?

It is suggested that the defendants divide up the threefold function assigned to the single spring of the patent; the recoil springs, which they employ, being depended on solely to absorb the energy or momentum of the tub and assist in its recovery, and the spring of the lever merely serving to even up or relieve the tension and to impart motion to the tub in a resilient or yielding manner, like the ordinary draft spring. But infringement is not avoided by the dividing up of functions and assigning them around to different parts of the same character, operating in the same way. Nor does it matter that the three-spring arrangement may be an improvement of sufficient merit to deserve and receive a patent, as it has; it being possible that a patented improvement may be an infringement of the device on which it improves. *Watrous Mfg. Co. v. American Hardware Co.* (C. C.) 161

Fed. 362. Not altogether consistently with the asserted protection secured by the patent which they so hold, it is urged that the defendants' machine is nothing more than their old Standard or Wearne washer, with the addition of a drive lever with draft spring attachment which any one was entitled to use; but, as already pointed out, it is none the less an infringement to apply, as this does, the spring lever of the patent, which is not to be identified with the ordinary draft spring, to an existing style of tub; the combining of the two in no way relieving from the appropriation which is so made. And this is emphasized by the statement of Mr. Winans that the spring attachment of the patent was added because he realized that a fixed or rigid connection without it would rack the machine, while the use of it would permit an adjustment to the varying momentum of the tub and its load, one of the purposes for which it was designed. This, as already suggested in another connection, is not only a tribute to the efficiency of the device, but a distinct proof of its necessity to the proper operation of the machine; there being no extenuation for, or escape from, the taking which is thus confessed.

It is further said, however, that the defendants have abandoned the style of tub which they were making when the bill was filed, and that nothing can be charged against the one which they now use; but, infringement having been made out as to the one, it is not important at this time whether the form to which they have changed infringes or not, which can be considered when it comes to the accounting. *Hanifen v. Armitage* (C. C.) 117 Fed. 845, 851. *Walker Patent Pivoted Bin Co. v. Miller* (C. C.) 146 Fed. 249.

Let a decree be drawn sustaining the patent, awarding an injunction, and referring the case to a master.

HENNEBIQUE CONST. CO. v. ARMORED CONCRETE CONST. CO. OF BALTIMORE et al.

(Circuit Court, D. Maryland. January 28, 1908.)

PATENTS—INFRINGEMENT—REINFORCED CEMENT GIRDERS.

The Hennebique patent, No. 611,907, for a cement joist or girder strengthened by iron rods or bars, is limited to a construction in a continuous girder, in which the strengthening rods in each span extend over the intermediate support and into the next span, so as to increase the strength of the girder next to such points of support. So construed, held not infringed.

In Equity. On final hearing.

Wm. B. Whitney, for complainant.

Charles H. Knapp, Arthur Stewart, and W. Cabell Bruce, for respondents.

MORRIS, District Judge. This is a bill of complaint, in usual form, charging infringement of a patent belonging to complainant, and praying for an injunction and an account. The bill alleges that, prior to December 29, 1897, Francois Hennebique, a citizen of France, was the inventor of certain improvements in the construction of joists,

girders, and the like, and that upon his application, filed December 29, 1897, there was granted to him, in due form of law, patent of the United States, dated October, 1898, No. 611,907, for improvements in the construction of joists, girders, and the like of cement strengthened with iron. This patent, by valid assignment, has become the property of the complainant, the Hennebique Construction Company. The specifications and claims of the patent are as follows:

"The use of strengthened beton in buildings has within recent years greatly developed. It has been thought possible, by mixing beton and iron or steel, to replace the purely metallic elements of building construction by parts equally incombustible, but lighter, and more simply and rapidly made. In any case the mixture of cement or hydraulic lime, which resists perfectly compression, with iron or steel, which more particularly resists tension and flexion, has not hitherto been capable of being carried out in a judicious and rational manner. By arranging at useful points in a mass of beton of suitable form longitudinal bars of iron of a given shape in order to constitute the tension chord, by distributing them in the mass in a judicious manner in order that the whole mass of iron and beton may have at every point of the piece formed the desired resistance to flexion and tension, and by further connecting the longitudinal bars by brace pieces or stirrups of suitable form, I have succeeded in producing the practical joists, girders, and the like which form the object of my present invention.

"The invention is illustrated in the accompanying drawings, in which I have shown diagrammatically in Figure 1 a practical continuous joist or girder of beton strengthened with iron arranged according to these principles. Figure 2 is a detail perspective view of one of the stirrup pieces. Figure 3 is a section on line, s, t, of Figure 1. Figure 4 is a sectional perspective on line, x, y, of Figure 3; the longitudinal half of the girder being supposed to be removed. Figure 5 is a detail illustrating the construction at the point of passing an intermediate support. This joint, incased or built in at one of its ends, A, is placed on a series of intermediate supports, C. The characteristic of the metallic core or strengthening is the addition to longitudinal bars, 1, arranged parallel to the lower side of the joist, of inwardly-bent bars, 2, 2', 2'', arranged in the same vertical plane. These bars are parallel to the bars, 1, in the mean central part of the joist; that is to say, in the part where the effects of tension are almost nothing. They are placed parallel to the bars, 1, and in their vicinity they double the resistance of the latter to tension. They are carried by the same supports or stirrups, 3, and these latter thus connect the chord of tension formed by the bars with the chord of compression formed by the beton. One of these stirrup pieces is shown in perspective in Figure 2. It is formed of a band of sheet iron of U shape having straight arms, terminated by a little hook, which facilitates their fixing in the beton. These straight stirrup pieces play in the joist of strengthened beton the part which the suspension rods play in the trussing of metallic girders.

"As in the extreme parts of the girder the tension action increases in proportion as the wall, A, and the support, C, are approached, I raise the bar, 2. The inclined arms, 2', of this bar, are connected with the horizontal bar, 1, by stirrup pieces, 3, approached more and more closely together. I thus form a triangle of resistance, the apex of which is at the point of divergence of the bars, 2'. This triangle, in consequence of the stirrup pieces, 3, being progressively placed nearer one another, and of the growing mass of beton which it incloses between the bars, 1 and 2', offers a proportionate increasing resistance to the tension action. Each bar, 2, is inclined upwardly at 2', runs horizontally, as shown at 2'', and is extended beyond the incline of the adjacent bar, as shown at 2''. At the point where the continuous girder passes on to an intermediate support, C, I prolong the bar, 2'', to 2'', in the adjoining compartment or bay, which is thereby strengthened; and in order to insure that the reaction of the beton of this prolongation shall not raise the latter I crown it with reversed stirrups, a, which maintain the bar perfectly firm.

"Figure 5 shows in detail the passing over an intermediate support, C. The crossing of the arms, 2'', consolidates the girder in a practical manner on

the support, C, where the bending strain is greatest. It will be seen, therefore, that owing to the addition of a single bar, 2, the arms, 2', 2'', 2''', of which are suitably inclined, connected, and arranged in the beton, and, further, owing to the rational distribution of the straight stirrup, 3, it is possible to construct girders resistant in all their parts in a perfect manner to the effects of tension, the effects of compression, the breaking effects, and the bending effect, while reducing to a minimum the quantity of iron employed, and suppressing or dispensing with iron in the part under compression, thereby avoiding between the irons, 1 and 2, any cross-fastening by inclined stirrups or by wire lattice work. It is needless to state that the principles herein described may be applied to the manufacture of any suitable girders or joists for ceilings or floors, and in fact, to any constructions formed of beton strengthened with metal, which, as regards the strains which they will support, may be likened to girders placed on supports or incased in masonry. It is also understood that according to the dimensions of the girder, the transverse section of which is not necessarily rectangular, the number of bars, 1 and 2, placed in the same vertical plane, may vary.

"Having now particularly described and ascertained the nature of my said invention and in what manner the same is to be performed, I declare that what I claim is:

"1. In the construction of joists, girders, and the like of cement strengthened with iron or the like, the inwardly-bent bars, 2, 2', 2'', 2''', of which the central branch, 2, is horizontal and arranged in the plane of the bar, 1, which forms the chord of tension of the girder, and of which the arms, 2', are always raised in the same vertical plane and in the direction of the point where they are fitted into the wall, A, or on the supports, C, in order to obtain a better resistance to the increasing breaking strain, while the branch, 2'', is extended into the next span, substantially as described.

"2. In the construction of joists, girders, or the like of the kind described, the straight stirrup pieces, 3, of hoop iron in a U form for connecting the bars, 1, and the inwardly-bent bars, 2, 2', 2'', 2''', the said stirrup pieces being distributed in the girder, substantially as hereinbefore described."

In the strengthened concrete girder of the Hennebique patent, straight rods are imbedded in the lower side of the cement girder, and other rods parallel to them are imbedded in the same horizontal plane of the girder for some distance on each side of the point midway between the points of support; but then these other rods begin to gradually rise, being upwardly bent, to near the upper surfaces of the cement girder, and then are continued over the support into the next span for some distance ending at 2''', as shown in the drawings. This distance of extension into the next span is represented in the drawings of the patent as being at least one-seventh of the whole width of the span between the two points of support. Obviously this method of construction is applicable to continuous girders; that is to say, girders which are continuous over one or more intermediate supports, and which are thereby divided into two or more consecutive spans. In such a girder the tensile strain, which tends to pull apart the lower side of the beam, will be greatest midway between the supports, and for that reason the parallel strengthening rods are placed there; but near the supports it is the upper portion of the girder, the top fibers, that are in tension and need the strengthening of the iron rods which have been brought up to the top and carried over each support into the next span, so that there is, at the points of greatest stress, near the supports, a double number of rods in each span to give resistance to the stress which at these places tend to bend the girders when the load is applied. As Mr. Hennebique, in his testimony, explains, if the weight

is too great for the resistance of the single rods at the top of the girder, and the rods are not extended into the adjoining span, then the weight will "produce destructive deformation of the concrete of the girder."

The testimony and the reasoning of Mr. Hennebique, as well as the usual meaning of those words, convey to me that the words "bay" or "span" or "compartment" in the patent mean the clear open space between the faces of the adjoining supporting columns. Especially is this so with respect to the building in question in this case, in which the supports are walls which extend above the points entered by the girders, so that the superimposed weight of the wall rests upon the girder and would prevent its yielding at that point to the stress of the load, to which it could only yield at some point in the bay outside of the support. The scientific reasons which explain why this arrangement of the iron rods places them just where they are needed and dispenses with their use where they are not required, and therefore results in an economical use of the material of which the rods are made, are most learnedly shown in the testimony of the expert witnesses and in the briefs of counsel. But, after all, it is the actual construction covered by the patent with which this litigation is concerned, and that construction, I think, is clearly indicated by the specifications and claims of the patent to require that the upwardly bent rod shall pass over the supporting column into the next adjoining span or compartment. It is stated in the specifications:

"At the point where the continuous girder passes on to an intermediate support, C, I prolong the bar, 2", to 2'", in the adjoining compartment or bay, which is thereby strengthened. * * * The crossing of the arms, 2'", consolidates the girder in a practical manner on support, C, where the strain is the greatest."

The defendants, in support of their defense of noninfringement, contend that in the building erected by them, which is complained of, they did not use complainant's patented construction; that the plans and the calculations for the strength of the irons were not based on the calculations proper to be used in the Hennebique construction, and the rods were not designed to pass over and did not pass over into the adjoining compartments or bays, and the ends did not cross each other, as shown at 2'" in the patent. The defendants contend that the rods used in the building extended no further than the center of the supporting column, and if, in some few cases, they did extend a few inches further, it was only by accident, and they never extended into the next bay, so as to obtain any of the benefits claimed by the patentee for his construction. This is a question of fact to be determined from the testimony, and my conclusion is that the testimony fully supports the contention of the defendants.

It is urged, however, that, even if this be conceded, yet the defendants are to be held to have used the patented construction and have attempted to evade it by constructing it imperfectly, so that its utility is diminished. If the real, substantive invention of the Hennebique patent consists in the overlapping of the ends of the rods of one span with the ends of the rods of the next span, so as to give the resistance of the double rods to the shearing stress, which is greatest on the ce-

ment girder at a short distance from the face of the support, then it results that rods, the ends of which simply meet in the support, and do not cross and overlap beyond the faces of the support, do not infringe Mr. Hennebique's real invention, and do not infringe the claims granted to him in his patent.

It is urged on behalf of the complainant that the claims of the Hennebique patent are not solely for a combination of all the elements of the claim, and that the patent is infringed by the use of the bent bar with the stirrup pieces. Considering the prior art, as disclosed by the exhibits and testimony, I think it fairly appears that Mr. Hennebique was not the first to use the stirrup pieces, or similar metal ligatures, or a bent bar, and therefore he cannot claim to be the inventor of these devices, but that the invention of his patent must be limited to the combination which he has described of the bent bar and the stirrups with the bent bar extending into the next compartment in such manner as to produce the beneficial results obtained by the overlapping.

Being of opinion that the defense of noninfringement has been sustained, and for that reason that the bill of complaint should be dismissed, I do not enter upon the question of the effect of the delay of Mr. Hennebique in applying for the United States patent, or of the prior printed publications of his invention.

TINDEL-MORRIS CO. v. CHESTER FORGING & ENGINEERING CO.

(Circuit Court, E. D. Pennsylvania. August 7, 1908.)

No. 9, October Sessions, 1907.

1. PATENTS—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

A court of equity may enjoin a threatened infringement of a patent, although no act of infringement had been committed when the bill was filed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 88, Patents, §§ 478, 479.]

2. SAME—INFRINGEMENT—PURCHASER OF PARTS OF MACHINE—RIGHT TO USE.

A sale of a patented machine by one authorized to sell vests the purchaser with an absolute title and the right of user, but a sale of the parts of a dismantled machine as scrap iron does not pass title to the machine, nor the right to use it, and if the parts are reassembled, and the machine used, such use is an infringement of the patent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 399.]

3. SAME—INJUNCTION—MACHINE OBTAINED BY FRAUD.

Defendants, two of whom were then employes of complainant, one being its foreman, organized a company to engage in a competing business in the making of crank shafts. Before the foreman left complainant's employment, it sold a quantity of scrap iron to a junk dealer and, among other things taken by him, were the parts of two dismembered crank shaft lathes covered by patents owned by complainant. Such parts were not knowingly sold by complainant, were stored in a different place from the scrap, and there was evidence that they were loaded in the junk wagon at the instance of the foreman. He or his codefendant picked the parts of the machines from the scrap and purchased them from the junkman for \$100, their value being at least \$1,500, and they were proceeding to reassemble them preparatory to operating the machines. Held, that the evidence was sufficient to show that they were obtained from complainant

by fraud, and that a preliminary injunction would be granted restraining defendants from using the machines, regardless of the question of the validity of the patents.

In Equity. On motion for preliminary injunction.

Frank P. Prichard, for complainants.

E. Hayward Fairbanks, for defendants.

ARCHBALD, District Judge.¹ This is a bill to enjoin the use of two patented machines for the turning of crank shafts which formerly belonged to the complainants, but of which the defendants, as it is charged, have obtained unlawful, if not fraudulent, possession. The defendants have demurred, on the ground that, infringement being the basis of the bill, no infringing act had been committed at the time it was filed; the different parts of the machines, which came into their hands in a dismembered condition, not having as yet been completely put together. But the possession being unlawful, as the demurrer admits, and the purpose to use the machines after they have been completed not being denied, the threatened use may be enjoined without awaiting its accomplishment. *Page Woven Wire Fence Co. v. Land* (C. C.) 49 Fed. 936; *National Meter Co. v. Thomson Meter Co.* (C. C.) 106 Fed. 531; *Adair v. Young*, 12 Chanc. Div. 13. The wrong is imminent, and the court is not so powerless as to have to let it go on and be carried out, before interfering. *Vicksburg Waterworks v. Vicksburg*, 185 U. S. 65, 22 Sup. Ct. 585, 46 L. Ed. 808.

Turning, then, to the merits, the facts disclosed by the affidavits are considerably out of the ordinary. The defendant company was organized early in 1907, as a rival of the complainants in the crank shaft business, by two men, Tomkins and Arnhold, who were in their employ; Witterman, the third member, being taken in to complete the company. When this was discovered by the complainants, Tomkins and Arnhold were discharged; Arnhold, who was foreman of the shop, being retained till the end of the month to close up certain matters. The latter part of February, while he was still in charge, the complainants had occasion to sell some old hack saws to a junk dealer, who was also asked to make an offer for the cast iron scrap scattered around in piles, which he did after looking it over. There were stored away at the time, on a platform over the warehouse, in a place provided for unused machinery, the complete parts of two dismantled crank lathes, made under the patents held by the complainants, which were somewhat out of order, by reason of wear, but were capable, with slight repairs, of being put in an operative condition. Some of these parts were of steel, with phosphor bronze bushings, and under no circumstances would be classed as scrap; nor were any of them in the scrap piles examined by and sold to the junkman. In some unexplained way, however, they were taken down from the place where they were stored and loaded up and carted off with the scrap in the junk wagons. There is evidence that this was by the direction of Arnhold, but it is denied by him, although it certainly was done under his supervision, of which more presently. With-

¹ Specially assigned.

in a day or two afterwards, the junk dealer was notified, by telephone either by Tomkins or Arnhold, he is not sure which, that they would come and look over the scrap, and might want to select some things out of it. This they did, taking the different parts of the two crank lathes in question, for which they paid him \$100, directing them to be hauled to the shop of the defendant company. As scrap, this material had cost the junk dealer \$18 a ton; the whole amount paid by him being some \$37. As machinery, it was worth at least \$1,500. Since coming into the hands of the defendant company, the lathes have been put together, suitable bed plates constructed, and other parts supplied to put them in complete running order. None of this latter is covered by the complainants' patents, but the machines, as so assembled and set up, are admittedly within and infringe upon them, unless, under the circumstances, the defendants have acquired the right to use them.

The purchaser of a patented article, from one who is authorized to sell, becomes possessed of an absolute property in it (*Keeler v. Standard Folding Bed Co.*, 157 U. S. 659, 15 Sup. Ct. 738, 39 L. Ed. 848), which he is capable also of transmitting to others, provided, of course, there are no express restrictions. *Dickerson v. Pinling*, 84 Fed. 192, 28 C. C. A. 139. Had therefore the machines which are in controversy here been advisedly sold to the junkman, he in turn could have sold them, as he did, to Tomkins or to Tomkins and Arnhold, and the defendant company, buying from them, would undoubtedly have been protected. The complainants having parted with them in this way, if that was the fact, the right of property which thereby passed would have carried with it, as of course, the right of user. But it is manifest that, to have this effect, the sale must have been actually intended, and it must have been of the machines as such, and not of the dismantled parts as scrap. A sale as scrap was a sale, not to use, but to destroy, and cannot be wrested into a sale of the patented machines, because the different parts could be picked up and put together out of it. *Wortendyke v. White*, 2 Ban. & Ard. 25; *Cotton-Tie Co. v. Simmons*, 106 U. S. 89, 1 Sup. Ct. 52, 27 L. Ed. 79. Even assuming, then, that there was no fraud, and that the patented parts were merely included by mistake in the scrap that was sold to the junkman, this would give no authority to him, or to any one buying from him, to rig them up into a machine in disregard of the patents.

So far the case has been considered as though the sale were a fair one; but the evidence goes further and justifies the conclusion that it was not fair, but fraudulent, and the complainants are entitled to press this point, as it dispenses with the necessity for passing upon the validity of the patents, which otherwise might have to be gone into. That the complete parts of the two machines were included in the scrap hauled off by the junkman, not only with the acquiescence, but with the connivance, of Arnhold, there can be little question. Being foreman of the shop, if there was nothing else, it is not to be believed that they could be brought out from where they were stored and carted away, without his knowing it. But, more than this, we have the testimony of Cash, who was employed there at the time, that Arnhold was present during the loading, and told him that he had orders from the firm to get this material out of the way because it

was a nuisance up there on the platform, a statement which apparently had not a word of truth in it, and Pylant, another workman, swears that, by the direction of Arnhold, as he thinks, although he cannot be positive, he took down the machines and helped to load them; Arnhold being present and telling him to handle them carefully, as they were going to be used again; while Griffiths, the shipping clerk, who usually tended to such matters, says that the shop order to deliver this scrap covered only that which was piled in the yard, and that the machines, as he subsequently learned, were loaded on the first wagon that went off, when he was temporarily absent. It is charged that Townsend, the superintendent, and Crispin, assistant secretary, inspected the piles and knew that they contained this machinery; but that is denied, and is merely stated on information and belief, there not being a particle of evidence to substantiate it. Indeed, if they had, it is not credible that they would have stood by and allowed unbroken steel parts, with phosphor bronze bushings, to go as cast iron scrap, and, on the other hand, if this was done by Arnhold, as is proven, it is difficult to resist the conclusion, in view of the sequel, that it was done with a purpose; it being very peculiar, also, that two entire machines, with all the minor parts complete, should afterwards be able to be picked out from the scrap of which he had supervised the loading.

The next thing is that Birtwell, the junkman, within a day or two after the purchase, gets a telephone message from Tomkins or Arnhold—it does not matter which, except that, if it was Tomkins, it is all the more damaging, because he must have been in communication with Arnhold—to the effect that they would call and look over the scrap, which they did, selecting out what they wanted, for which they paid him \$100, for what was worth \$1,500. Before this, however, or possibly afterwards (it is not clear which, although, if it was afterwards, it is difficult to see why it is brought in here, because the advice of counsel after the fact is of no significance), Tomkins, as he says, and Witterman also, for that matter (they both seem anxious that the company should proceed on an approved legal basis), took counsel and was advised that he had a right to buy these machines of Birtwell, as he did, and that the company, in acquiring title through him, would be entitled to set them up and use them. If this occurred before he bought, it needs no comment. If afterwards—being apparently before any controversy had arisen—it is a confession of sensible weakness, for if he knew nothing of how the machines got into the hands of the junkman, and had no reason to doubt the validity or good faith of the transaction, why did he need to have any such legal assurance with regard to it? Putting all these things together, and without lingering longer over them, there is but one reasonable conclusion to be drawn, and that is that the defendants proposed, in the words of Arnhold, “to steal a march on Tindel,” who would not sell the machines—of which, by the way, Arnhold claims that he, and not Tindel and Albrecht, is the real inventor, which may have something to do with his conduct—trusting to their ability to hold and use them, once they got them into their possession. Equity will see, however, that this is not successful, for whatever title passed to the dis-

membered parts as scrap, by virtue of the sale to the junkman, having now got into the hands of those who concocted the scheme, it is against all conscience that they should be allowed to carry it out or get the fruits of it. As to them, the rights of the complainants remain as at the start, unaffected by the motions which have been gone through with, which the fraud vitiates, and this is the case, patents or no patents, dispensing with the necessity for going into the question of their validity, which is raised, or requiring it to be first adjudicated or acquiesced in, according to the ordinary rule which prevails in applications of this kind.

The complainants having thus shown themselves clearly entitled to the relief asked, an injunction to restrain the use of the machines in question will issue, and it is so ordered.

WESTERN TELEPHONE MFG. CO. v. SWEDISH-AMERICAN TELEPHONE CO.

(Circuit Court, N. D. Illinois, E. D. June 25, 1908.)

No. 28,994.

PATENTS—INFRINGEMENT—TELEPHONE SWITCH BOARDS.

The Fisk patent, No. 521,461, for a combined annunciator and spring-jack for telephone switch boards, as construed and limited by prior decision, held not so clearly infringed as to warrant the granting of a preliminary injunction.

In Equity. On motion for preliminary injunction.

Coburn & McRoberts (J. McRoberts, of counsel), for complainant.
Dyrenforth, Lee, Chritton & Wiles (P. C. Dyrenforth, W. Clyde Jones, and Russell Wiles, of counsel), for defendant.

KOHLSAAT, Circuit Judge. This cause is now before the court on application for a preliminary injunction restraining in limine the defendant from infringing patent No. 521,461, granted to H. M. Fisk, June 19, 1894, for a "combined annunciator and spring-jack."

Heretofore such proceedings were had in the case of said complainant against the American Electric Telephone Company et al. in this court (case No. 24,516) and on appeal (same title, 131 Fed. 75, 65 C. C. A. 313), that the said patent stands adjudicated as valid for the purposes of this motion, so that the only question before the court is that of infringement. In this last-named case, infringement was found by the Court of Appeals. The patent in suit covers the idea of restoring this fallen shutter of the jack by the contact of the plug with the shutter as it enters the jack. The shutter hangs in front of the jack, so that the plug, on being thrust in to make circuit connection, contacts with it directly, and by means of an enlarged shaft of the plug forces it (the shutter) upwards into contact with a latch, thereby forcing it and keeping it out of the path of the plug. Thus the one opening of the jack served for signaling, restoring the shutter, and closing the circuit. The matter here under consideration is the method of lifting the drop or signal to waiting position. Defendant's

device in that suit, as is also the case here, has two openings, one for signaling and the other for restoring the signal and closing the circuit by means of the insertion of a plug. The latter opening was placed under the former, so that the shutter or curtain, which was provided with a cam on its outer side, fell outwardly to a horizontal position, carrying its cam projection into the path of the plug, as it was being thrust into the lower opening, whereby the contact of the plug with the cam caused the shutter to be lifted back into closed position. This method the Court of Appeals deemed to be the equivalent of that of the patent then and now in suit.

A consideration of the testimony of the complainant's experts, Miller and Wiles, in the former suit, the arguments of counsel before the Court of Appeals, the language of the opinion and of the patent, and the conditions of the prior art are at this time deemed to fully justify the contention of defendant herein that the decision of the Court of Appeals was based upon the theory of direct impact of the plug with the shutter. "It is perfectly clear," say defendant's counsel, in their brief before the Court of Appeals, "that our position has been consistent upon the point that the Fisk patent covers the idea of restoring the fallen shutter by the contact of the plug as it enters the jack. Nothing more, and certainly nothing less." No other question was considered of moment in that case. "Appellee's drop," says the court, "contacts with the plug through the cam projection in the drop. We have already stated that we regard it as immaterial whether the contact is effected through having the plug reach up or the drop reach down, or both." The main question now before the court therefore is whether, as the record now shows, defendant's devices directly contact with the drop in the light of said decision and of the prior art.

Two of defendant's forms are alleged to be infringements. These may be designated as the old and the new. The former employs a two-part intermediate mechanism in restoring the drop. The latter restores it by means of a single element. The former is so removed from complainant's device that, for the purposes of this hearing, it is not considered pertinent. The new form consists, in part, of a vertically swinging flexible lever secured at its inner end to the coil-casing, and extending forward to a position near to the plug spring opening, and inside the front wall of the jack, where it takes on a cam-roller, and then passes on through the front wall of the jack, and terminates in a short projection under the drop. The cam-roller is adapted to be struck by the plug as it is pushed into the jack. This movement wedges the swinging end of the lever into a lifted position, which in turn causes the outer free end of the lever to strike the drop or curtain and lift it to its restored position. Thus, the horizontal thrust of the plug results in a vertical movement of the lever against the drop. There is no contact of the plug with the drop. It is conceded by complainant (page 34, reply brief in the Court of Appeals on former hearing) that to combine the drop and jack in a unitary structure was not new with Fisk. It is shown in a number of patents in the prior art. Nor was it new to automatically restore the curtain by the mere act of thrusting in the plug. Defendant's side by side arrangement of the drop and jack was also old. The restoration to posi-

tion of the drop was, prior to Fisk, accomplished by more elaborate means. In the English patent to McClure dated March 14, 1879, applied for October 5, 1878, we find an associated jack and drop. "This invention," says the inventor, "provides by one action for the resetting the indicator-drop and the introduction into the required circuit of a telephone and signal instrument." The two are located side by side. The signal drop is rigidly attached to a rocking shaft or lever, which is released from position by the application of a current from the subscriber or other distant operator, by means not here in question, whereby the indicator is, with the aid of a counterweight, carried athwart the aperture in which it is made to show the circuit on which the signal has been sent. Also attached rigidly to the rocking-shaft and indicator is a cam. The plug, when inserted, strikes this cam, whereby the lever or shaft and its indicator are reset. Thus, there is just one intermediate element between the plug and the drop. While the plug does not, strictly speaking, contact with the drop, it does contact with a lever or shaft, of which the drop is an integral part. If that part of the lever lying between the drop and the cam were removed, the cam would be located upon the drop, or the drop upon the cam, and we should have, practically, the device of the defendant's device in said former suit. Mr. Wiles, complainant's expert in the former suit, says:

"I should say that the space of a half inch or more between the cam (of the McClure device) and the edge of the shutter would probably necessitate an increase of the width of the entire device beyond that which it otherwise necessarily had, and that this would take the device outside the limitation of the claims which I have fixed in the foregoing consideration of their meaning."

It will be understood that the distance between the cam-roller and the drop in defendant's instrument now before the court is much greater than half an inch. Of course, the distance was fixed at half an inch arbitrarily, probably in order to exclude the cam projection on the drop then under consideration. There may have been in that case some novelty in the matter of adaptability to contact arrangement of the parts. It is difficult to find any difference in operation between Fisk and McClure. Several other patents have been introduced in evidence, showing intermediate mechanisms for restoring the drop of a more elaborate character than those of Fisk and McClure, viz., the Rein patent, No. 240,182 of 1881. Here the annunciator and jack are associated. "The object of my invention," he says, "is to provide for raising the drop automatically by the devices used for connecting or breaking the lines, thus avoiding necessity of handling the drop and insuring its return to place." The drop is restored by means of the plug, a rod held in an advanced position by a spiral spring, and cams which lift a bolt, which in turn lifts the floating lever-arm, which rigidly carries the drop. The Vail patent, No. 300,168, dated June 10, 1884, in which the intermediate device consists in part of an electrical circuit, is of the same general class, as is also the Gould patent, No. 392,326, disclosing several elements intervening the plug and the drop. All of them serve to emphasize the former finding of this court that the Fisk patent was of necessity very narrow.

Some point is made to the effect that the McClure patent is inoperative. This is not justified by the record. I am unable to say from the facts as now presented that there is a clear case of infringement. Indeed, there seems to be grave doubt as to that fact. In such a case, the court is not justified in granting extraordinary relief.

The motion for a preliminary injunction is denied.

HOUGHTON v. WHITIN MACHINE WORKS.

(Circuit Court, D. Massachusetts. April 6, 1908.)

No. 340.

PATENTS—SUITS FOR INFRINGEMENT—FEES OF MASTER IN ACCOUNTING.

In the district of Massachusetts the sum of \$25 is fixed as the normal rate of daily allowance for the services of a master in an accounting under a bill in equity for infringement of a patent, subject to increase or reduction where particular cause is shown.

In Equity.

Louis W. Southgate, for complainant.

Wetmore & Jenner, for defendant.

LOWELL, Circuit Judge. The court has to decide: What daily allowance should be made to a master in an accounting under a bill in equity for the infringement of a patent? The master has asked an allowance of \$35. Counsel for the defendant has objected thereto.

An examination of the practice of this court shows that no regular fee is now established, either by rule or by custom. Some masters have charged at a higher rate; others, at a lower. After conference with the other judges, and careful consideration of the matter, I am authorized to say that we think \$25 may be taken to be the normal rate of daily allowance, subject to increase or reduction where particular cause is shown. The allowance in the case at bar is fixed accordingly. In other respects, the allowance asked by the master will be ordered.

UNITED STATES v. ROGOFF.

(Circuit Court, S. D. New York. March 28, 1908.)

CRIMINAL LAW—FORMER JEOPARDY—DISMISSAL AFTER SWEARING JURY.

The dismissal of an indictment by the court, before submission of the case to the jury, but after they were sworn, on the ground that it did not charge a crime, will not support a plea of *autrefois acquit* or of former jeopardy to a second indictment for the same offense attempted to be charged in the first; the court in the first proceeding never having had jurisdiction of the offense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 316.]

On Demurrer to Pleas.

Henry L. Stimson, U. S. Atty., and T. W. Bird, Asst. U. S. Atty.

Clarence S. Houghton, for defendant.

CHATFIELD, District Judge. The defendant was indicted for the crime of perjury in connection with an examination in a bankruptcy proceeding brought against himself, and the indictment was moved for trial. After the jury had been sworn and the case opened, but before evidence was offered, a motion to dismiss was made, on the ground that the indictment did not show facts sufficient to constitute a crime, in that it was not alleged that the proceeding in bankruptcy was pending before any court of the United States. The court directed a verdict in favor of the defendant, and a new indictment has been found, to correct the insufficiencies of the former one. The defendant has interposed to this indictment the pleas of *autrefois acquit* and former jeopardy. The government has demurred to these pleas, so that the sufficiency of the plea comes up as a matter of law.

The plea of *autrefois acquit* does not apply, as no acquittal was had, either after trial or by direction of a verdict. The plea of double jeopardy is to the effect that the defendant had been put in jeopardy at the former trial, and that he cannot be tried twice for the same offense. By the demurrer the government admits that the charge in the second indictment is the same as that in the first, and that the present trial is an attempt to retry the charge, which was not sufficiently set forth in the former indictment. The cases of *Ball v. United States*, 163 U. S. 662, 16 Sup. Ct. 1192, 41 L. Ed. 300, and *Kepner v. United States*, 195 U. S. 100, 134, 24 Sup. Ct. 797, 49 L. Ed. 114, both have to deal with a situation arising after verdict, and sufficiently show that in the United States courts the plea of *autrefois acquit* is inapplicable to the present situation.

The application of the plea of former jeopardy has suffered continual modification since it first arose as a plea at common law. Without attempting to trace these modifications, or to consider what the original scope of the plea was, it is sufficient to say that if a person has not been placed in jeopardy by the trial upon an indictment against him, in which a verdict has been rendered, and upon which the verdict has been reversed upon appeal, it is difficult to see how the dismissal of an indictment before the case goes to the jury, when this dismissal is had upon the ground that no charge sufficient in law has ever been made against the defendant, can be said to have placed him in jeopardy. The entire transaction, from the finding of the indictment to the dismissal, is made a nullity, and the defendant comes before the court upon the second indictment as if the first charge had never been made. This was the theory upon which the case of *Ball v. United States*, *supra*, was determined, and, as has been said, the entire proceeding, including the trial, was held to be a nullity, upon the ground that the indictment had never been sufficient to charge a crime, and therefore not sufficient to have put the defendant in jeopardy of any conviction for a crime. To the same effect is the doctrine in the case of *United States v. Jones* (C. C.) 31 Fed. 725, and *People v. Casborus*, 13 Johns. (N. Y.) 351; this latter case being very similar to the case at bar.

The court, having jurisdiction of the defendant, nevertheless had no jurisdiction over the offense which was attempted to be charged, inasmuch as no offense was charged, and the defendant was therefore

never in a position of jeopardy before a jury which was called to pass upon any sufficient criminal charge. The matter was disposed of as a question of law, with the same effect as if it had been argued upon demurrer to the indictment.

The demurrer to the plea is sustained, and the defendant ordered to plead to the present indictment.

UNITED STATES v. WELLS et al.

(District Court, D. Idaho, C. D. March 12, 1908.)

No. 448.

1. COURTS—FEDERAL COURTS—CONFORMITY TO STATE PRACTICE.

In the absence of congressional legislation, the laws of the state where in a court of the United States is held control the practice before federal grand juries; but failure of a state statute to point out a method for attacking the validity of an indictment cannot deprive a defendant of that right.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 908.]

2. CRIMINAL LAW—PLEADING—PLEA IN ABATEMENT—COUNTER AFFIDAVITS.

Matters not disclosed by the record are properly presented by plea in abatement; but, if the rule were otherwise, the filing of counter affidavits disputing matters set up in affidavits accompanying a plea in abatement is a waiver of the objection that the issue was raised by plea, rather than by motion to quash.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 638-642.]

3. INDICTMENT AND INFORMATION—NECESSITY.

Offenses under section 5440, Rev. St. (U. S. Comp. St. 1901, p. 3676), are infamous, and can only be tried upon indictment returned by a grand jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, §§ 10, 12.]

4. SAME—CONSTITUTIONAL LAW.

While the fifth amendment of the Constitution enables the people, through the grand jury system, to initiate criminal prosecutions, it was primarily adopted and still stands as a safeguard against arbitrary or oppressive action.

5. GRAND JURY—DELIBERATIONS—DUTIES OF DISTRICT ATTORNEY.

The district attorney has no right to participate in nor be present during the deliberations of a grand jury, nor to express opinions on questions of fact, or as to the weight and sufficiency of the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Grand Jury, § 73.]

6. SAME—MISCONDUCT OF DISTRICT ATTORNEY.

The district attorney, at the conclusion of the evidence, without invitation from the grand jury, or request for information or advice, made an extended address, in which he commented upon and reviewed the evidence and explained and applied the law thereto for the purpose of securing an indictment. The remarks amounted to an expression of opinion that the defendants were guilty and that the grand jury should return an indictment against them. At the conclusion of the address, without deliberation other than that had during its delivery, and without discussion among themselves, the grand jury proceeded to ballot on the persons under investigation, a list of whom the district attorney furnished during the course of his remarks. *Held*, that while the mere presence of a prosecutor during the taking of a vote or during the deliberations,

through inadvertence and without intending to influence any action which may be taken, is not necessarily fatal to a bill returned under such circumstances, yet where the prosecutor not only expresses his opinion, but urges the finding of an indictment, and it is clearly shown that the grand jury must necessarily have been influenced, whether consciously or unconsciously, and particularly where it is manifest that at least one defendant was indicted without substantial evidence, prejudice will be presumed, and an indictment so returned will be quashed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Grand Jury, § 73.]

7. INDICTMENT AND INFORMATION—MOTION TO QUASH—GROUNDS.

The fact that it sufficiently appears from testimony adduced in open court on the trial of one of the defendants, upon the indictment so returned, that there was probably sufficient proof before the grand jury to justify the finding of a true bill as to some of the defendants who were indicted, does not deprive them of the right to a fair and unprejudiced investigation before the tribunal created by the Constitution, free from outside interference and undue influence. To hold, because the evidence was sufficient as to certain defendants that the indictment ought not to be quashed as to them, would be to substitute the judgment of the court for that of the grand jury.

(Syllabus by the Court.)

M. C. Burch and S. R. Rush, Sp. Asst. Attys. Gen., and N. M. Ruick, U. S. Atty.

Hawley, Puckett & Hawley and Frank Martin, for defendants.

WHITSON, District Judge. There are several cases against a part of the defendants, indicted under section 5440, Rev. St. (U. S. Comp. St. 1901, p. 3676) but we are only now concerned with No. 448, the indictment having been returned by the grand jury on April 12, 1907. The defendants John I. Wells and Patrick Downs filed motions to quash, which were overruled in September for reasons then assigned. They also presented two pleas in abatement. The first related to the statute of limitations. It was agreed by counsel in open court that this question was properly raised by demurrer theretofore interposed. Plea No. 1 was thereupon overruled. The second plea in abatement charges misconduct of the district attorney, whereby the defendants were denied a fair and impartial investigation of the charge against them. The averments of this plea may be summarized as follows:

At the conclusion of the testimony taken before the grand jury, while deliberating and before a vote had been taken, and prior to any discussion among themselves, or at all, concerning the sufficiency of the evidence produced to warrant the finding of an indictment, the district attorney went before that body, without request, and without being informed that any advice from him was desired, and proceeded then and there in argument to deduce his conclusions from the proofs, and to give his opinion thereon, and to urge the finding of an indictment; that the argument was at least an hour in length; that he said there need be no hesitation in finding the indictment, as the jury would soon be adjourned, scattered and gone; that no one would blame them, but the responsibility would rest upon him and other parties, who would be accountable; that he continued his argument until about time for adjournment, whereupon he stated that he wish-

ed the indictment voted at once; that he further stated, then and at numerous other times during the sessions of the grand jury, that in asking for an indictment against these defendants and others he was acting under specific instructions from the Department of Justice at Washington; that there was plenty of evidence upon which to find the indictment, and that he had other evidence which he had not adduced, but would do so at the trial, which would be quite sufficient to justify their action; that there was never any discussion by the grand jury as to the advisability of voting the indictment, but all deliberation was cut off and prevented, and, although jurors requested permission to make statements, they were not permitted to do so, the discussion being limited to that of the district attorney; that when the grand jury convened the following morning the district attorney immediately entered the grand jury room without invitation, whereupon he was requested by a member to leave the room, the grand juror at the time stating that they had some matters which they desired to discuss in his absence; that he positively refused to absent himself, saying that he would not leave, and that no further consideration could be had until the indictment was signed; that he thereupon directed the foreman to sign the indictment, without permitting further consideration or discussion, and without it being read, the members not being permitted to know the contents or the parties indicted; that the indictment was actually signed and returned without the knowledge of any member, except possibly the foreman, as to the contents or the persons indicted; that a number of papers, contracts, and agreements were withheld from the grand jury, which was compelled to take the contents from the district attorney's statements; that at no time after the evidence was taken were the deliberations of the grand jury permitted to go on freely or under its own direction or control, nor was it permitted to deliberate or consider the evidence as desired, but was urged and directed to proceed without discussion or deliberation; that the members of the grand jury permitted themselves to be thus influenced by the appeals and arguments of a zealous advocate, instead of relying upon a calm and fair deliberation on the evidence.

The third pleas in abatement were interposed by the defendants Martin and Pritchard only. These defendants separately complain that in obedience to subpoenas duly issued and served they appeared before the grand jury and gave evidence material to their own connection with transactions under investigation, without being informed or having knowledge of that fact, by which they were greatly prejudiced in being thus compelled to testify against themselves. Exceptions to the second and third pleas were overruled, and a hearing ordered upon them. Accordingly witnesses were called to ascertain the truth or falsity of the matters therein charged.

First, then, considering plea No. 2, it is to be observed that the grand jury was composed of 23 persons. Jurors Latham and Sloan made affidavits for the defendants. These affidavits are attached to the plea of the defendant Martin. Eastman, Clopton, King, Trout, Nicholson, Newman, Brannon, Gess, Grigsby, McGlinchey, Hartman, Adelman, Bayles, Windell, Wilson, and Hashbarger made affidavits for the prosecution. Latham, Sloan, and Cunningham were called as

witnesses to sustain the allegations of plea No. 2, and orally gave their testimony in court. The prosecution then by agreement submitted affidavits of the jurors above referred to as having been made on behalf of the prosecution, such affidavits to stand as their examination in chief, subject to cross-examination, and all of such jurors were thereupon called and cross-examined, with the exception of Windell, and, in addition to those who made affidavits, Ashbe and Halstead were examined, making a total of 21 jurors who testified. Nothing short of an extended and critical examination of the testimony will reveal exactly what occurred before the grand jury. That the district attorney did make an address was testified to by every witness who was called, with the exception of Juror Gess, who had no distinct remembrance. Indeed, it is not denied. As to the time consumed the jurors vary in their estimates, as will appear by reference to the margin.¹ That this address was voluntarily made and without request for advice is not controverted. What was said extracts from the testimony will best disclose.² That the district attorney repeatedly said that he was making the investigation under instructions

¹ Talked an hour. (Latham, pp. 2, 3.) From an hour to three quarters of an hour. (Sloan, p. 52.) Did not remember. (Cunningham, p. 74.) Not to exceed 20 minutes. (Halstead, p. 81.) Half an hour. (Wilson, p. 85.) Not over half an hour. (Ashbe, pp. 93, 94.) Quarter of an hour to 20 minutes. (Adelmann, p. 108.) An extended address. (Newman, p. 116.) Nearly half an hour. (Hartman, p. 122.) On cross-examination this juror was not certain. (Page 124.) No remembrance. (Gess, p. 131.) Fifteen to 20 minutes. (McGlinchey, p. 134.) Between half an hour and an hour. (Bayles, p. 140.) Twenty to 30 minutes. (Nicholson, p. 147.) Ten minutes. (Eastman, p. 154.) Half or three-quarters of an hour. (Clopton, p. 160.) Half an hour or less. (King, p. 164.) About twenty minutes. (Trout, p. 167.) Between 20 and 30 minutes. (Grigsby, p. 173.) Explained law and briefly went over the testimony. (Hashbarger, affidavit.) Twenty minutes or half an hour. (Brannon, affidavit.) Did not state. (Windell, affidavit.)

² "A. Well, I took from his talk that he wanted indictments brought on those parties, the list of names he brought up. He stated merely he thought the testimony would justify it, or words to that effect. Q. Justify the finding of the bill? A. Yes, sir." (Latham, p. 3.) "A. Well, as I understood it at that time, he was reviewing the evidence that had been submitted to the grand jury, just the same as any other attorney would to a jury. Q. That is, the same as they would in the trial of a case? A. I didn't see very much difference in it. He talked along that subject, it seems to me." (Sloan, p. 52.) "The district attorney brought a list of the names into the grand jury room, and in referring to them said: 'They had plenty of evidence to convict them.'" (Sloan, p. 53.) "The district attorney suggested that they take immediate action." (Sloan, pp. 54, 63.) Cunningham would not call it an argument. Said he made some statements in a general way. (Page 74.) Halstead, in answer to the question as to whether the district attorney referred to the evidence in his address, said: "Why, I think he did; for that was generally his subject. I think it was in regard to the evidence, or in regard to these indictments." (Page 81.) Ashbe, after much evasion and apparently with great reluctance, admitted that he explained the law and the facts and went over the testimony. "Well, the law, as I remember, and he went over the testimony briefly. He mentioned the different phases of it bearing on the case." (Page 104.) "Was explaining the law or duties of grand jurors." (Adelmann, pp. 102-109.) "Q. He made quite an extended argument, did he not? A. Well, I don't hardly know whether it would be called an argument or not. Q. Well, an

from the Department at Washington, like the making of the address, is in effect admitted. Cross-examination of the witnesses, conducted by him, proceeded upon that assumption.

Quotations have been made from the evidence given by the witnesses in open court, where there was opportunity for full disclosure. Little weight can be given the *ex parte* affidavits of grand jurors which have been filed, either to overturn or sustain the indictment.

address, or whatever it would be called? A. Yes. Q. And in that he reviewed the evidence that had been given by the different witnesses? A. Well, he kind of summed up. Q. He summed up the evidence? A. Whether he reviewed the examinations, or anything else, I don't remember. Q. He called your attention to a statement of the various witnesses. A. I would call it rather a summing up of evidence. Q. A statement of all that had been said. A. In other words. Q. And in connection with that he told you what the law of the case was, did he? A. Well, I think it was in regard to some of the evidence, and points of law proper to the case." (Newman, p. 116.) "A. He made some kind of an address; yes, sir. Q. Well, is your recollection at all clear in regard to that matter? A. As to just what was said? Q. Yes, sir. A. No; it is not right clear as to just what was said. If you will ask me questions, perhaps it will come to my mind." Did not remember that he referred to the evidence; memory not good; finally concluded could not tell what was said. (Hartman, pp. 122-124.) Gess remembered nothing about the address, nor much of anything else. (Page 123.) "He stated the law of conspiracy." (McGlinchey, p. 135.) "Q. In the course of that address he spoke of the law of conspiracy, did he not? A. Yes, sir. Q. And he spoke of the evidence that had been given by the different witnesses, did he not? A. Yes, sir. Q. About calling attention to the main points in the evidence? A. Yes, sir. Q. And he told the grand jury what their duty was, did he not? A. Yes; I think he did. Q. Did he discuss this evidence pretty thoroughly; call your attention to it in an extended way? A. Well, he went over some of the evidence, I suppose. Q. He went over the main points in the evidence that had been given? A. Yes, sir." (Bayles, p. 140.) "Q. He told you what the different witnesses testified to, the important matters that had been brought out by the evidence of the different witnesses, and called your attention to it, did he not? A. Yes, sir. Q. And after that on any occasion did he call your attention to the law governing the matter, in connection with that? A. No; not until he got through. He explained the law to us, what constituted conspiracy. Q. After he had explained the evidence to you, and what the witnesses testified to, then he explained the law to you? (Objection. Overruled.) Q. Is that correct? A. I think so. Q. He explained the evidence, went over the evidence, taking and showing you the strong points of the evidence, did he not, then explained the law, and then told you he would leave it to you? Is that the way of it? A. Yes, sir." (Bayles, pp. 141, 142.) "A. My recollection, Mr. Hawley, is that after Mr. Ruick examined the last witness he rose to speak before the grand jury, and he said—I can't recollect his language—he says: 'This will be the last witness we will examine, and the matter is up to you, gentlemen.' Then he went on to give us an outline of what constituted conspiracy, and our duties as grand jurors, in a general way. I can't remember it accurately. I don't pretend to say what he did say." (Nicholson, p. 148.) "A. He explained the question about conspiracy, stated what conspiracy was, and went on in a general way over some of the main points of evidence, showing that there was a conspiracy. Q. And he stated the points that had been made in the evidence? A. He rehearsed some of the main points that came up before us. Q. Called your attention to the salient points? A. Some of the main points." (Eastman, p. 154.) "Q. He reviewed the main points of the evidence, or what he stated to be the main points of the evidence? A. He called attention to some particularly. Q. He was calling the attention of the grand jury to the salient or main

In relation to these affidavits the prosecution had the decided advantage. The attendance of grand jurors was obtained by subpoena, and they were told by the marshal to report to the district attorney. They were accessible to him, and not to the other side. That this had its bearing I have not the slightest doubt. All the affidavits embody statements and conclusions of the affiants which do not bear the light of cross-examination. The following will illustrate: This ap-

points in the evidence that would establish conspiracy, did he not? A. Well, the evidence would have that bearing. Q. And that is what you understood from his remarks, was it not? A. I understood from his remarks that he meant to refresh our minds in regard to the names, and so on. Q. And what they testified to? A. Possibly what they testified to. Q. And he did this in connection with the review of the law governing conspiracy. A. Yes, sir." (Clopton, p. 160.) "Q. The law of the case and the facts of the case? A. The law of the case and the evidence that had been produced. Q. The evidence. I stand corrected, Mr. Clopton. And he had a chance to make a pretty thorough review of the evidence in that time, did he not? A. I cannot recall to memory how thorough a review he may have made. He went over certain parts of the evidence, and called our attention to the facts. He gave us the names over again, of course. Our memories were refreshed in regard to some matters. Q. The names of the people that testified, or the names against whom the testimony was directed, or both? A. Well, both. Q. But the statement of the evidence, and all that, brought it to your attention to whom it was directed, did it not? A. Certainly." (Clopton, p. 161.) "Q. What was the subject-matter of that address? A. Well, summing up the evidence, as well as I remember. Q. Well, the address was devoted to summing up the evidence as given by the different witnesses? A. Yes, sir. Q. And he called your attention to that, and then called your attention to the law, did he not? A. Yes, sir. Q. Most of the time was devoted to the evidence, was it not? A. Well, I could not say which the most was devoted to. Q. He went quite fully into the evidence? A. Well; that is, as far as the important matters were concerned. Q. Well, not to say lengthy? A. Well, not lengthy. Q. But he called your attention to the different matters, so that you understood what he was referring to—the witnesses he was referring to? A. Yes, sir." (King, pp. 164, 165.) "A. Well, the main thing of his discussion was explaining the law of conspiracy. Q. He discussed the question of evidence, did he not? A. Not very much. Q. He did partially, then? A. Well, I would not say he did at all." (Trout, p. 167.) "Q. Was the matter of the evidence presented to you? A. Well, it was presented to us, about some few of the jurors, some few of the men that were to be presented. Q. What was the matter he was discussing? Just tell the court what it was. A. He was telling the jury what their duties were, what the law required them to do, and said we would have to vote on these four men to connect the chain of evidence together, as nigh as I remember. Q. You mean he would have to connect these four men, indict them along with the others—is that what you mean? A. That is the way I understood him. Q. In the second indictment? A. Yes, sir." (Wilson, pp. 85, 86.) The address was "In regard to the law and the duties of the jurymen." (Nicholson, p. 151.) "A. I remember at various times of his saying that the investigation was by instructions from Washington—the investigation itself. The remarks as to the responsibility being upon the district attorney were made after the indictment had been returned and before final adjournment." (Clopton, p. 162.) "I remember of his saying at one time something to the effect that the grand jury would soon adjourn, be scattered and gone, and no one would blame them, but that the responsibility for the indictments would rest upon him, the district attorney." (Windell, affidavit, p. 2.) "The district attorney ran the whole business." (Latham, pp. 12, 23.) Said there was enough evidence to convict. (Latham, pp. 20, 21, 28; Sloan, pp. 53, 56.)

pears (referring to the affidavit of Latham) in most of the affidavits for the prosecution:

"That it is not true, as stated therein, that the district attorney went before said grand jury without request and argued the sufficiency of the evidence and gave his opinion of the evidence, or urged the finding of the, or any, indictment against the defendant Frank Martin, or either of the defendants named in said indictment."

Yet it is true that, when before the grand jury and without request, he made an extended address in which he discussed the law and the facts, and several of the jurymen were frank enough to say that they understood the object to be the finding of an indictment against these defendants. If the foregoing language of the affidavits be construed with the utmost grammatical nicety, what the jurors said is literally true, though substantially misleading. They have said that they were left free to vote as they would, that the proceedings were fair, that they voted on their own judgment, and it is not claimed that the district attorney was present during the voting. That the jurors thought the proceedings were fair greatly preponderates, though some evidently thought otherwise. Whatever view be taken, it would be utter nonsense to say that this speech, address, argument, or whatever it may be called (for its proper designation has been questioned), was not for the purpose of securing an indictment against the persons under investigation, and who were actually indicted, and it would discredit the intelligence of the prosecutor to find that he had any other object in view. These copious quotations show that the grand jurors did not intend to say that which a technical construction of the language used in their affidavits might imply. As illustrative of this thought, the foreman of the grand jury, in referring to the district attorney, testified as follows:

"Q. Did he ever tell you, at that time or in the course of your investigations, that he wanted any one of these men indicted? A. No; he never asked for any indictment to be returned against any special one, that I remember."

He further said, having reference to this issue:

"* * * But he never directed us to ballot against any special individual."

Again, McGlinchey and five others deposed:

"* * * Nor is it true that the district attorney stated on numerous occasions, or on any occasion, that he was acting under specific instructions of the department in asking for these particular indictments against these defendants and others. * * *"

But he did state, in substance, that he did not invite or initiate the proceedings, but was acting under positive orders from the department in the prosecution. This technical differentiation runs all through the affidavits. The distinction is made between investigating the matter and asking for indictments against the particular persons under investigation, but for practical purposes this may be regarded as a refinement; for the jury would naturally understand, and it is fair to say did understand, that the indictment was urged against the persons whose names appeared on the list, which was probably, though not certainly, made in the grand jury room by the clerk, and which the district attorney submitted when he was making his re-

marks, and this at the instance of the department. So when the jurors made affidavit, as many of them did, that they relied upon their own independent judgment in voting, it is to be borne in mind that the prosecutor had attempted to influence it by his conduct before them, and they perhaps could not tell how far their views may have been warped by what he said. They were intelligent, but inexperienced, men. The results must be weighed by the inevitable consequences which would flow from the occurrences which have been referred to. The affidavits appear to have been carried in stock. The cross-examination shows that jurors did not remember the transaction exactly alike. They varied, as witnesses will, in the details, and as to many matters which were material, yet we find that McGlinchey, Hartman, Adelmann, and Bayles made one affidavit, that Grigsby, Gess, Eastman, Clopton, King, Trout, and Nicholson subscribed to another, and Brannon to another, that Windell and Wilson, on manifold copies of this stock form, with slight variations, subscribed to others, and that most of these affidavits are substantially identical in the language used. They consist of categorical denials, which furnish apt illustrations of negatives pregnant. This, then, is what occurred:

On the morning of April 11th the last witness was examined by the district attorney in the grand jury room. Immediately upon the conclusion of the examination of that witness, without invitation or request, he arose and made an address upon the case, reviewing the facts, summing up the evidence, applying those facts to the law relating to conspiracy, as he explained it, at the time furnishing a list of the persons whom, as he contended, had been connected with it, all of which was done for the purpose of inducing the grand jury to return an indictment against the defendants. The remarks made amounted to an expression of opinion on his part that the defendants were guilty and should be indicted. At the conclusion of the address he said it was now "up to" the members of the grand jury to vote for or against the finding of a bill, and thereupon he left the room. It being nearly the hour for lunch, adjournment was immediately taken until 2 o'clock. Upon reassembling, pursuant to adjournment, no discussion was had, the manner of voting only being considered, whereupon it was concluded to ballot separately upon each name contained in the list, rather than upon the whole, which seemed to have been tentatively suggested, and this order of business was at once entered upon. During the balloting a juror (Latham) asked permission, as he expressed it, to explain his vote as to one of the defendants about to be balloted upon. He intended to open up a discussion as to the propriety of returning an indictment against such person, but he was declared out of order by the foreman, and so the voting proceeded. Whether there was a ballot taken upon John Doe, said to be Frank Steunenberg, at the time known by the grand jury to be dead, is not very clear; but for purposes of the present inquiry it is perhaps immaterial. The jury then adjourned. In the meantime the district attorney, who was not present during the voting, had been advised of the result of the ballots, and on the morning following he appeared with an indictment for the signature

of the foreman. Before it was signed Juror Cunningham asked him to retire, as they had a matter which they wished to discuss. The evidence is in some confusion as to just what occurred at this time. This juror testified that he intended to bring up a question relating to the ballot of the day before, with a view to reconsideration, but did not inform the district attorney as to his purpose. The fact that the district attorney in response suggested that the grand jury had been tampered with, and high words ensued between himself and the juror, shows that there was some ground for the conclusion reached by Latham and Sloan that he knew what was intended, and did not propose that discussion should be had, but insisted upon the indictment being forthwith signed. That he did not retire in compliance with this request is clearly shown. But, indulging every intendment in favor of the validity of the indictment, it must be concluded that the presumption is not overthrown by a preponderance in favor of the contention that this was intended as an arbitrary refusal to allow deliberation upon the action of the day before. The district attorney more than once during the sessions of the grand jury called attention to the fact that the whole matter was under investigation by direction of the Department of Justice, and not upon his initiation. That he told the grand jury that the responsibility would rest upon him is clearly shown. The controversy arises as to when this declaration was made. It fairly preponderates that it occurred after their labors were concluded, and when he was making what has been termed his "farewell address." He requested immediate action, as charged; but my conclusion is that it was to enable him to ascertain the names of those to be embraced in the indictment, rather than by way of forcing a vote. As to the statement that he had evidence sufficient to convict, which had not been offered, the probabilities are that this was made in regard to purely cumulative testimony; at least, it is not shown to the contrary. After his retirement from the grand jury room, had the jury desired, they could have proceeded to discuss the case. The indictment, covering 46 pages, was not read to the grand jury; but no request was made by any member for its reading. The charge that the prosecutor withheld contracts or other evidence is not sustained, and as to this jurors so asserting misunderstood the drift and conduct of the proceedings to that extent.

Defendants Martin and Pritchard are lawyers. Martin was under investigation. This the prosecutor, and, of course, the grand jury knew. He was called as a witness, without being informed that he was the subject of inquiry, and, if he had any suspicion, it must have developed from the character of the questions propounded while being examined. That he testified against himself regarding transactions vital and material to the issue is abundantly disclosed by the record. Pritchard at the time the investigation began was residing in Los Angeles. In obedience to a subpoena he left his home and journeyed to Boise, where the inquiry was in progress. He was met at the train by a deputy marshal with a warrant, and was taken into custody, although possibly the warrant was not served until afterwards. The marshal had specific instructions not to allow him to

confer with any one, but to take him directly to the office of the district attorney. Here he was questioned, and a stenographer was brought in to take down what he said. He was threatened. The threat was made to take him before the court. He was then taken before the grand jury as a witness, and questioned concerning his own connection with, and upon issues pertinent to, the charge against him, when he was under investigation, and when he did not know that this was the purpose in view. This is admitted. He was treated to such remarks as the following: "Now, you know you are lying about that." "I will put the screws to you." He was badgered by a series of questions concerning his own conduct while under arrest. These defendants were subjected to rigid cross-examination before the grand jury. They were not treated as it may be supposed other witnesses are, as they were often met with questions of this character: "Do you want this grand jury to understand?" "Do you say to this grand jury?" and the like. This concerning matters of the utmost importance as applied to the charges against them individually, and clearly implying that the object of the inquisition was to secure declarations relating to their own connection with the conspiracy and for which they were subsequently indicted upon the evidence thus taken. The examination was carried on from the standpoint of hostility, rather than friendly inquiry.

Reference has been made at this time to what occurred in relation to these defendants, not for the purpose of considering their pleas No. 3, but to illustrate the methods pursued in conducting the examination, and as throwing light upon, and giving color to, the manner of investigating the charges which were being presented to the grand jury. The conduct of the district attorney before that body was the equivalent of expressing the unqualified opinion that the evidence established the guilt of the defendants; that they ought to indict them; that the department at Washington wanted them indicted, and it was therefore the duty of the grand jury under the circumstances to do so; that the defendants Martin and Pritchard, being guilty, had in their testimony purposely lapsed into forgetfulness when they said they did not remember as to certain transactions concerning which they had been questioned. It must be concluded that the address was a plea for an indictment, substantially in manner and form as a prosecuting officer would plead for the conviction of defendants before a trial jury. These views are fortified by the failure of the district attorney to take the stand to explain or dispute the conduct attributed to him. At one stage of the proceedings he did offer to submit himself for examination; but he was informed that a controversy was being carried on between parties litigant, and he might use his own pleasure. A stenographer reported the proceedings of the grand jury. In reply to an inquiry from the court for a copy of what was said, the district attorney replied that some notes were taken by the clerk for his use, "but the reporter does not claim to have been a stenographic reporter, taking notes continuously, or taking testimony; that is the situation." Whether it was intended to create the impression that the remarks were not taken down by the stenographer at all, or that the notes made were so imperfect as to

give no adequate idea as to what was said, does not exactly appear; but what seems to be an accurate transcription of the testimony of the defendants Martin and Pritchard has been furnished, and the absence of the district attorney as a witness, or, if taken by the reporter, the failure to reproduce the remarks made by him, justify the inference that he could not have denied the strongest statement which any juror made.

These being the facts as I find them, we are brought to consider the second plea in abatement from the standpoint of the authorities.

1. State statutes control the practice, in the absence of federal enactment. *Crowley v. United States*, 194 U. S. 461, 24 Sup. Ct. 731, 48 L. Ed. 1075; *United States v. Clune* (D. C.) 62 Fed. 798; *United States v. Mitchell* (C. C.) 136 Fed. 909; *United States v. Eagan* (C. C.) 30 Fed. 612. There are several answers to the technical objection that the defendants have not properly raised the issue by pleas in abatement:

The state statute does not seem to point out any method whereby the identical question which is here presented may be raised at all. If it should be literally followed, defendants would be denied the right to challenge the proceedings. It is manifest that it could not be invoked to that extent.

Pleas in abatement for the purpose of presenting issues not shown by the record have been repeatedly recognized as pursuing the proper practice. *Agnew v. United States*, 165 U. S. 44, 17 Sup. Ct. 235, 41 L. Ed. 624; *Tarrance v. Florida*, 188 U. S. 523, 23 Sup. Ct. 402, 47 L. Ed. 572; *United States v. Gale et al.*, 109 U. S. 65, 3 Sup. Ct. 1, 27 L. Ed. 857; *Bishop's New Crim. Procedure*, vol. 1, §§ 791, 861; *Thompson & Merriam on Juries*, §§ 543, 687; *Wharton's Criminal Prac. & Pl.* (9th Ed.) 388.

If there was any merit originally in the contention, it was waived when the affidavits of 16 jurymen were filed in answer to those which had been filed and attached to the plea in abatement. The issue as tendered by the defendants was accepted, and it is now too late to contend that they failed to pursue the proper remedy.

2. In considering the conduct of the district attorney we are compelled to recur to fundamentals. The provision of the fifth amendment of the Constitution that "no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment by a grand jury, except," etc., is a reproduction of *Magna Charta*, which imposed the same restraint in this language:

"No man shall be taken (that is) restrained of liberty by petition or suggestion to the king or to his council, unless it be by indictment or presentment of good and lawfull men, where such deeds be done."

Our constitutional limitation relates only to offenses committed against the laws of the United States. *Hurtado v. California*, 110 U. S. 516, 4 Sup. Ct. 292, 28 L. Ed. 232; *McNulty v. California*, 149 U. S. 645, 13 Sup. Ct. 959, 37 L. Ed. 882; *Nordstrom v. Washington State*, 164 U. S. 705, 17 Sup. Ct. 997, 41 L. Ed. 1183. The offense charged is infamous, and can only be tried upon indictment. *United States v. Gale et al.*, 109 U. S. 65, 3 Sup. Ct. 1, 27 L. Ed. 857; *Ex parte*

Wilson, 114 U. S. 426, 5 Sup. Ct. 935, 29 L. Ed. 89; Mackin v. United States, 117 U. S. 348, 6 Sup. Ct. 777, 29 L. Ed. 909; Parkin v. United States, 121 U. S. 282, 7 Sup. Ct. 896, 30 L. Ed. 959; Ex parte Bain, 121 U. S. 1, 7 Sup. Ct. 781, 30 L. Ed. 849; In re Claasen, 140 U. S. 205, 11 Sup. Ct. 735, 35 L. Ed. 409. The rights of the defendants are to be measured by the grand jury system as it existed and was understood at the time of its adoption. At the common law the prosecutor had no right to attend the sessions. It is even doubtful whether he had a right, unsolicited, to send indictments to the inquisitorial body for consideration. Edwards on The Grand Jury, pp. 110, 111, 113. It is a familiar historical fact that the system was devised to prevent harassments growing out of malicious, unfounded, or vexatious accusations. That it serves the purpose of allowing prosecutions to be initiated by the people themselves in no way detracts from the fact that it still stands as a safeguard against arbitrary or oppressive action; and so it has often been authoritatively declared. In his dissenting opinion in *Hurtado v. California*, 110 U. S. 516, 4 Sup. Ct. 292, 28 L. Ed. 232 (the majority opinion in no way conflicts upon this point), Mr. Justice Harlan commended this from Story's Constitution:

"Grand juries perform most important public functions, and are a great security to the citizens against vindictive prosecutions either by the government, or by political partisans, or by private enemies."

The following from Wilson's Works was also quoted with approval:

" * * * Among all the plans and establishments which have been devised for securing the wise and uniform execution of the criminal laws, the institution of grand juries holds the most distinguished place. This institution is, at least in the present times, the peculiar boast of the common law. The era of its commencement, and the particulars attending its gradual progress and improvement, are concealed behind a thick veil of very remote antiquity. But one thing concerning it is certain. In the annals of the world there is not found another institution so well adapted for avoiding all the inconveniences and abuses, which would otherwise arise from malice, from rigor, from negligence, or from partiality in the prosecution of crimes."

Mr. Justice Field, in his charge to a grand jury (2 Sawy. 668), speaking of the institution, said:

"It was at the time of the settlement of this country, an informing and accusing tribunal, without whose previous action no person charged with a felony could, except in certain special cases, be put upon his trial. And in the struggles which at times arose in England between the powers of the king and the rights of the subject it often stood as a barrier against persecution in his name, until at length it came to be regarded as an institution by which the subject was rendered secure against oppression from unfounded prosecutions of the crown. In this country, from the popular character of our institutions, there has seldom been any contest between the government and the citizen which required the existence of the grand jury as a protection against oppressive action of the government. Yet the institution was adopted in this country, and is continued from considerations similar to those which give to it its chief value in England, and is designed as a means not only of bringing to trial persons accused of public offenses upon just grounds, but also as the means of protecting the citizen against unfounded accusation, whether it comes from the government, or be prompted by partisan passion or private enmity. * * * Into every quarter of the globe in which the Anglo-Saxon race have formed settlements, they have carried with them this

time-honored institution, ever regarding it with the deepest veneration, and connecting its perpetuity with that of civil liberty."

This learned judge observed that the grand jury was to be regarded as standing against "oppressions of power, the virulence of malice, and the intemperance of prejudice." Here the grand jury was duly qualified and impaneled, and it remains to inquire whether the occurrences already related were of such a nature as to infringe the constitutional rights of the defendants. To this end reference must be had to the decisions.

The district attorney should not give advice or express his opinion as to the sufficiency of the evidence. In *re* District Attorney of the United States, Fed. Cas. No. 3,925 (vol. 7, p. 745); *Ex parte* Crittendon, Fed. Cas. No. 3,393a (vol. 6, p. 822); *Commonwealth v. Frey* (Quart. Sess.) 11 Pa. Co. Ct. R. 523; *Edwards on The Grand Jury* p. 127. He cannot advise upon the law. *United States v. Kilpatrick* (D. C.) 16 Fed. 766. He has no right to be present during the deliberations of the grand jury. *Charge to Grand Jury*, Fed. Cas. No. 18,255 (vol. 30, p. 992), 2 Sawy. 667. *State v. Adam*, 40 La. Ann. 745, 5 South. 31; *Commonwealth v. Bradney et al.*, 126 Pa. 199, 17 Atl. 600; *Rothschild v. State*, 7 Tex. App. 519; *Edwards on The Grand Jury*, p. 128. The great justice, in his charge to the grand jury, *supra*, said:

"The district attorney has the right to be present at the taking of testimony before you, for the purpose of giving information or advice touching any matter cognizable by you, and may interrogate witnesses before you; but he has no right to be present pending your deliberations on the evidence."

Wharton in his *Criminal Pleading and Practice* (9th Ed. § 366), quotes from and comments upon this charge, as follows:

"It is proper in this connection to keep in mind the fact, already noticed, that the only valid basis on which the institution of grand juries rests is that they are an independent and impartial tribunal between the prosecution and the accused; and it is the duty of the courts to refuse to tolerate any practice which conflicts with this independence and impartiality. * * * And in any view the presence of counsel for the prosecution, public or private, during the deliberations of the jury, should be ground for quashing the bill, unless it appear that there was no interference by such counsel in any degree with the freedom of such deliberations. The purpose of the institution of grand juries was, as we have seen, to interpose a check upon the sovereign; and they would cease to answer this purpose, and would increase the danger they were intended to avert, if they should be put under the official direction of the prosecuting authorities of the state."

The attendance before the grand jury of a special prosecutor appointed by the court under the misapprehension that the prosecuting attorney was disqualified is prejudicial error, and the indictment should be quashed. *State v. Heaton*, 21 Wash. 59, 56 Pac. 843. Where an attorney employed to assist in a prosecution was before the grand jury during their investigation of the case at the request of the district attorney, it was held that this was not ground for setting aside the indictment or for reversing a judgment of conviction. *State v. Whitney*, 7 Or. 386. To the same effect is *United States v. Terry* (D. C.) 39 Fed. 355.

Since the states are not controlled by the limitation of the federal Constitution, being free to adopt, modify, or reject the grand jury system altogether, they have not always retained it as it existed when the fifth amendment was adopted. In the main, however, through tradition and otherwise, certain general features have been preserved. Speaking of the powers and duties of a prosecuting officer, the general rule is thus laid down in 20 Cyc. p. 1338:

"But he cannot participate in the deliberations, or express opinions on questions of fact or as to the weight and sufficiency of evidence, or attempt in any way to influence the finding."

To this proposition cases are cited from Alabama, Arkansas, Illinois, Indiana, Louisiana, Mississippi, Pennsylvania, and South Carolina. In the same connection it is said that the mere presence of the prosecutor with the consent of the grand jury while deliberating or voting on a charge will not constitute such an irregularity as, in the absence of injury or prejudice to the accused, will invalidate the indictment. Authorities to sustain this statement are cited from Alabama, Arkansas, Iowa, Illinois, Indiana, Pennsylvania, and Utah. These principles are not inconsistent. The fundamental idea, which runs through the statutes and decisions apparently is that the prosecutor must remain neutral, must be impartial, must not undertake to control the finding by undue influence.

United States v. Mitchell (C. C.) 136 Fed. 896, has been cited by the prosecution. It was there urged that the district attorney had "greatly influenced the grand jury to find this indictment." But the court found that there was no specific charge. The general allegation was discarded with these observations:

"Instead of conclusions and opinions, there must be something tangible, justifying a presumption of injury to the defendant in a substantial right, before the court will interfere, assuming that it ought to do so upon any state of facts of the character indicated."

In United States v. Cobban (C. C.) 127 Fed. 722, relied upon by counsel, the action of the district attorney was regarded by the court as "overzealous," but not prejudicial.

Remembering, now, that, at the common law the prosecuting officer had no right to attend the sessions of the grand jury at all, and that it is only by virtue of statutes and modified procedure that he may now be present in the grand jury room, we are to conform the practice as near as may be to the statutes of Idaho, and in doing so we find that section 5311, Pen. Code 1901, provides:

"The grand jury may, at all reasonable times, ask the advice of the court, or the judge thereof, or of the prosecuting attorney; but unless such advice is asked, the judge of the court must not be present during the sessions of the grand jury. The prosecuting attorney of the county may at all times appear before the grand jury for the purpose of giving information or advice relative to any matter cognizable by them, and may interrogate witnesses before them whenever they or he thinks it necessary; but no other person is permitted to be present during the session of the grand jury, except the members and witnesses actually under examination, and an interpreter when necessary, and no person must be permitted to be present during the expressions of their opinions, or giving their votes upon any matter before them."

Giving the doctrine that the state statutes relating to practice prevail in the federal courts the greatest latitude, and this section, considering the grand jury system as administered by them its widest meaning, it must be held, in the absence of state construction, that the provision that the prosecuting attorney may at all times appear before the grand jury for the purpose of giving information or advice relative to any matter cognizable by them, was meant to confine him to those traditional duties of giving advice concerning procedure and the like, to the examination of witnesses, as expressly provided, and not to the expression of opinions or the making of arguments. The following may be deduced as the general rule applicable to federal grand juries:

If the district attorney, through inadvertence, without intending to influence the grand jury, is present during its deliberations, or even during the taking of a vote, it is not necessarily fatal to its action by bill returned. It does not always result that an indictment will be quashed. It depends upon circumstances. On the contrary, it does follow that, where the prosecutor not only expresses his opinion, but urges the finding of an indictment, and it is clearly shown that the grand jury must necessarily have been influenced, whether consciously or unconsciously, prejudice will be presumed. Where the conduct is overpowering in its nature, where it inheres in the investigation, where it permeates everything, where it overshadows, as it did in this case, coming from a prosecutor of such profound ability, it is perfectly apparent that it was prejudicial. The court has occasion to know that there was no ground for the return of the indictment as to one of the defendants, for it must be assumed that the same evidence was adduced upon the trial that was offered to the grand jury. On the other hand, there was abundant evidence to justify the return of a bill as to certain other defendants, and here it will naturally occur that as to those defendants against whom there was sufficient evidence the indictment should be upheld, and be quashed as to those against whom it was insufficient. The difficulty with this procedure inheres in the system. In discussing the right to sustain an indictment by striking out what was considered as surplusage, Mr. Justice Miller, in *Ex parte Bain*, 121 U. S. 9, 7 Sup. Ct. 786, 30 L. Ed. 849, in answer to the argument that the grand jury would have returned the indictment in any event, said:

"He goes on to argue that the grand jury would have found the indictment without this language. But it is not for the court to say whether they would or not. The party can only be tried upon the indictment as found by such grand jury, and especially upon all its language found in the charging part of that instrument."

Where is the differentiation to begin and end? How shall the distinction be made without at once substituting an opinion here and assuming the functions of the grand jury? If this indictment can be sustained upon these admitted facts, then any citizen, upon the assurances of a prosecuting officer, or upon a partisan argument, may be held to answer without having had the benefit of an investigation by that impartial tribunal which the Constitution has established;

and this particularly applies to conspiracy. The authorities agree that a district attorney cannot share in the deliberations of a grand jury. When counsel was making his address, the grand jury was deliberating. He shared in that deliberation, and expressed his opinion as fully as any member could have done. He was present during the whole time that the jury was engaged in deliberating, for no discussion was had in the grand jury room or among the grand jurors after the close of the testimony, except that which he indulged. It is true there was an opportunity to deliberate afterwards; but no discussion took place, and nothing was subsequently done, except to vote upon the names which the prosecutor had discussed and designated in the list which he submitted. It cannot be said that the grand jurors were deliberating while voting, in the sense in which it is used in the books, and with that meaning in view which attends the rule that the deliberations must be confined to the members and cannot be participated in by any one else; and since the prosecutor cannot share in the deliberations, in view of the unusual and extraordinary proceeding before the grand jury, it is difficult to see how it can be concluded that there was no prejudice, even if it be said that the evidence was sufficient for the return of the indictment, where the contention is met with the proposition that one defendant at least was presented without sufficient evidence. If prejudicial to him, it was to other defendants.

The Department of Justice has ever stood for constitutional rights, and if in the performance of its legitimate functions it intrusted to the officer appointed for that purpose the presentment of persons who in its judgment had violated the law, it had a right to assume that the ordinary methods of procedure would be followed; and if that officer for the time overstepped the bounds, while it must be denominated as unfortunate, it cannot be upheld. It was proper, of course, for the department, which had no other hand in the matter, to direct that this or any other charge be presented to a grand jury, and in doing so to name the persons against whom accusation should be made; but it was improper that this should have been communicated to the jury. Nor can it be said that this statement, standing alone, would necessarily be prejudicial; but upon the proofs here it is manifest that to sustain this indictment would be to establish a precedent to which political partisanship, religious intolerance, or antireligious intolerance—for the latter is quite as apt to exist as the former—could point as a justification for upholding the return of an indictment through popular demand, public excitement, persecution, or personal ill will. We will do well to adhere to old landmarks and established principles, which are quite sufficient for bringing to trial all who are guilty of an infraction of the laws of the land. If it be competent to do that which it is admitted the prosecutor did in this case, then the grand jury system has ceased to stand for that for which it anciently stood, and for which it was adopted in this country. The Supreme Court has said that it is better that a prisoner should escape altogether than that a judgment of conviction for an infamous crime should be sustained where the record does not show that there was a valid trial. *Crain v. United States*, 162 U. S. 625, 16 Sup. Ct. 952, 40 L. Ed. 1097.

Upon the whole record it appears that a commendable zeal, which gathered force as it progressed, finally expanded into an exaggerated partisanship wholly inconsistent with the semijudicial duties of a public prosecutor, and entirely unnecessary in the execution of the powers reposed, and particularly in this case, where there could have been no necessity in bringing real offenders to justice. The language of the Supreme Court in *Ex parte Wilson*, 114 U. S. 426, 5 Sup. Ct. 939, 29 L. Ed. 89, is important:

"But the Constitution protecting every one from being prosecuted, without the intervention of a grand jury, for any crime which is subject by law to an infamous punishment, no declaration of Congress is needed to procure, or competent to defeat the constitutional safeguard."

All this without overlooking the fact that the jurors testified that they were not influenced by what occurred; but this is hardly possible. We have seen that they were by some method induced to do that which the evidence, or rather want of evidence, before them could not justify; and the fact that the prosecutor at the conclusion of his address told them in effect that they were the judges of the matter did not withdraw from them the influence and effect of his remarks, nor restore that unbiased equipoise which, from the time of the institution of the grand jury system, has been one of its principal features. Whether the defendants should in fact be brought to trial is not the question. It is whether they should be brought to trial in the manner provided by law, and whether their substantial rights have been invaded. There is no surer road to anarchy than for the courts to assume legislative power by stretching statutory enactments and importing into them penalties not fixed by law, or to extend procedure to such an extent as to invade constitutional rights. The power is with the people to declare all rights and to supply all remedies, and the tribunals created for enforcing the law and the officers appointed to aid in that regard should act strictly within their delegated powers. If a grand jury not properly organized as such, for instance, with less than the number required by the statute, should present even a guilty man for trial, his rights would be invaded, and it would not for a moment be contended that such a proceeding, as against a timely plea, could have validity; and the Supreme Court has cited numerous instances which would render proceedings altogether void. *United States v. Gale*, 109 U. S. 71, 3 Sup. Ct. 1, 27 L. Ed. 857.

It follows that plea No. 2 of the defendants Wells and Downs must be sustained. All other identical pleas, which were duly interposed and submitted, if timely and not subsequently waived by other pleas or attacks upon the indictment, will take the same course; but the defendants will be held to bail pending such further proceedings as the prosecution may desire to take.

It is gratifying to observe that Congress recently passed an act providing for a review of decisions of this character. If the position of the prosecution regarding the statute of limitations is sound, there would appear to have been no reason why the pleas might not have been confessed and the matter have been resubmitted to a grand

jury which was in attendance in October, as then suggested. The last overt act is charged to have been committed on January 31, 1905. The court does not feel responsible for the condition which has been presented, nor is there reasonable ground to suppose that the grand jury would have refused to vote an indictment against such of the defendants as the evidence seemed clearly to connect with the fraudulent transaction; for, whatever may have been the derelictions of trial juries, the refusal of grand juries to find indictments has not been one of the difficulties attending prosecutions, and, when a grand jury improperly refuses to return a bill, courts have power, and will upon proper representation of the district attorney, at once call another jury to investigate the same matter.

WELLES v. CHICAGO & N. W. RY. CO.

(Circuit Court, E. D. New York. June 25, 1908.)

RAILROADS—BONDS GIVING OPTION TO EXCHANGE FOR STOCK—RIGHTS OF HOLDER AGAINST SUCCESSOR OF COMPANY.

Defendant railroad company purchased all of the stock of a second company, exchanging its own therefor, and thereafter the second company conveyed to it all of its property, in part consideration for which defendant assumed all of the grantor's debts and obligations. Previous to such sale and conveyance, the selling company, by action of its board of directors, had issued a series of convertible debenture bonds, running for 20 years, and containing a provision giving the holder of any such bond the option to exchange the same at par for common stock of the company within 10 days after the declaration of any dividend on such stock. No provision, however, was made for the issuance of stock for the purpose of such exchanges. After the sale and conveyance of its property, no meetings of either directors or stockholders were held, and no dividends were declared; the earnings of the property being paid into the treasury of defendant, which operated the same as a part of its system. Twelve years after such transfer, complainant, who was the owner of certain of such convertible bonds not then matured, commenced suit in equity against defendant to compel it to exchange stock therefor, or to account for the value of such stock, on the ground that it had inequitably and unjustly prevented the issuing company from fulfilling its contract in that regard. *Held*, that it having been determined in an action at law that the purchase of the stock and property by defendant and its action thereafter were lawful under the laws of the states in which the selling company was incorporated, and that it was under no legal obligation to maintain itself in a position to permit a bondholder to exercise such option, its exercise of its legal rights gave rise to no equity in favor of complainant inconsistent therewith.

Baldwin & Baldwin (William Woodward Baldwin, of counsel), for complainant.

MacFarlane, Whitney & Monroe and William S. Kies (Edward B. Whitney and Lloyd W. Bowers, of counsel), for defendant.

CHATFIELD, District Judge. The complainant is a resident of the county of Suffolk, in the state of New York, and brought this action in the Supreme Court of New York for that county. It has been removed into the United States court by the defendant, and must now proceed as a case in equity herein.

The action arose from a certain clause, of which the language is as follows:

"Said railway company agrees to transfer to the bearer, at his option, ten shares of one hundred dollars each, of its common capital stock, at any time within ten days after the date fixed for the payment of any dividend upon its common stock, upon delivery to it in the city of New York of this bond and all unmatured coupons thereon in exchange for said stock, and thereupon this bond shall be canceled"

—contained in some seven bonds of the Milwaukee, Lake Shore & Western Railway Company, a corporation operating a railway in the states of Wisconsin and Michigan at the time of the issuance of the bonds.

These seven bonds were purchased by the father and testator of the complainant, and came into the possession of the complainant as a part of the legacy to him, under the terms of his father's will, some time prior to the commencement of this action. Because of this fact, argument has been had as to whether the complainant was a purchaser for value; but this is aside from the real issue of the case, inasmuch as the complainant takes the position that his father, if living, would have as substantial rights as he has, and no grounds of estoppel are set forth because of which there seems to be any reason for considering that the complainant is not in as entirely as good position as his father would have been if living and now bringing the present action.

The action was commenced in the month of August, 1905. The original issue of bonds, of which the ones in question are a part, were dated February 1, 1887, and were to run for the term of 20 years, with interest at 5 per cent. per annum; this interest being payable semiannually at the office of the company in the city of New York. The suit was therefore started prior to the date upon which the obligation of the bonds became due and within the 20 years described in the bonds. It may be noted, at this time, that one of the questions, other than that of laches, is whether the "conversion clause" above quoted was valid for the period of 20 years, if valid at all, or whether it was limited by a 10-year statute of the state of Michigan, which statute will be referred to later.

The company issuing the original bonds was organized December 11, 1876, under the laws of the state of Wisconsin, by certain parties who had acquired the property and franchises of two other Wisconsin corporations. On February 13, 1883, the Vieux Desert & Lake Superior Railway Company, a corporation of the state of Michigan, which was organized September 28, 1881, and which operated a line within the state of Michigan, was consolidated with the Milwaukee, Lake Shore & Western Railway Company, under authority of the laws of both Wisconsin and Michigan, and the name of the associated company was to remain the Milwaukee, Lake Shore & Western Railway Company.

At various times from December 15, 1886, the directors of the company as consolidated authorized the preparation and the issuance of bonds to raise money for certain purposes, namely, the construction of an ore dock and the purchase of additional stock, building, tracks, etc. At a meeting upon the 18th of January, 1887, the form of the

debentures for those purposes was approved, and part of the issue were called, in the resolution, the "Milwaukee, Lake Shore & Western Railway Company, five per cent. twenty-year debentures of 1907." The bond, approved as to form, included as part of the title the word "convertible," and also contained the "conversion clause" above quoted. The directors, also, by resolution, directed its officers to execute the bonds, and authorized the sale by the treasurer of any part of these bonds at 95 and interest. At various meetings of the board of directors subsequent to that time, further bonds were authorized, and their execution directed, and the treasurer was at different times authorized to sell the bonds issued at different prices until on the 29th of January, 1889, the directors authorized the execution and delivery to the Central Trust Company of New York, as trustee, of a mortgage to secure an issue of \$5,000,000 worth of bonds, to be known as the "issue of February 1, 1889," and a portion of which were to be security for the 2,000 bonds of \$1,000 each, known as the "convertible debentures of 1907," above recited. The mortgage was to and did provide "that the property mortgaged is to be held in trust for the holders of the bonds issued thereunder," and also the holders "of the said two thousand of the debenture bonds or any of them and the coupons attached thereto, equally pro rata and without preference or priority of one over another."

Provision was made for the exchange of these new sinking fund bonds for the "convertible debentures of 1907," and at various times reports were made to the annual stockholders' meetings as to the amount of these exchanges. These exchanges, between the dates of April 13, 1889, and May 9, 1894, amounted to 1,564 of the total issue of 2,000 "convertible bonds." But the bonds purchased by the complainant's testator, and with reference to which this suit is brought, seem never to have been exchanged for the sinking fund mortgage bonds of February 1, 1889, and were purchased as follows: No. 1,282, January 17, 1888, from S. S. Sands & Co., at 90 per cent. and accrued interest; Nos. 1,457, 1,458, and 1,459, purchased February 27, 1889, from Clark, Dodge & Co., at 99 per cent.; and Nos. 1,630, 1,631, and 1,632 were bought January 10, 1890, from Clark, Dodge & Co., at 102. The reports made to the stockholders' meetings were accepted and ordered on file; but no resolution was ever introduced, and no action taken by any of the stockholders, looking toward an authorization of the original bonds nor of any issue of capital stock, for the express purpose of exchange, under the conversion clause of the bonds called the "convertible debentures of 1907."

The capital stock of the consolidated company consisted of 50,000 shares of preferred stock at \$100 par value each, and 50,000 shares of common stock at \$100 par value each, and in June, 1892, the stock outstanding seems to have been the entire amount of 50,000 shares preferred, and 26,500 shares of common. This issue of outstanding stock was purchased by the defendant company herein, the Northwestern Railway Company, during the first six months of the year 1892, and this purchase was accomplished by the exchange of four shares of the common stock of the defendant company for five shares

of the stock of the Lake Shore Railway Company. There is also testimony that the reasonable value of the defendant's common stock at the time of the exchange was \$118.75 a share. This exchange of stock was followed up by a deed executed on behalf of the Lake Shore Railway Company, to the Northwestern Railway Company, conveying all the money, stocks, bonds, and property of every description, and all the franchises, effects, and property whatsoever of the said Lake Shore Railway Company, which deed was executed and delivered and possession completed in the month of August, 1893, since which time the Northwestern Railway Company, as it admits in its answer, has been in possession of "the railroad, railway property and franchises, and other property of said Lake Shore Railway Company, conveyed as aforesaid." The consideration set forth for this conveyance was as follows:

"One hundred dollars to it paid by said party of the second part [the defendant company], the receipt of which is hereby acknowledged, and the assumption by the party of the second part of all the existing debts, liabilities, and obligations of said party of the first part and other good and valuable consideration."

The last dividend upon the common stock of the Lake Shore Railway Company, payable February 16, 1891, and amounting to 7 per cent., was declared upon the 13th of January, 1891, out of the profits of the year 1890. The last dividend upon the preferred stock was declared November 15, 1892, payable February 15, 1893, out of the earnings of the company during the year ending December 31, 1892. Since that time the profits, if any, and the gross income of the entire property have gone into the treasury of the Northwestern Railway Company, and this company has declared annual dividends of 6 per cent. or more upon all its outstanding common stock since the year 1894. The last election of directors of the Lake Shore Railway Company was held in 1893, and the articles of association of that company contain the following provision, which is in accordance with the laws of Wisconsin:

"No person shall be a director of said company unless he shall be a stockholder therein owning stock absolutely in his own name or as trustee or personal representative and qualified to vote at the election at which he shall be chosen, and if at any time any director shall cease to be a stockholder as above provided, he shall be disqualified from being such a director and his office shall be from thenceforth vacant."

The last meeting of the stockholders of this company at which any business was transacted was held upon the 2d day of June, 1893, and the last meeting of which any record is furnished was held upon the 17th of August, 1893, at which no stockholders were present, and the secretary made an entry that no meeting was held.

The last election of officers of the Lake Shore Railway Company was had prior to that date, and the secretary, who before that time had authority to issue the stock, was Mr. Alfred L. Cary, of Milwaukee, who upon February 13, 1905, in answer to an inquiry by the complainant in this action, as to when and where he could exchange "convertible debenture bonds of 1887, of the Lake Shore Railway Com-

pariy, for common stock of that company," wrote to the complainant that he could not advise him as to when and where this exchange could be made, inasmuch as in 1893 the company had sold and conveyed its railroad to the Northwestern Company, and by this letter referred the complainant to Mr. E. E. Osborn, vice president and secretary of the Northwestern Railway Company, at 52 Wall street, New York, who subsequently acknowledged the receipt of complainant's letter to Mr. Cary, and stated that, while he could not speak officially or with authority for the Lake Shore Railway Company, he felt justified by the communication from Mr. Cary in saying that an exchange of the debentures of 1887 for the common stock of the Lake Shore Railway Company might not be effected because the debentures had not "been presented for such exchange within the period provided by such debentures." Following the receipt of this letter, and on March 13, 1905, the complainant presented to Mr. Osborn, at the offices of the Northwestern Railway Company, in New York City, the bonds involved in this suit, tendered the same to him, and demanded common stock in exchange therefor, and this tender and demand was refused, and a written statement furnished, which alleged that the refusal was because of the incapacity of Mr. Cary so to do, inasmuch as he "had no such stock and did not represent the Lake Shore Railway Company." The present action was then brought, to which neither the Lake Shore Railway Company, nor Mr. Cary, as secretary thereof, is a party.

The laws of the state of Wisconsin (section 4, c. 119, p. 139, Laws 1872, approved March 22, 1872) provide that the directors of a railway corporation shall continue in office until their successors are elected. But Mr. Cary, as secretary, has performed no official acts since the year 1893, except that on December 26, 1906, he was served with a summons in three actions brought in the Circuit Court of the United States for the Eastern District of Wisconsin, and at that time he told the person so serving him that he was the last secretary elected by the company, and did not know whether he was still secretary or not. The relief asked by the complainant in this action is against the defendant, upon the theory that the defendant has inequitably and unjustly prevented the Lake Shore Railway Company from maintaining a position under which the complainant might exercise his alleged option of converting his bonds into stock, and that the Northwestern Railway Company, as sole stockholder has inequitably and unjustly held no meeting and declared no dividends upon the stock of the Lake Shore Railway Company, although the complainant contends that the property has been profitable, and the earnings have been sufficient (if they had been credited to the Lake Shore Railway Company), to justify the declaration of such dividends, and the complainant prays this court to decree that the defendant corporation shall transfer common stock of the Lake Shore Railway Company in exchange for the seven convertible bonds held by the complainant, or that, if such stock cannot be delivered, the defendant deliver its own common stock on such basis as may be found upon an accounting to be just and equitable, and to account for the profits of the Lake Shore Railway Company, which the complainant alleges should have been

apportioned by the defendant to it as earnings applicable to the declaration and payment of dividends, and that these orders be enforced by the declaration of a trust upon the properties now in the hands of the defendant, and formerly belonging to the Lake Shore Railway Company, with an injunction preventing their use and disposition until the decree may be complied with.

The defendant sets up, among other allegations, the various transactions referred to in the statement of facts above, and a denial that any of its acts have been contrary to equity, or done to the wrong, injury, or oppression of the complainant, and also claims that the complainant and his testator have been guilty of laches. The defendant also denies that the Lake Shore Railway Company has declared or paid any dividend since February 15, 1893, or that the defendant has received any dividend since that time, and further denies that the Lake Shore Railway Company ever made the agreement to transfer common stock for the bonds in question, but alleges that the bonds were issued by its officers solely under the authority of the board of directors, and for less than 95 per cent. of the par value of each bond.

It appears from the evidence that the defendant has at all times since the 1st of February, 1907, admitted its liability to pay the principal and interest of the bonds in suit, under its agreement to meet the obligations of the Lake Shore Railway Company; but it is contended by the defendant that this is the extent of the defendant's liability to the complainant, and that because of these various matters no suit in equity can be maintained, and, further, that no right of action at law exists except for the face value and the interest of the said bonds.

The evidence in the action has been closed, and the case argued by both sides. Subsequent to the submission of the case, a common-law action, brought by Frederick J. Lisman, David M. Minsesheimer, and William Goodman, as plaintiffs, against the Milwaukee, Lake Shore & Western Railway Company and Chicago & Northwestern Railway Company, as defendants, in the Circuit Court of the United States for the Eastern District of Wisconsin, was tried and decided. This trial was had before Judge Quarles, of that circuit, and an opinion had been filed, holding that the plaintiffs in that suit have no cause of action in tort, and cannot recover, for the reason that the demand for conversion of the bonds into stock was not made within 10 days after the date fixed for the payment of any dividend upon the common stock, and that the Northwestern Railway Company was not bound throughout the whole period of 20 years to maintain itself in a position where shares of the Lake Shore Railway Company common stock could be transferred throughout the entire period. Judge Quarles says in his decision:

"It must be apparent that all hope of speculative venture under the option was extinguished when the stock ceased to represent any value and had been withdrawn from the market; the stock certificates being stored away as a memento of a defunct enterprise."

The court's determination upon this point is based upon a finding that the consolidation of the various companies and the purchase of the property by the Northwestern Railway Company were valid, under the laws of both Wisconsin and Michigan, and it is unnecessary to consider the correctness of this determination, inasmuch as, unless plainly erroneous, the holding of the Circuit Court of Wisconsin upon this question will be followed by this court.

Judge Quarles further shows in his opinion that the measure of damage is not satisfactorily proven, and, in addition, says that, if the complainants had exchanged their bonds for stock of the Lake Shore Railway Company, and now demanded stock of the Northwestern Railway Company, on the basis of four to five for the Lake Shore Railway Company stock supposedly held by them, they would not be entitled to that relief:

"First. Because it appears by the evidence that the proposition so made by the Northwestern Company in 1892 was extended to the stockholders of the Lake Shore Company, and to none others. The holders of convertible bonds were not stockholders. They were creditors. They had neither a legal nor equitable interest in the stock. *Pratt v. American Bell Telephone Co.*, 141 Mass. 225, 230, 5 N. E. 307, 55 Am. Rep. 465. It is well settled that any such proposition can be accepted only by the class of persons to whom it is expressly made. *Indianapolis Ry. v. Miller*, 71 Ill. 463. Second. The proposal was expressly limited as to time. The proposition in question was communicated through the instrumentality of certain brokers in New York City to the stockholders, and by its terms expressly expired on the 1st day of February, 1892."

The determination of Judge Quarles upon the legal rights of the parties, as has been said, will be followed by this court; but inasmuch as the present action was brought in equity, and although removed into the United States court, inasmuch as the equitable principles applicable in the state court are considered to be applicable in the case as removed, it has been necessary to recite the issues and evidence of the present suit, in order to see whether the determination of the alleged cause of action in the suit at law disposed of the issue in the present case, or whether, on the contrary, the complainant here, notwithstanding the result of the suit at law in Wisconsin, makes out such a willful disregard of complainant's (the bondholder's) rights, and such an inequitable disposition and control of the property and stock of the Lake Shore Railway Company, as will make it necessary for a court of equity to attempt restitution or restoration of the rights which the complainant would have enjoyed if no such action had been had.

The defendant has incidentally objected that necessary parties were not before the court; but the evidence has all been taken, the merits of the proposition are before the court, and a determination can be reached which, inasmuch as the decision must be for the defendant, makes it unnecessary to consider the difficulty of carrying out the decree if a different conclusion had been reached.

In addition, it might be said that this court can see no reason why the Northwestern Railway Company, controlling all of the stock of the Lake Shore Railway Company, being able to exchange its stock

upon whatever basis might be decided, for the stock of the Lake Shore Railway Company, and being in a position to cause to be done everything that might be necessary, is not the only party whose presence would be required, in order to effectuate any relief that might have been ordered, if basis for such relief were believed to exist. The decision of Judge Quarles in the action at law, as has been said, would seem to be conclusive, in so far as it determines that the Northwestern Railway Company had a legal right to do as it has done, and there seems to be no evidence in the case which would indicate a lack of equity in the exercise of the legal rights found by Judge Quarles to exist in the Northwestern Railway Company.

The Massachusetts cases cited by the complainant (*John Hancock, etc., Co. v. Worcester, etc., Co.*, 149 Mass. 212, 21 N. E. 364; *Day v. Worcester R. R. Co.*, 151 Mass. 302, 23 N. E. 824; *India Mutual Ins. Co. v. Worcester Ry.*, 25 N. E. 975), and the various arguments advanced by it to the effect that it is in itself inequitable to so act as to make it impossible for a person to carry out his legal obligations, are disposed of by the determination that these acts have been legal, and need not be discussed at length.

It would seem, in addition, that the action of the directors of the Lake Shore Railway Company, in authorizing the issue of stock in exchange for convertible bonds, which bonds were sold at less than par, was of itself an act that under the laws of the state of Michigan would have been illegal, and under the laws of the state of Wisconsin would have required the action of the stockholders of the corporation. A ratification might estop the stockholders, but would not prevent a reliance upon the fact that such offer was illegal, when considering the action of the Northwestern Railway Company in buying the stock, and in so managing the affairs of the corporation that no dividend was declared, and hence no opportunity given for the making of a demand for what it believed to be an illegal offer to exchange bonds for stock.

On the merits of the contention as to the paragraph for the exchange of stock for bonds itself, it should be said that while it is contended on behalf of the complainant that this provision was inserted for the benefit of the corporation, and while so long as the offer existed the demand might be made at any time, but that no stock could be issued in exchange, except within the period of 10 days provided, nevertheless it is believed that no demand could be made effectual, and no obligation to issue the stock in exchange for the bonds could be relied upon, unless a dividend was declared. A deposit of the stock in anticipation of the declaration of the dividend would not justify the interposition of a court of equity in declaring that a dividend must be made, unless at least it should be shown that the failure to declare a dividend was for the purpose of unjustly depriving the bondholders of the benefits of the demand which they had made. In the present case, no such fraudulent or unjust purpose is shown, and it is believed that in equity, as in law, the Northwestern Railway Company was within its rights in considering that no obligation rested upon it to furnish an opportunity for the making of a demand to exchange stock

for bonds, after its purchase of the stock of the Lake Shore Railway Company.

Reference has been made to a 10-year statute of limitations, which of itself might be an additional reason for considering that the agreement to exchange for a period of 20 years was illegal because of this statute, as well as because of the failure of the stockholders to make the agreement; but, for the reasons already expressed, it is unnecessary to base the decision upon this ground.

UNITED STATES v. WILSON et al.

(Circuit Court, S. D. New York. June 8, 1908.)

1. SEARCHES AND SEIZURES—PAPERS TAKEN FROM DEFENDANT'S POSSESSION—APPLICATION FOR RETURN.

The right of a defendant in a criminal case to a return of property held by the district attorney and alleged to have been obtained as the result of an unconstitutional search and seizure, and which includes papers intended to be used as evidence on the trial in alleged violation of defendant's rights under the fifth constitutional amendment, may be determined by the court on his motion in advance of the trial.

2. CRIMINAL LAW—EVIDENCE WRONGFULLY OBTAINED—RIGHT TO USE PAPERS IN EVIDENCE.

On the arrest of a defendant by officers of the United States, a trunk check was found on his person, and on its presentation to a railroad company the officers obtained the trunk, which was searched, and papers taken therefrom which were held by the district attorney to be used as evidence on defendant's trial on a criminal charge. *Held*, that defendant was not entitled to a return of such papers before the trial, and that they were not obtained as the result of an unlawful search and seizure in violation of the fourth constitutional amendment, but the rights of the defendant were not greater than if they had been taken from his person at the time of his arrest, and the district attorney had the right to hold and use the same as evidence, subject to objections made when they were offered as to their admissibility, or on the ground that their use would be compelling defendant to testify against himself, contrary to the provisions of the fifth amendment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 877.]

On Motion by Defendant for an Order Requiring a Return of Property Taken from his Possession After his Arrest.

Henry L. Stimson, U. S. Atty., and Thomas D. Thacher, Asst. U. S. Atty.

Hugh Gordon Miller, for defendants.

CHATFIELD, District Judge. The defendant Wilson was under arrest in the Southern district of New York. Upon his person were found certain chattels, among them a trunk check. Upon presentation of this check to the railroad company, the trunk was delivered to the United States attorney for the Southern district of New York. Certain papers found in this trunk by the United States attorney are held by him as evidence to be used in the case now about to go to trial, upon an indictment filed in this district. The defendant has

therefore moved for a return of the trunk and its contents, upon a claim that they are his personal property, taken from him after a search alleged to be contrary to the provisions of the fourth amendment to the Constitution of the United States, thus compelling the defendant to testify against himself, contrary to the fifth amendment of the Constitution.

The provisions of the Constitution are as follows:

"Amend. 4. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

"Amend. 5. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Recovery of personal property must ordinarily be the subject of an action at law. Similarly, objection against the use of evidence can ordinarily be urged only upon a trial, at a time when the evidence is offered. But inasmuch as the case has been called for trial, and a demurrer argued and overruled, the papers to be used as evidence could be impounded, and it seems to the court that the question raised is one of general principle, not entirely covered by the rules as to the admissibility of evidence. The question therefore can be better disposed of on the merits than left until the evidence shall be offered on the trial and in the presence of a jury.

The only questions to be then considered would be those of materiality and relevancy, which would not be affected by this question, and competency, which would usually be determined by the conditions under which the documents offered as evidence came into existence, rather than the way in which the government obtained them. It is true that, under objection on the trial, a statement or confession by the defendant is inadmissible, unless the court is satisfied that it was voluntary and made under such conditions that no coercion or inducement could be said to have influenced the defendant to vary from a truthful recital. *Bram v. U. S.*, 168 U. S. 543, 18 Sup. Ct. 183, 42 L. Ed. 568. But upon the offer of such a statement or confession, an objection on behalf of the defendant will raise the direct question of the voluntary character of the transactions under the provisions of amendments 4 and 5.

So, upon the trial of this particular case, an offer of the testimony and an objection on the part of the defendant must be ruled upon by the trial judge, and any determination now cannot preclude a decision upon the facts appearing at that time, nor can it now be known whether objection will be made; but if, as claimed, a great and unconstitutional wrong has been done the defendant by the district attorney, who is now urging the trial of the charge, it would seem that this court (in protecting the rights of defendants actually on the eve

of trial and presumed to be innocent) should consider whether the property found on the defendant at the time of his arrest is to be returned to him before that trial. Without any forced assumption of jurisdiction, it would seem that this court can consider the right of the defendant to the return before trial of such personal property as the contents of his trunk, obtained at the time of his arrest by means of a check taken from his pocket, all of this property being within the control of the court, if it is to be used as evidence. If objection is made during trial to the use of papers and documents, upon the ground that they have been unlawfully seized, and in that sense that the defendant has been compelled to testify against himself, contrary to the provisions of the amendments above cited, the decision in the case of *Boyd v. United States*, 116 U. S. 630-631, 6 Sup. Ct. 524, 29 L. Ed. 746, and the general language of the court throughout that opinion would seem to indicate that such an objection could not only be considered, but, if well founded, could be sustained.

But it is evident from many decisions upon the subject that upon the trial of an action the manner of obtaining documentary evidence or specific chattels will not be looked into, and any objection because of trespass will be overruled, unless the defendant has been compelled to produce papers in the case, and thus testify against himself. This proposition is stated by the Supreme Court of the United States, in the case of *Adams v. New York*, 192 U. S. 585, 594, 24 Sup. Ct. 372, 48 L. Ed. 575, and is so well recognized that it cannot be the subject of much discussion. Further, property found upon the defendant, or in his immediate possession, at the time of his arrest, has always been considered properly usable as evidence, and no action for trespass will lie for the retention of such property by the officers of the law, for the purpose of using that property as evidence. The distinction would seem to be that the property must be material, or seem to be material, as evidence on the charge which is made against the defendant. The old case of *Dillon v. O'Brien & Davis*, 16 Cox, C. C. 245, and other cases cited by the district attorney, viz., *Spalding v. Preston*, 21 Vt. 15, 50 Am. Dec. 68, *Reifsnnyder v. Lee*, 44 Iowa, 101, 24 Am. Rep. 733, *Rex v. O'Donnell*, 7 C. P. 138, and *Rex v. Burgiss*, 7 C. P. 488, hold substantially to the same effect. The language used by the Supreme Court in the case of *Boyd v. United States*, supra, is substantially the only foundation for this particular application. That case arose from a seizure under the internal revenue laws, followed by an action for the forfeiture of the property seized, and an attempt was made, under a statute of the United States, to compel the claimant of the goods to produce his books. The court, holding that the action was in its nature criminal, came to the conclusion that such a compulsory production of books and papers would be contrary to the provisions of amendment 5 of the Constitution, and that to allow the district attorney, under such compulsion, to search through the papers of the claimant for evidence, would as well be a violation of amendment 5 of the Constitution.

A great deal of discussion is had in the case over the English statutes and declarations of the courts of England upon rights of search. A search for stolen goods is expressly excepted. Upon page 630 of

116 U. S. and page 532 of 6 Sup. Ct. (29 L. Ed. 746), in the Boyd Case, the court uses the following language:

"It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his infeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods is within the condemnation of that judgment. In this regard the fourth and fifth amendments run almost into each other."

The language of the above quotation, and that contained in the following sentence upon page 631 of 116 U. S. and page 533 of 6 Sup. Ct. (29 L. Ed. 746), of the same opinion:

"It is elementary knowledge that one cardinal rule of the court of chancery is never to decree a discovery which might tend to convict the party of a crime, or to forfeit his property, and any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free government"

—would seem to uphold to some extent the contention of the defendant upon this motion. But it is considered that the language was used with reference to the matter under consideration in that case, and with respect to the enforced examination and production of papers still in the possession of the defendant, in the course of a judicial proceeding, rather than with relation to the securing of documents for use as evidence under circumstances substantially equivalent to the search of the defendant upon his arrest.

In the case of *In re Pacific Ry. Comm.* (C. C.) 32 Fed. 251, Mr. Justice Field quotes from the Boyd Case, *supra*, and says that the language quoted above "had reference, it is true, to the compulsory production of papers as a foundation for criminal proceedings," and approves the principles laid down by Lord Camden, in the case of *Entick v. Carrington*, 19 How. St. Tr. 1029, to show that compulsory process, either in a judicial proceeding or before a commission, is in violation of constitutional liberty and security of the property; but Judge Field goes on to say:

"Of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves, not merely protection of his person from assault, but exemption of his private affairs, books, and papers from the inspection and scrutiny of others. * * * The law provides for the * * * seizure of criminal papers necessary for the prosecution of offenders against public justice, and only in one of these ways can they be obtained, and their contents made known, against the will of the owners."

This language, too, might be used as a basis for the defendant's application in this case; but, again, it is considered that the learned justice had in mind a compulsory production, rather than the taking, in connection with arrest, of the property and papers sought to be used as evidence.

The provisions of the Constitution and the principles above referred to have been embodied in section 860 of the Revised Statutes (U. S. Comp. St. 1901, p. 661), which says:

"No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States in any criminal proceeding," etc.

In *Brown v. Walker*, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819, the distinction is plainly set forth between the immunity given by this statute and the provisions of the Constitution, and the right to refrain from testifying where immunity is given. Again, in *McKnight v. United States*, 115 Fed. 972, 54 C. C. A. 358, it has been held that, for the purpose of giving secondary evidence, it is improper to demand the production of papers, and put the defendant in the position of claiming his immunity, thus indirectly compelling him to testify against himself, or, if he does not produce the documents desired, to admit that their production would incriminate him. But none of these cases and none of the language quoted apply directly to the question in point.

Suppose it should be urged that if a man were accused of murder, and the body of his victim were believed to be in a trunk among his private effects, and the police, with the consent of the owner of the property on which the goods were stored, should break into the trunk and secure evidence as to the corpus delicti, could it be urged that this trunk and its contents were the personal property of the defendant, and could not be searched or seized without his consent, thus leaving it within the power of the defendant to make it impossible to prove the essential element of his crime? Or, suppose that by a ruse the officers of the government were admitted to the home of a defendant by the defendant's wife, and there found objects and papers bearing upon the crime, could the defendant assert that he had not given his permission, and that therefore the evidence obtained could neither be scrutinized nor used, and that in addition he would have the right to obtain damages for the trespass involved? Are not such cases on all fours with the search of the defendant himself at the time of his arrest, and the right to use anything that may be found upon him? In other words, do the terms "compulsory discovery" and "seizure" refer to more than the exercise of compulsion upon the defendant himself, either during the trial, or while he is under arrest, to compel him to produce, or to furnish information as to, property and papers which are wanted as evidence? Or, again, is not the right in property and papers similar to that with respect to oral statements? And is not the test rather to see if the production has been compelled, than to prohibit the use of everything not voluntarily and knowingly turned over?

In *Adams v. New York*, supra, the police entered upon the premises by right of a search warrant. They examined and seized many more papers than those for which the search warrant had been issued. Their entry was lawful; but, even if unlawful, the obtaining

of the papers was in connection with the crime, and it cannot be argued that they should have applied to the defendant for leave to search for and seize these papers, and thus compel him to consent or to refuse upon the ground that he would be incriminated.

In the case of *State of Conn. v. Griswold*, 67 Conn. 290, 34 Atl. 1046, 33 L. R. A. 227, the entry of a police officer, by consent of a servant, and the finding of an envelope, later used as evidence, was justified under the Constitution.

In the case of *Newberry v. Carpenter*, 107 Mich. 567, 65 N. W. 530, 31 L. R. A. 163, 61 Am. St. Rep. 346, the court said:

"There is no statute which authorizes an officer to take from a prisoner such evidence of guilt as may be found on the person—the bloody knife. * * * It is not only the right, but the duty, of an officer making an arrest to take from the prisoner, not only stolen goods, but any articles which may be of use as proof in the trial of the offense with which the prisoner is charged."

The precise point urged upon this motion was decided upon an application for an injunction directed to the district attorney to deliver over certain letters in the case of *J. Morgan Smith v. William Travers Jerome*, 47 Misc. Rep. 22, 93 N. Y. Supp. 202. The letters in question had been seized in Cincinnati, in the room of the defendant, and were brought with him to New York, and Judge Gaynor, who in his many decisions has held the police strictly accountable for their acts, said:

"The police have the power, and it is also their duty, to search the person of one lawfully arrested, and also the room or place in which he is arrested, and also any other place to which they can get lawful access, for articles that may be used in evidence to prove the charge on which he is arrested. We have no statute defining this power or prescribing this duty, but the ends of justice require that they should exist, and they have been exercised under the common law from time immemorial. * * * This right and duty of search and seizure extend, however, only to articles which furnish evidence against the accused. They do not, for instance, permit the seizure of his money unless it furnishes evidence of his guilt, and in no other case may a prisoner's money or other property be taken from him."

The doctrine urged by the defendant would result, if the language of the *Boyd Case*, *supra*, should be construed in the sense which the defendant asks, in the strange situation in criminal cases, that no evidence in the way of property or papers could be seized or used against the accused unless found upon his person at the time of the arrest, or voluntarily delivered by him to the police, or unless the property and papers belonged to persons other than the defendant himself. The provisions of amendments 4 and 5 to the Constitution would be extended to read that no property of the defendant shall be used as evidence against him, without his consent, unless taken at the time of the arrest of the defendant, or that no papers of the defendant, however obtained, shall be read, in order to see whether their contents would be evidence in the case, unless the defendant has voluntarily consented, or unless they were found upon his person when arrested. Such meaning would render futile and ridiculous all rulings upon the competency or admissibility of property and documents of defendants, in all the criminal cases which have been tried,

or in any which may come up in the future, unless their production could pass the one test of having been voluntarily furnished by the defendant, if not taken with him at the time of his apprehension. It would seem that the mere statement of these propositions and a recital of the cases cited would decide the question at bar. All courts should see that the property of the defendant in the possession of the officers of the court is returned to him, when no longer needed, unless forfeited or contraband. So, also, any property not material as evidence should be restored to the defendant as soon as the ends of justice, in the light of a due preparation for trial, may allow a decision to be made. But property needed as evidence should be retained, and its possession in the hands of officers of the law protected.

With the question of the defendant's rights in a suit for trespass this court has nothing to do beyond the principle just stated, and upon the trial of this action the circumstances brought out by the testimony must be considered in order to determine whether the evidence offered is admissible, and whether the defendant has been compelled to furnish the testimony against his will.

As was said at the beginning of this opinion, an objection to testimony cannot be passed upon in advance of the trial; but for the reasons stated the application of the defendant to have certain papers turned over to him, prior to the trial, must be denied.

EGAN v. CHICAGO GREAT WESTERN RY. CO. et al.

(Circuit Court, N. D. Iowa, E. D. July 28, 1908.)

No. 613.

1. COURTS—FEDERAL COURTS—ADOPTION OF STATE PRACTICE—APPEAL AND ERROR—LIABILITY ON SUPERSEDEAS BOND—SUMMARY REMEDY IN FEDERAL COURTS.

Where the statutes of a state authorize a summary judgment against the sureties on an appeal or supersedeas bond, the Circuit and District Courts of the United States in that state may render such judgment.

2. APPEAL AND ERROR—LIABILITIES ON BONDS—SUMMARY REMEDIES.

Persons signing supersedeas, cost, or delivery bonds in suits between other parties voluntarily become connected with such suits in such manner that they subject themselves to the jurisdiction of the court in which the suit is pending and to summary judgment upon their undertakings when the amount of their liability can be ascertained without an issue and trial.

3. COURTS—FEDERAL COURTS—ADOPTION OF STATE PRACTICE—APPEAL AND ERROR.

Code Iowa 1897, § 4140, authorizes the Supreme Court of the state on affirmance of a judgment on appeal to render judgment against the appellant and his sureties on the appeal bond for the amount of the judgment appealed from, with damages and costs. A judgment for the recovery of money was rendered by a Circuit Court of the United States in Iowa in an action at law, from which a writ of error was prosecuted and a supersedeas bond given under the provisions of Rev. St. § 1000 (U. S. Comp. St. 1901, p. 712), and rule 13 of the Circuit Court of Appeals (150 Fed. xxviii, and 79 C. C. A. xxviii), which provides that "such indemnity, where the judgment is for the recovery of money, not otherwise secured, must be for the whole amount of the judgment or decree, including just

damages for the delay, and costs and interest on the appeal." The judgment was affirmed, and the usual mandate issued. *Held*, that since the conformity statute (Rev. St. § 914 [U. S. Comp. St. 1901, p. 684]) applies only to the Circuit and District Courts, and it is not the practice of the federal appellate courts in actions at law to render judgment anew on affirmance, but to remand the cause with direction to the court below to proceed according to right and justice, the Circuit Court, on receipt of the mandate had power, in conformity to the Iowa statute, to enter summary judgment against the surety on the supersedeas bond for the amount of the judgment stayed, with interest and costs.

[Ed. Note.—Conformity of practice in common-law actions to that of state court, see notes to *O'Connell v. Reed*, 5 C. C. A. 594; *Nederland Life Ins. Co. v. Hall*, 27 C. C. A. 392.]

4. APPEAL AND ERROR—LIABILITIES ON BOND—MOTION FOR SUMMARY JUDGMENT—DEFENSES.

The fact that a judgment defendant is solvent is no defense to a motion for a summary judgment against the surety on his supersedeas bond on affirmance of the judgment by an appellate court, nor is the fact that the plaintiff has taken steps to secure payment from the judgment defendant.

5. SCIRE FACIAS—NATURE OF REMEDY.

Scire facias is a judicial writ at common law to revive judgments, or to obtain satisfaction thereof, from sureties upon bail or other recognizances taken in the proceedings in which the judgment is rendered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, *Scire Facias*, §§ 1-11.

For other definitions, see Words and Phrases, vol. 7, pp. 6351-6355; vol. 8, p. 7796.]

At Law. On motion of the plaintiff for judgment against the Metropolitan Surety Company, as surety upon a supersedeas bond.

The plaintiff, as administratrix of the estate of Charles H. Egan, deceased, recovered in this court, April 28, 1908, judgment against the Chicago Great Western Railway Company in the sum of \$8,000, as damages, and costs, for the wrongful and negligent killing of the deceased while he was in the employ of the railway company as a conductor upon one of its trains running between Dubuque and Oelwein, in this state. The railway company in due time sued out a writ of error from the Circuit Court of Appeals to reverse such judgment, which writ was, within 60 days from the date of the judgment, duly allowed to operate as a supersedeas upon the execution of a bond to the plaintiff in the sum of \$10,000 with sureties to be approved and conditioned as by law provided. The railway company and the defendant Metropolitan Surety Company, as surety, executed such a bond to the plaintiff, which was duly accepted and approved, conditioned as follows: "Now the condition of the above obligation is such that if the Chicago Great Western Railway Company shall prosecute said writ of error to effect, and answer all damages and costs if it shall fail to make good the same, then the above obligation to be void, else to remain in full force and virtue." Execution upon the judgment was thereupon stayed, citation issued, a transcript of the record in the cause duly filed in the office of the clerk of the Circuit Court of Appeals, and the cause docketed in that court.

Afterwards, and in January, 1908, a suit in equity was brought by John A. Humbird and others, creditors of the Chicago Great Western Railway Company, in the Circuit Court of the United States for the District of Minnesota, against said railway company, in which suit receivers were appointed on January 8, 1908, by Hon. Walter H. Sanborn, one of the circuit judges of this circuit, to take possession of all of the property of the railway company and hold the same pending the hearing and determination of said suit, and said property was thereupon placed in their custody and control, and they are now operating said railway under the orders of said court. January 9, 1908, ancillary proceedings were instituted in this court by said John A. Humbird

and others against the Chicago Great Western Railway Company, and the same receivers were appointed by Judge Sanborn in such proceedings for the property of said railway company in this judicial district, and they are now in possession of and operating the same under the directions of the court so appointing them.

March 14, 1908, the Court of Appeals, upon consideration of the record and proceedings in the cause of the plaintiff against said railway company, affirmed the judgment of this court and remanded the cause to it for further proceedings. *Chicago Great Western Railway Company v. Egan*, 159 Fed. 40. The mandate of the Court of Appeals was duly issued, and on May 16th filed with the clerk of this court, directing this court as follows: "You therefore are hereby commanded that such execution and proceedings be had in said cause, as, according to right and justice and the laws of the United States, ought to be had, the said writ of error notwithstanding." May 19, 1908, the plaintiff filed in this court in this cause an application, or motion, for judgment against the Metropolitan Surety Company upon its bond for the amount of such judgment, interest and costs. An order was made requiring it to appear and show cause, if any it had, why the application or motion should not be granted, and that a copy of the order and of the application of the plaintiff be served upon it, and they have been so served.

May 21, 1908, the plaintiff also filed an intervening petition in this court in the ancillary proceedings of John A. Humbird and others against the Chicago Great Western Railway Company, reciting the recovery of the judgment by her, in this cause against the railway company, its affirmance by the Court of Appeals, and its nonpayment by the railway company, and alleged that said judgment was recovered for a personal injury inflicted by the railway company upon said deceased which caused his death, that under section 2075, Code Iowa 1897, such judgment is a prior lien upon the property of the railway company in Dubuque county, Iowa, and prayed that the receivers be directed to pay said judgment as a preferred claim against the property in their custody. This petition was referred to the master in the receiver's suit, where it is still pending.

The Metropolitan Surety Company appears specially, in response to the order and notice served upon it, and alleges: (1) That this court is without authority, statutory or otherwise, to render summary judgment against it in this proceeding as asked by the plaintiff; (2) that it does not appear that the railway company has refused to pay, or is unable to pay, the plaintiff's judgment against it; and (3) the filing of the intervening petition in the receiver's suit and its pendency before the master in that suit.

John W. Kintzinger, for plaintiff.

Arthur J. Stobbart, for defendant Metropolitan Surety Co.

REED, District Judge (after stating the facts as above). The execution of the supersedeas bond by the surety company, the stay of execution upon plaintiff's judgment against the railway company because thereof, the affirmance of the judgment by the Court of Appeals, and its nonpayment are not disputed. The principal contention of the surety company is that this court is without authority, statutory or otherwise, to render summary judgment against it upon its undertaking, and that plaintiff's only remedy is an ordinary action upon the bond. It may be conceded that there is no act of Congress other than the Conformity act of June 1, 1872 (17 Stat. 197, c. 255; Rev. St. U. S. § 914 et seq. [U. S. Comp. St. 1901, p. 684]), authorizing such procedure; but the Supreme Court of the United States has repeatedly held that, where the statutes of a state authorize a summary judgment against the sureties upon an appeal or supersedeas bond, the Circuit and District Courts of the United States in that state may render such judgment. *Hiriart v. Ballon*, 9 Pet. 156, 9 L. Ed. 85; *Beall v. New*

Mexico, 16 Wall. 535, 21 L. Ed. 292; Moore v. Huntington, 17 Wall. 417, 21 L. Ed. 642; Smith v. Gaines, 93 U. S. 341, 23 L. Ed. 901; Reilly v. Golding, 10 Wall. 56, 19 L. Ed. 858.

In *Hiriart v. Ballon*, above, Ballon, the appellee, recovered judgment in the District Court of the United States for the District of Louisiana against one Gassies, who appealed from the judgment to the Supreme Court and gave a supersedeas bond signed by the appellant Hiriart, as surety. The judgment was affirmed by the Supreme Court, and its mandate in due course returned to the District Court. The appellee thereupon moved in the District Court for an order upon the appellant to show cause, if any he had, why judgment should not be entered against him upon his bond for the amount of the judgment, interest, and costs, which had been stayed by the giving of such bond. Notice of the motion was served upon the appellant, who appeared and answered that the proceeding by motion was unauthorized, and that his liability for judgment could only be established, if at all, by an ordinary action upon the bond in which he would be entitled to a jury trial. This contention was overruled by the District Court, and summary judgment entered against him upon the bond for the amount of the judgment, interest and costs. The law of Louisiana then in force allowed appeals from the judgment of the lower state courts to the state Supreme Court upon giving an appeal bond with security, and, upon affirmance of the judgment, authorized judgment to be entered against the surety upon the appeal bond in the court from which the appeal was taken. This law of Louisiana had been adopted as a rule of practice of the United States District Court for the District of Louisiana. The Supreme Court held that the summary judgment against the surety upon the supersedeas bond was regular and strictly authorized by the law of Louisiana and the rules of the United States court adopting the same as the practice and mode of proceeding in that court, and that the appellant was not entitled to a trial by jury. *Smith v. Gaines*, 93 U. S. 341, 23 L. Ed. 901, and *Reilly v. Golding*, 10 Wall. 56, 19 L. Ed. 858, also from Louisiana, are to the same effect.

In *Beall v. New Mexico*, 16 Wall. 535, 21 L. Ed. 292, a summary judgment was entered against the surety upon a supersedeas bond by the Supreme Court of the territory of New Mexico, pursuant to a statute of the territory, upon affirming the judgment of a lower court. The surety appealed to the Supreme Court. Mr. Justice Bradley, speaking for that court, said:

"A party who enters his name as surety on an appeal bond does so with full knowledge of the responsibilities incurred. In view of the law relating to the subject, it is equivalent to a consent that judgment shall be entered against him if the appellant fails to sustain his appeal. If judgment may thus be entered on a recognizance, and against stipulators in admiralty, we see no reason in the nature of things, or in the provisions of the Constitution, why this effect should not be given to appeal bonds in other actions, if the Legislature deems it expedient. No fundamental constitutional principle is involved. No fact is to be ascertained for the purpose of rendering the sureties liable, which is not apparent in the record itself. No object (except mere delay) can be subserved by compelling the appellee to bring a separate action upon the appeal bond."

In *Moore v. Huntington*, 17 Wall. 417, 21 L. Ed. 642, also from New Mexico, a decree was entered against the sureties on a supersedeas bond, upon affirming the judgment appealed from. Mr. Justice Miller, speaking for the court said:

"The decree was rendered in the Supreme Court (of New Mexico) jointly against the defendants and their sureties in the appeal bond, and it is alleged for error that no such judgment could be rendered against the latter; but there is no error in this. It is a very common and useful thing to provide by statute that sureties in appeal and writ of error bonds shall be liable to such judgment in the appellate court as may be rendered against their principals. This is founded on the proposition that such sureties, by the act of signing the bond, become voluntary parties to the suit and subject themselves thereby to the decrees of the court."

What, then, is the statute of Iowa upon the subject? The Supreme Court of that state is a court of record, and has appellate jurisdiction over all judgments and decrees of the lower courts of record. Equitable causes are triable anew therein on appeal, and the final decree is frequently there entered, whether the decree of the lower court be reversed or affirmed, though it may remand the cause to the lower court to carry into effect the decree; but law actions are remanded to the lower court for new trial if the judgment be reversed, or to carry into effect the judgment if it be affirmed, if the Supreme Court shall so direct. Code Iowa 1897, §§ 3651, 3652. Other provisions of the Code are:

"Sec. 4128. No proceedings under a judgment or order, nor any part thereof, shall be stayed by an appeal, unless the appellant executes a bond with one or more sureties, to be filed with and approved by the clerk of the court in which the judgment or order was rendered or made, to the effect that he will pay to the appellee all costs and damages that shall be adjudged against him on the appeal; and will satisfy and perform the judgment or order appealed from in case it shall be affirmed, and any judgment or order which the Supreme Court may render, or order to be rendered by the inferior court, not exceeding in amount or value the original judgment or order, and all rents or damages to property during the pendency of the appeal out of the possession of which the appellee is kept by reason of the appeal. * * *"

"Sec. 4140. The Supreme Court, if it affirms the judgment shall also, if the appellee asks or moves therefor, render judgment against the appellant and his sureties on the appeal bond for the amount of the judgment, damages and costs referred to therein, in case such damages can be accurately known to the court without an issue and trial."

"Sec. 4143. If the Supreme Court affirm the judgment or order, it may send the cause to the court below to have the same carried into effect, or may issue the necessary process for this purpose directed to the sheriff of the proper county, as the party may require."

It is contended by the surety company that these sections authorize the state Supreme Court only to render summary judgment against the sureties, that the court from which the appeal is taken has no power to do so, that this court has none, and that the Court of Appeals only, of the federal courts, can render such judgment.

Section 914 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 684) provides:

"The practice, pleadings, * * * and modes of proceeding in civil causes, other than equity and admiralty causes, in the Circuit and District Courts, shall conform, as near as may be to the practice, pleadings, * * * and modes of proceeding existing at the time in like causes in the courts of record

of the state within which such Circuit or District Courts are held, any rule of court to the contrary notwithstanding."

By its terms this section is limited to the Circuit and District Courts of the United States, and does not apply to the Supreme Court nor to the Circuit Courts of Appeals. Its plain purpose is to conform as near as may be, the practice and modes of proceeding in law actions in the Circuit and District Courts, to the practice and modes of proceeding that obtain in the state courts under state laws, and they are given a large discretion in adopting and applying the laws of the state as the proper mode of proceeding in those courts for the advancement of justice and the prevention of delays in proceedings. *Shepard v. Adams*, 168 U. S. 618-625, 18 Sup. Ct. 214, 42 L. Ed. 602. If therefore, under the statutes of the state of Iowa, a party is entitled to summary judgment against a surety upon a supersedeas bond, in any court of record in that state upon affirmance of the judgment appealed from, then a party to an action in a Circuit or District Court of the United States in that state may have such judgment in those courts upon affirmance of the judgment by an appellate court, by proceeding in substantially the same manner.

But persons signing supersedeas, cost, or delivery bonds in suits between other parties voluntarily become connected with such suits in such manner that they subject themselves to the jurisdiction of the court in which the suit is pending and to summary judgment upon their undertakings, when the amount of their liability can be ascertained without an issue and trial.

In *Jewett v. Shoemaker*, 124 Iowa, 561, 100 N. W. 531, the Supreme Court of the state held that the sureties in an appeal bond are parties to the record, though not to the suit, and that summary judgment may be entered against them by the Supreme Court without notice, upon affirming the judgment appealed from. As the bond is required, under the statute, to be filed in the court from which the appeal is taken, the sureties are of necessity parties to the record in that court, and subject to its orders upon a remand of the cause by the Supreme Court.

In *Blossom v. Railroad Company*, 1 Wall. 655, 17 L. Ed. 673, Mr. Justice Miller says:

"It seems to be well settled that, after a decree adjudicating certain rights between the parties to a suit, other persons having no previous interest in the litigation may become connected with the case, in the course of the subsequent proceedings, in such a manner as to subject them to the jurisdiction of the court, and render them liable to its orders. * * * Sureties signing appeal bonds, stay bonds, delivery bonds, and receivers under writs of attachment, become quasi parties to the proceedings, and subject themselves to the jurisdiction of the court, so that summary judgments may be rendered on their bonds or recognizances."

In *Third National Bank v. Gordon* (C. C.) 53 Fed. 471, a statute of Alabama provided:

"If the Supreme Court affirms the judgment of the court below it must render judgment against all or any of the obligations in the bond for the amount of the judgment affirmed, ten per cent. damages thereon, and the costs of the Supreme Court."

The defendant Gordon signed as surety a supersedeas bond in the Circuit Court of the United States for the District of Alabama to

supersede the judgment of that court pending the determination of a writ of error in the Supreme Court of the United States. The judgment was affirmed, and upon the return of the mandate from the Supreme Court the bank moved in the Circuit Court for judgment against him upon his bond. This was granted and the judgment was affirmed by the Court of Appeals, Fifth Circuit, in 56 Fed. 790, 6 C. C. A. 125.

In *Empire, etc., Mining Co. v. Hanley*, 136 Fed. 99, 69 C. C. A. 87, the Court of Appeals, Ninth Circuit, held to the same effect, though in that case it appears that the statute of Idaho, in which the case arose, authorized such judgment in the court from which the appeal was taken; but at pages 103, 104 of 136 Fed., pages 91, 92 of 69 C. C. A., cases are cited in support of the proposition that such judgment would be authorized in the absence of such a statute. See, also, *Perry v. Tacoma Mill Co.*, 152 Fed. 116-119, 81 C. C. A. 333.

This proceeding is analogous to that of *scire facias*, a judicial writ at common law to revive judgments, or to obtain satisfaction thereof, from sureties upon bail or other recognizances taken in the proceedings in which the judgment is rendered. 3 Black, Com. 416-422; *Owens v. Henry*, 161 U. S. 642-645, 16 Sup. Ct. 693, 40 L. Ed. 837; *Pullman's Palace Car Co. v. Washburn* (C. C.) 66 Fed. 790; *McGee v. Barber*, 14 Pick. (Mass.) 212. When resorted to, it must be in the court having the record or recognizance upon which it is founded. *Carnes v. Crandall*, 4 Iowa, 151; *Id.*, 10 Iowa, 377; *Osgood v. Thurston*, 23 Pick. (Mass.) 110; *Chancellor v. Niles*, Adm'r, 78 Ill. 78. The bond in question was given under the requirements of section 1000, Rev. St. U. S. (U. S. Comp. St. 1901, p. 712), and rule 13 of the Court of Appeals, this circuit (150 Fed. xxviii, and 79 C. C. A. xxviii), and is conditioned as there required:

"That the plaintiff in error shall prosecute his writ to effect, and answer all damages and costs if he fail to make his plea good. Such indemnity, where the judgment is for the recovery of money, not otherwise secured, must be for the whole amount of the judgment or decree, including just damages for delay, and costs and interest on the appeal."

The undertaking is, in effect, the same as in like bonds, under the state statute. It was taken and approved by the judge who allowed the writ of error and signed the citation, was filed in this court, and is a part of the record of this cause. The judgment is for the recovery of money, is not otherwise secured, was stayed by this bond, and upon the affirmance of the judgment the liability of the surety to the plaintiff became fixed for the full amount of the judgment stayed, with interest and costs. *Catlett v. Brodie*, 9 Wheat. 553, 6 L. Ed. 158; *Jerome v. McCarter*, 21 Wall. 17, 22 L. Ed. 515; *Babbitt v. Finn*, 101 U. S. 7-14, 25 L. Ed. 820; *Davis v. Patrick*, 57 Fed. 909, 6 C. C. A. 632; *Wood v. Brown*, 104 Fed. 203, 43 C. C. A. 474.

It is not the practice of the Supreme Court of the United States nor of the Court of Appeals of this circuit, upon affirming the judgment of a lower court, to enter a judgment anew in either of those courts, in actions at law at least; but their practice is to remand the cause to the lower court with directions "that such execution and proceedings be had in the said cause, as according to right and justice and the laws

of the United States should be had, the said writ of error notwithstanding." That has been done in this case. The undertaking of the surety company, presumably upon an adequate consideration, is that it will pay the plaintiff's judgment if it shall be affirmed; and why should it not be held equally liable with its principal, the railway company, for that judgment? Of course, if damages other than the amount of the judgment, with interest and costs, were sought to be recovered against it, which could not be accurately known by the court without an issue and trial in the ordinary way, there would be reason for such a trial to ascertain the amount of such damages; but where it is sought to be held only for the amount of the judgment, interest, and costs, which appear of record, no reason is preceived, other than to postpone the day of payment, why it should not be summarily required to perform its undertaking. It has prevented the plaintiff from issuing execution upon and collecting her judgment from the railway company, and, pending the hearing in the Court of Appeals, a court of equity has taken possession, and assumed control through its receivers, of all the property of the railway company, and the plaintiff is thereby further delayed at least, and it may be prevented entirely, from collecting her judgment. Under such circumstances, the surety company should respond at once to its undertaking, and it is certainly "according to right and justice" that it be summarily required to do so. A summary judgment by the Circuit Court against sureties upon a supersedeas bond after affirmance of the decree appealed from, for the rent of real property pending the appeal, was upheld by the Supreme Court in *Woodworth v. Mutual Life Ins. Co.*, 185 U. S. 354, 22 Sup. Ct. 676, 46 L. Ed. 945, upon a question certified by the Court of Appeals of this circuit (*Brown v. Insurance Co.*, 119 Fed. 148, 55 C. C. A. 654); but the question of procedure does not seem to have been raised, and is not considered in the opinion of either court.

It is suggested however, that it does not appear that the railway company is insolvent or unable to pay the judgment against it, and that the surety company is only liable upon its undertaking for such damages as may be caused by the delay in collecting the judgment. This contention is untenable. *Smith v. Gaines*, 93 U. S. 341, 23 L. Ed. 901; *Babbitt v. Finn*, 101 U. S. 7-14, 25 L. Ed. 820; *Davis v. Patrick*, 57 Fed. 909, 6 C. C. A. 632; *Wood v. Brown*, 104 Fed. 203, 43 C. C. A. 474.

Finally, it is urged, in effect, that plaintiff has elected her remedy by filing her intervening petition in the receiver's suit of *Humbird et al. v. Chicago Great Western Railway Company* in this court, praying that the lien of her judgment upon the property of the railway company be recognized, and that the receivers be required to pay the same, and that she has thereby waived her right to proceed against the surety company on its undertaking. Surely this does not relieve the surety company from its obligation on the supersedeas bond, and is not available to it as a defense to its undertaking. *Davis v. Patrick*, 57 Fed. 909, 6 C. C. A. 632; *Wood v. Brown*, 104 Fed. 203, 43 C. C. A. 474.

The motion for judgment against the Metropolitan Surety Company is therefore sustained, and a judgment may be entered accordingly.

In re WALSH BROS.

(District Court, N. D. Iowa, E. D. August 6, 1908.)

No. 596.

1. BANKRUPTCY—DETERMINATION OF ADVERSE CLAIMS TO PROPERTY—JURISDICTION OF REFEREE.

Where a third person acquired possession of property from a bankrupt prior to the bankruptcy, and claims it in good faith as owner, and not merely colorably, a referee in bankruptcy is without jurisdiction to determine his right thereto on an application by the trustee for a summary order requiring him to return it as a voidable preference; and such jurisdiction is not conferred by the appearance of the adverse claimant in response to an order to show cause, the filing by him of an answer asserting his claim, and his contesting of the application, even though he does not formally object to the jurisdiction.

2. SAME—"PROCEEDING IN BANKRUPTCY."

An action by a trustee to recover property from a third party, which is alleged to have been transferred by the bankrupt prior to the bankruptcy as a preference, is not a "proceeding in bankruptcy," within the meaning of Bankr. Act July 1, 1898, c. 541, § 23a, 30 Stat. 552 (U. S. Comp. St. 1901, p. 3431).

[Ed. Note.—For other definitions, see Words and Phrases, vol. 1, pp. 703-704.]

In Bankruptcy. On petition for review of an order of the referee denying an application of the trustee for an order for the return of property alleged to have been transferred and delivered by the bankrupts as a preference prior to the bankruptcy proceeding.

Walsh Bros., a copartnership, dealers in farm implements and machinery, were adjudged bankrupts by this court January 18, 1908, upon their own petition filed that day, and a trustee of their estate was afterwards duly appointed. About March 7, 1908, the trustee filed with the referee an application setting forth that the bankrupts on December 17 and 18, 1907, transferred certain of their stock of farm implements and machinery, of the value of more than \$625, to Burns Bros., a copartnership, in payment of debts assumed by the bankrupts; that such transfer was made while the bankrupts were insolvent; that Burns Bros. so knew, or had reasonable cause to believe; and that the same was intended as, and was in fact, a preference by the bankrupts to said Burns Bros., and accepted by them as such. A summary order is asked that Burns Bros. be required to return the property to the trustee, or for such order in the premises as the referee may deem proper. March 16th Burns Bros. appeared before the referee and filed an answer, in which they admit that the property was transferred and delivered to them by the bankrupts December 17 and 18, 1907, but allege that it was in payment in good faith of a valid debt owing them by the bankrupts, and deny that the transfer was a preference, or intended as such, or that they knew of the insolvency of the bankrupts, or had reasonable cause to believe them to be insolvent, at the time of the transfer. They ask that they be dismissed, with their costs. Upon a hearing of the issues so joined evidence was offered by both parties, and the referee denied the application of the trustee upon the ground alone that it was not made to appear that Burns Bros. had reasonable cause to believe that Walsh Bros. were insolvent at the time the property was transferred and delivered to them. The Sandwich Manufacturing Company and other creditors of Walsh Bros. appeared at the hearing before the referee

and participated therein, and they petition for a review of the order. The trustee does not petition for a review, nor join in that of the creditors.

F. Lingenfelder, Ellis & Ellis, and Eggert & Lockwood, for creditors.

P. W. Burr, for Burns Bros.

REED, District Judge (after stating the facts as above). The jurisdiction of the referee to pass upon the merits of the controversy arising upon the application of the trustee and the answer of Burns Bros. thereto was not raised before the referee, other than by the facts alleged in the application of the trustee and the answer of Burns Bros., and the request of the latter that they be dismissed with their costs. But the jurisdiction of a federal court to determine a matter presented to it is a question that asserts itself, and the court will notice it, though it is not raised by the parties. The application of the trustee is for a summary order requiring Burns Bros. to return to him property alleged to have been transferred and delivered to them by the bankrupts a month before the bankruptcy proceedings were instituted. This property, therefore, has never come into the custody of the court of bankruptcy. Burns Bros. appeared before the referee and made claim to the property, and alleged facts plainly showing their title and right to it. The claim so made and asserted is not a mere colorable one, but is one that arose before the bankruptcy proceedings, and clearly appears from the allegations of the answer to be one that is adverse to the bankrupts, though it may be voidable at the election of the trustee. The application of the trustee is in the nature of an independent action by him against Burns Bros., who are not parties to the bankruptcy proceedings, to avoid the transfer because, as he alleges, it is a voidable preference. Such a suit is not a part of the "proceedings in bankruptcy," but is a controversy either at law or in equity between the trustee and a third party, within the meaning of section 23, cls. "a" and "b," of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3431]). *Bardes v. Bank*, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175; *Jaquith v. Rowley*, 188 U. S. 620, 23 Sup. Ct. 369, 47 L. Ed. 620; *Bush v. Elliott*, 202 U. S. 477, 26 Sup. Ct. 668, 50 L. Ed. 1114; *In re Rochford*, 124 Fed. 182, 59 C. C. A. 388.

Has a referee in bankruptcy jurisdiction to determine such a controversy, even with the consent of both parties? If the subject-matter of a controversy is not within the jurisdiction of a referee, of course, consent will not confer it, and the court upon a petition for review will acquire none, except to determine the jurisdiction of the referee. *First Nat. Bank v. Title & Trust Co.*, 198 U. S. 280, 25 Sup. Ct. 693, 49 L. Ed. 1051. That the court of bankruptcy would not have had jurisdiction of such a suit prior to the amendment of 1903, without the consent of the proposed defendant, is settled by the cases of *Bardes v. Bank* and *Jaquith v. Rowley*, above. Section 60b of the bankruptcy act as amended in 1903 is as follows (Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799 [U. S. Comp. St. Supp. 1907, p. 1031]):

"If a bankrupt shall have given a preference, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall

be voidable by the trustee, and he may recover the property or its value from such persons. *And, for the purpose of such recovery any court of bankruptcy, as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.*"

The words in italics were added by the amendment: What courts, then, since the amendment, have jurisdiction of a suit by a trustee to recover such a preference? Plainly only a "court of bankruptcy," or "any state court which would have had jurisdiction if bankruptcy had not intervened." Courts of bankruptcy, as defined by the act, are:

"The District Courts of the United States in the several states and territories, the Supreme Court of the District of Columbia, and the United States Court of the Indian Territory, and of Alaska." Section 1 (8) and section 2 of the bankruptcy act.

The courts of bankruptcy as above defined are invested, within their respective territorial limits—

"with such jurisdiction at law and in equity as will enable them to * * * (6) bring in and substitute additional parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy; (7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as otherwise provided." Section 2.

The exception is of the controversies and suits referred to in section 23, cls. "a" and "b," as originally enacted, and in sections 60b, 67e, and 70e, as amended. In re Rochford, 124 Fed. 182-185, 59 C. C. A. 388. The word "court" may include the referee. Section 1 (7). But this obviously means the referee when acting upon a matter of which he is given jurisdiction by the act. The jurisdiction of the referee is prescribed by section 38, as follows:

"Referees respectively are hereby invested * * * with jurisdiction to (1) consider all petitions referred to them by the clerks and make the adjudications or dismiss the petitions; (2) exercise the powers vested in courts of bankruptcy for the administering of oaths to and the examination of persons as witnesses and for requiring the production of documents in proceedings before them, except the power of commitment; (3) exercise the powers of the judge for the taking possession and releasing of the property of the bankrupt in the event of the issuance by the clerk of a certificate showing the absence of a judge from the judicial district, or the division of the district, or his sickness, or inability to act; (4) perform such part of the duties, except as to questions arising out of the applications of bankrupts for compositions, or discharges, as are by this act conferred on courts of bankruptcy, and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided. * * *"

Rule 11 of this court confers upon referees in this district the power to exercise the duties conferred upon courts of bankruptcy by clauses 2, 3, 5, 6, 7, 11, and 18 of section 2 of the act. While much of the authority of the court of bankruptcy is exercised by the referee, and rightly so in proceedings in bankruptcy proper, none of these clauses, nor any other provision of the act, confers upon a referee any authority or power to act except in such proceedings. It is easier to state what are not "proceedings in bankruptcy" than to definitely name all that are; and it is perhaps not advisable to now attempt to accurately distinguish between such proceedings and "controversies at law and in equity between trustees as such and adverse claimants concerning the

property claimed by the trustees." It is sufficient for the present to know that it is definitely settled by the Supreme Court in the cases before cited that an action by a trustee to recover property from a third party which is alleged to have been transferred by the bankrupt prior to the bankruptcy as a preference is not a "proceeding in bankruptcy," within the meaning of the bankruptcy act. If the application of the trustee in question can be upheld as a part of the proceedings in bankruptcy, then a suit to set aside a conveyance of real estate, or an action to recover real property, or any action at law or suit in equity against a third party claiming to own the property as against the bankrupt, might also be brought before the referee, and the only requisite to his jurisdiction would be that the bankrupt once owned the property sought to be recovered. This proposition cannot be assented to.

When a referee may, and when he may not, proceed summarily in bankruptcy proceedings before him, is well illustrated in two cases in the Supreme Court, viz. *Mueller v. Nugent*, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405; and *Louisville Trust Co. v. Cominger*, 184 U. S. 18, 22 Sup. Ct. 293, 46 L. Ed. 413.

In the former of these cases the bankrupt, a few days before an involuntary petition was filed against him, and again on the same day it was filed, but a few hours before, transferred to his son over \$14,300 in money. After the adjudication the son was cited by the referee to appear and show cause why he should not be required to turn this money over to the trustee. The son appeared and challenged the jurisdiction of the referee to make any order in the premises, but did not assert any claim to the money as his own or adverse to the bankrupt. The referee found from the evidence that the money belonged to the bankrupt and was held by the son only as agent or bailee of the bankrupt, and made an order requiring him to turn the same over to the trustee within a specified time. This order was sustained by the District Court upon a petition for review, but reversed by the Circuit Court of Appeals. It then came before the Supreme Court, and that court sustained the order of the referee and of the District Court approving the same, upon the ground that no adverse claim to the property was asserted by the son, and that, inasmuch as the money was a part of the bankrupt estate, it was within the rightful power of the referee to require it to be turned over to the trustee. Upon the question of the authority of the referee the Supreme Court said:

"There was no pretense that at the date of the filing of this petition in bankruptcy this money of the bankrupt * * * was held subject to any adverse claim, or that the right or title thereto had been passed over to another. The position now taken amounts to no more than to assert that a mere refusal to surrender constitutes an adverse holding in fact, and therefore an adverse claim when the petition was filed, and to that we cannot give our assent. But suppose that respondent had asserted that he had the right to possession by reason of a claim adverse to the bankrupt; the bankruptcy court had the power to ascertain whether any basis for such a claim actually existed at the time of the filing of the petition. The court would have been bound to enter upon that inquiry, and in doing so would have undoubtedly acted within its jurisdiction, while its conclusion might have been that an adverse claim, not merely colorable, but real, even though fraudulent and voidable, existed in fact, and so that it must decline to finally adjudicate on the merits. If it erred in its ruling either way, its action would be subject to

review. In this case, however, respondent asserted no right or title to the property before the referee, and the circumstances under which he held possession must be accepted as found by the referee and the District Court. The decisions of this court under the present law sustain the validity of the action we are considering."

While the order of the referee and of the District Court approving it were sustained, the cause was remanded to the District Court, with directions to take such further proceedings as it might be advised were proper to prevent any injustice being done.

In the second of these cases Comingor was an assignee under a state statute for the benefit of the creditors of Simonson, Whiteson & Co. In administering the estate under the state statute he had incurred expenses to a large amount. Subsequently Simonson, Whiteson & Co. were adjudged bankrupts and a trustee of their estate was duly appointed. Various proceedings afterwards occurred in the state court and in the court of bankruptcy, the result of which was that Comingor was required to turn the fund over to the trustee in bankruptcy. In complying with this order he withheld his commissions as assignee, and the expenses incurred by him in the state court before the proceedings in bankruptcy were instituted, upon the alleged ground that he was entitled to them as against the bankrupts or the trustee. The referee subsequently ordered that he turn the amount of these over to the trustee also, and this order was approved on a petition for review, upon the ground that Comingor, by his acquiescence in the proceedings before the referee and in the court of bankruptcy without challenging the jurisdiction of either, had consented to their jurisdiction. The Supreme Court said:

"We have just held in *Mueller v. Nugent*, supra, that the District Court has power to ascertain whether in the particular instance the claim asserted is an adverse claim existing at the time the petition was filed, and according to the conclusion reached the court will retain jurisdiction or decline to adjudicate the merits. * * * In many cases jurisdiction may depend on the ascertainment of facts involving the merits, and in that sense the court exercises jurisdiction in disposing of the preliminary inquiry, although the result may be that it finds that it cannot go farther. And where, in a case like that before us, the court erroneously retains jurisdiction to adjudicate the merits, its action can be corrected on review. We are of opinion that, even if Comingor could have consented to be pursued in this manner, he did not so consent. He was ruled to show cause, and the cause he showed defeated jurisdiction over the subject-matter; that is, jurisdiction to proceed summarily. He did not come in voluntarily, but in obedience to peremptory orders; and, although he participated in the proceedings before the referee, he had pleaded his claims in the outset, and he made his formal protest to the exercise of jurisdiction before the final order was entered. He had been restrained from settling his accounts in the state court in the action pending there, and the District Court, instead of dissolving the injunction, declining jurisdiction, and leaving the litigation to the state court, either in due course, or by plenary suit, adjudicated the merits and entered a peremptory order that he should pay over, disobedience of which order was punishable by commitment. We think that in this there was error, and that the Circuit Court of Appeals was right in its decree of reversal."

The rule deducible from these decisions is that, where a third party holds property at the time of the bankruptcy merely as agent or bailee of the bankrupt, he may be summarily required by the referee or the court of bankruptcy to turn the property over to the

trustee; but where he acquires the possession prior to the bankruptcy, and claims the right to hold the property as against the bankrupt or the trustee, then the authority of the referee, and of the court of bankruptcy in summary proceedings, is limited to determining whether the claim made is colorable merely, or is in fact adverse to the bankrupt, and according as it determines that question will it deny or retain jurisdiction of the controversy. *First National Bank v. Title & Trust Co.*, 198 U. S. 280, 25 Sup. Ct. 693, 49 L. Ed. 1051.

In the present case there can be no doubt that Burns Bros. set forth in their answer facts showing that they acquired possession of the property prior to the bankruptcy, and asserted a claim thereto adverse to the bankrupts, and offered evidence before the referee tending to support such claim. Upon this appearing, the referee should have declined to proceed further with the controversy and permitted the trustee to resort to a court of competent jurisdiction to recover the property, if he, or the creditors, should so elect.

The question remains: Does the failure of Burns Bros. to formally challenge the jurisdiction of the referee, after pleading the facts relied upon by them, confer upon him jurisdiction to summarily determine the merits of the controversy? The conclusion is that, under the ruling in *Louisville Trust Co. v. Comingor*, it does not. Obviously Burns Bros. appeared before the referee in response to a notice to show cause why the application of the trustee should not be granted. They did so appear, and set forth the facts, and offered testimony in support thereof, upon which they based their right to this property, and the facts so shown defeated the right or jurisdiction of the referee to determine the merits of the controversy. Their appearance was not voluntary; and if, instead of denying the right of the trustee to the property, the referee had decided against Burns Bros., it seems clear that upon a petition for review they could rightfully have formally challenged the jurisdiction of the referee, if that was necessary in addition to the facts pleaded and shown by them, and such challenge would have been timely, under the decision in *Louisville Trust Co. v. Comingor*.

The question presented is quite apart from any that may arise where property is taken from the possession of the bankrupt, or the court of bankruptcy, after the institution of bankruptcy proceedings, or where the court has acquired possession in the course of such proceedings. In case of the former, the court has the power summarily to require the return of the property to it. *White v. Schloerb*, 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. Ed. 1183. And in the latter the power inheres in the court of bankruptcy, as in every court exercising equitable jurisdiction, to inquire and determine in a proper way the ownership of or right to the property in its custody, and award it accordingly. In *re Rochford*, 124 Fed. 187, 59 C. C. A. 388. And this, though the property may have been wrongfully seized and brought into its custody. *Krippendorf v. Hyde*, 110 U. S. 276, 4 Sup. Ct. 27, 28 L. Ed. 145.

In *Re Moody* (D. C.) 131 Fed. 525, this court went to the verge in sustaining the action of the referee in directing a receiver to take possession of the property, and the possession of the receiver pur-

suant to such direction, under the circumstances there shown. But the property there was in the possession of the bankrupt at the time of the filing of the petition in bankruptcy and the application for the appointment of the receiver, and he was dealing with it as his own to all outward appearances, and the effect of the holding of the referee was that the claim of the third party to it was fraudulent and colorable merely. The holding in that case should not be extended beyond the particular facts upon which it rests.

The trustee has not petitioned for a review of the order of the referee, nor does he join in that of the creditors. He represents the creditors of this estate, and should by all proper proceedings endeavor to protect their interests. If he neglects to do so, they may be permitted to prosecute in his name such proceedings as he should prosecute. *Chatfield v. O'Dwyer*, 101 Fed. 797, 42 C. C. A. 30. Why he has not petitioned for a review of the order in question does not appear; but the facts, as disclosed by the pleadings and the evidence before the referee, are such that it is proper that the order should be reviewed, and the petition of the creditors is permitted to stand for that purpose, the same as if presented by the trustee.

The conclusion is that the referee erred in determining the merits of the controversy between the trustee and Burns Bros. regarding the property in question. His order will therefore be vacated, and the matter referred back to him, with directions to dismiss the application of the trustee, without prejudice, however, to his right, if he or the creditors shall so elect, to bring an action in any court of competent jurisdiction, as provided in section 60b of the bankruptcy act as amended, to recover this alleged preference.

It is accordingly so ordered.

In re GRAVES.

(District Court, D. Vermont. July 31, 1908.)

No. 1,686.

BANKRUPTCY—SECURED CREDITORS—SECURITY GIVEN BY THIRD PARTY.

Bankr. Act July 1, 1898, c. 541, § 57h, 30 Stat. 560 (U. S. Comp. St. 1901, p. 3443), providing for the valuation of securities held by secured creditors or their conversion into money, has no application to securities which were not the property of the bankrupt, but of a third party; and the fact that a creditor, holding the note of a corporation on which the bankrupt is indorser, sets forth in his proof of claim a mortgage given by the corporation as a security, does not give the court of bankruptcy jurisdiction over the mortgaged property, except to see that its proceeds are applied on the debt proved.

In Bankruptcy. On review of decision of referee.

O. M. Barber, for claimant.

J. K. Batchelder, for trustee.

MARTIN, District Judge. Graves, the bankrupt, filed his petition in bankruptcy October 6, 1905, and was adjudged a bankrupt on the following day. The claimant filed his proof as a secured debt Feb-

ruary 14, 1906. His claim is based upon an original note executed by the Vail Light & Lumber Company, secured by a mortgage on both real and personal estate of said company; and he also filed his submission in writing for the determination of the value of his security under subdivision "h," § 57, c. 541, under "An act to establish a uniform system of bankruptcy." Act July 1, 1898, c. 541, 30 Stat. 560 (U. S. Comp. St. 1901, p. 3443). This note is dated January 17, 1902, and given for the sum of \$35,000 to the order of A. L. Graves, the bankrupt, and J. D. S. Packer, with interest. The note was indorsed by both Graves and Packer, and was reduced by payments so that there was due, September 30, 1905, \$20,579.51. Said mortgage was given by the Vail Light & Lumber Company to Graves and Packer, under date of January 17, 1902, to secure payment of said note and to "save said grantees harmless from all loss, costs, damage, and expense, by reason of indorsing said note, or renewal thereof, or any part thereof." Said mortgage was assigned by said Graves & Packer to the claimant September 11, 1903. The Vail Light & Lumber Company is a corporation of which said bankrupt, Graves, and said Packer, were stockholders and directors. Prior to the filing of the petition of said Graves in bankruptcy, the claimant brought foreclosure of said mortgage in the state court under date of August 21, 1905, and joined therein as parties defendant said Vail Light & Lumber Company and one Hadley and one Simonds, who were then tenants under the Vail Light & Lumber Company, under a contract to occupy and improve the property of the said company, with a right of purchase of the equity therein. Service was made on the defendants, August 22, 1905, and entered by special leave in said court October 2, 1905. Petition taken as confessed and decree entered on the same day in accordance with a stipulation, which decree provided for the payment of \$5,000 and costs on or before the 1st day of December, 1905, and the balance at a later time. The proof of the claimant's debt sets forth the facts relative to the foreclosure. No payment has been made, wherefore the title passed to the claimant December 1, 1905. The claimant advertised said property at public auction, and on June 29, 1908, sold it for the sum of \$15,500.

On the 15th day of October, 1905, the claimant filed in the court of bankruptcy his petition for leave to amend his proof of claim, and therein set forth the fact that payments had been made, reducing the amount due on said note from \$35,000 to \$20,579.51; that the foreclosure proceedings had been consummated by a decree; that the defendants had failed to redeem; that the property covered by said mortgage was worth \$15,500; that he had expended in the care, preservation of the property, foreclosing, advertising, and selling the same \$350, and in taxes \$850. The trustee filed objections to the proof of said claim, setting forth, among other things, that the claimant took his decree of foreclosure for the full amount claimed to be due upon said note; that he took possession of the property without the knowledge or consent of either the bankrupt, Graves, or Mr. Packer, and that he did not join either of these parties as defendants in his foreclosure; that after the decree became absolute, by the non-payment of \$5,000 and costs, December 1, 1905, the claimant, while

in possession and control of said property, sold the same and appropriated the proceeds thereof to his own use, and all this without leave of the court of bankruptcy, notwithstanding that in the proof of his debt, filed February 14, 1906, he submitted his said mortgage security to the court of bankruptcy to be valued in accordance with said subdivision "h" of section 57 of the bankruptcy act of 1898; that the value of said property so taken under and by virtue of the decree of said court was more than the total amount due on said note, wherefore the claimant has been paid in full. There are many other objections set forth not necessary to be stated here.

It appears that the trustee consented to the allowance of the claimant's claim by the court of bankruptcy at \$5,451.15, subject to the approval of the creditors and the court. A meeting of the creditors of the bankrupt, Graves, was called for the purpose of considering the same. Sixty-eight creditors have proven unsecured debts amounting to upwards of \$33,000. Fifty-nine creditors, representing between \$8,000 and \$9,000, did not appear or vote upon said compromise. Nine creditors, representing \$24,917.92, voted in favor of the compromise, and none against it. Subsequently the matter was submitted to the referee, who held that the property covered by the claimant's mortgage must be treated as assets of the bankrupt, and should have been administered under the provisions of said subdivision "h" of section 57, the same as though it was a part of the bankrupt's estate; that the claimant, having failed to follow the provisions of said act, has no standing in this court and declined to approve said compromise. He finds the property taken by the claimant is worth at least \$18,000; that the claimant's sale of the property is a conversion, and, it being without leave of this court, also bars his right of recovery herein; that the proposed amendment in the proof of claim amounts to a new claim, and, it being nearly two years after the adjudication, is excluded by statute.

It is apparent that the assets covered by the claimant's mortgage cannot be administered by the trustee as the assets of Allen L. Graves, bankrupt. The mortgage was given by the Vail Light & Lumber Company, which is a corporation, and it covers the property only of that corporation. The referee assumes that, as the bankrupt Graves was a large stockholder, director, and creditor of that corporation, its property may be included as Graves' assets. Under this ruling any director, stockholder, or creditor of a corporation becoming bankrupt would bring into the court of bankruptcy the assets of the corporation. If this were so, and two or more creditors, directors, or stockholders should become bankrupt at the same time, serious difficulties would arise, as the trustee of each would demand the assets of the corporation, and, though the corporation might be solvent, the bankruptcy of any one of its stockholders or creditors might put it out of business.

The referee refers to the decision of this court in the case of Rutland County National Bank v. Graves (D. C.) 19 Am. Bankr. Rep. 446, 156 Fed. 168, as authority in this case. The question in that case was whether a payment made by the bankrupt, Graves, to the said Rutland County National Bank, within four months of bank-

ruptcy, was made with intent to prefer, and received under such circumstances as would charge the officers of the bank with knowledge of the bankrupt's insolvency at the time of the payment. In that case it appeared that the immediate cause of the insolvency of Mr. Graves was the burning of a valuable mill belonging to said corporation, the Vail Light & Lumber Company, after said claimed act of preference, and at a time when the bankrupt was the indorser of a large amount of the obligations of said corporation. The question then under discussion was one of intent on the part of the bankrupt in making the payment in question. The court then used this language:

"Counsel for the trustee forcibly and ably presented the theory that there must be added to the bankrupt's personal liabilities his liabilities on the Vail Light & Lumber Company notes, which amounted to many thousand dollars. I concur in this view; but [by clerical error it is printed "not"] even then the property of the Vail Light & Lumber Company may be treated as assets in considering Mr. Graves' intent in making the payment."

This is far from holding that the assets of the Vail Light & Lumber Company are to be administered by the trustee of said Graves' bankrupt estate, but far from it. Said subdivision "h" of section 57 reads as follows:

"The value of securities held by secured creditors shall be determined by converting same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors or by such creditors and the trustee, by agreement, arbitration, compromise, or litigation as the court may direct and the amount of such value shall be credited upon such claims and a dividend shall be paid only on the unpaid balance."

The only case cited by the referee that especially applies to the question of the application of property mortgaged by some outside party or a stranger to secure a note indorsed by a bankrupt that at all sustains the position of the referee in holding that the property of the Vail Light & Lumber Company, covered by claimant's mortgage, must be treated as the assets of the bankrupt, Graves, is *In re Mertens* (D. C.) 14 Am. Bankr. Rep. 226, 134 Fed. 101. This *Mertens* Case is a decision of the District Court. It was appealed and reversed by the Circuit Court of Appeals. 15 Am. Bankr. Rep. 362, 144 Fed. 818, 75 C. C. A. 548. Judge Wallace, speaking for the court, in his opinion states as follows:

"The provisions of the present bankrupt act requiring secured creditors to surrender preferences, and when the security is not preferential to have its value determined, as a condition precedent to the allowance of the claim, have no application to cases in which the security was not the property of the bankrupt. * * *"

In view of the language of Judge Wallace in the *Mertens* Case, it is useless to cite further authority; for that settles the law on this question in this circuit. In fact I can find no authority, under any statute like subdivision "h" of section 57, that holds that the court of bankruptcy may reject a claim secured by mortgage on the property of a stranger without bringing in the mortgaged property to be administered by the court of bankruptcy, except two or three cases under the Massachusetts state insolvency statute, and those cases

have been carefully considered by the federal court and held not to be authoritative. In re Cram, Fed. Cas. No. 3,343.

The fact that the claimant, in presenting his proof of claim, tendered the property of the Vail Light & Lumber Company covered by his mortgage to the consideration of the bankrupt court, can have no effect, because such an act does not give the court jurisdiction of the property, so long as there are other rights involved. There were tenants, other stockholders, and creditors of said corporation having an interest in that property. The court of bankruptcy could not foreclose these rights. Besides, foreclosure proceedings were pending in the state court when Mr. Graves filed his petition and was adjudged a bankrupt. It was perfectly proper for the claimant to proceed with his foreclosure to a decree. Had he asked leave of the court of bankruptcy to have done so, he would have been informed that the bankruptcy court had no jurisdiction over that property, so far as its title was concerned, except to ascertain its value and see to its proper application in payment on the note so indorsed by the bankrupt whenever said note may come under its jurisdiction by presentment for allowance against the bankrupt. The court of bankruptcy, in the exercise of its equitable powers, may refuse the claimant any right to share, or may reduce the amount upon which he may take contribution, in dividends, on the ground that he has obtained satisfaction, in whole or in part, out of property pledged as collateral security by some third person. Mr. Clement was entitled to prove his claim for the amount due thereon; but, having foreclosed on the property of another and obtained full and complete title thereto, he should have dividends only on the balance after deducting the value of the mortgaged property which he has received from said corporation, which is his principal debtor. It being made to appear by the finding of the referee that said mortgaged property is worth at least \$18,000, this court should not and does not reverse the referee in the exercise of his discretion in declining to confirm said compromise.

The cause is referred back to the referee to find the balance due on said note after deducting the value of the property covered by said mortgage and taken under said decree. If the counsel for the trustee and the counsel for the claimant agree as to what that balance should be, the referee is instructed to report that fact, with the amount agreed upon, to the court.

COLUMBIA DREDGING CO. v. SANFORD & BROOKS CO., Inc.

(District Court, E. D. Virginia. July 3, 1908.)

SHIPPING—CHARTER—HIRING OF SCOWS—LIABILITY FOR REPAIRS.

Libelant furnished a tug and three scows to respondent to be employed in certain dredging work at a stated hire, the contract providing that respondent should keep the scows in as good repair as when received, and return them in like condition, ordinary wear and tear excepted. When the scows were tendered, respondent objected to their condition, and they were extensively repaired by libelant to fit them for the work on completion of which repairs they were accepted and the hire commenced.

Held, that respondent could not charge libellant with the cost of repairs made on them thereafter without libellant's knowledge or consent or with the time lost while so laid up; such repairs either being such as respondent was required to make under its contract or structural changes made for its own advantage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, § 151.]

In Admiralty. Suit to recover for hire of tug and scows.

Henry R. Miller and Nat. T. Green, for libellant.

Hughes & Little, for respondent.

WADDILL, District Judge. This case is now before the court upon exceptions to the report of Commissioner John B. Jenkins, to whom the same was referred by decree of April 3, 1906, for the purpose of stating the accounts between the parties, respecting the transactions set up in the libel and cross-libel filed herein.

The case is briefly: The Virginia Dredging Company, under whom libellant claims by assignment, on or about the 24th day of May, 1904, contracted to hire the tug E. J. Codd and three scows, Nos. 9, 10, and 11, to the respondent Sanford & Brooks Company, Incorporated, to be used in carrying out the contract between the latter company and the United States government for cutting off Hospital Point, in the Elizabeth river, Norfolk, Va. The respondent contracted to pay as hire for the tug the sum of \$1,262 per month, and also to furnish coal for it, the libellant to furnish the crew. Respondent likewise agreed to pay hire of the scows at two cents per cubic yard, government measure, per day, except Sundays. At the time of making the contract, the tug and scows were at New London, Conn., and were to be delivered as soon as practicable to the respondent at Norfolk, Va., and respondent agreed to pay \$600 on account of the towage of the plant to Norfolk. The transfer was regularly made, and the tug and scows turned over to the respondent in the month of May, 1904, and continued in its service for some 14 months, with the exception of the tug, which was burned on the 2d of December. The libel in this case is filed to recover an alleged balance of \$2,426.99 for hires of the plant, and also to recover the further sum of \$1,822.58, with interest from October 18, 1905, alleged to have been expended by the libellant in repairing the scows upon their redelivery to libellant in Norfolk, at the termination of the work, in order to put them in the condition in which they were when delivered to the respondent at the commencement of the work, reasonable wear and tear excepted. The respondent filed a cross-libel, in which it denied all liability for the \$1,822.58, and insisted that, instead of owing anything to libellant, the libellant was indebted to them as follows: (a) For repairs placed upon the scows, \$1,831.98; (b) for time lost for scows being repaired, \$1,922.60; (c) for time lost by tug and expenditures made for tug hired in lieu of the E. J. Codd, \$694.63. The commissioner allowed the libellant the full amount of \$2,426.99, balance due on the hiring, and entirely rejected the libellant's item of \$1,822.58 for expenditures for repairs made upon the scows after their return by the respondent. He also disallowed entirely item "c" of libellant's offset, allowed on

account of item "b" \$1,610.36, and all of item "a" of the offset, making the account as thus passed upon by him stand as follows:

Due libelant on account of hiring.....	\$2,426.99
Due respondent for repairs.....	\$1,831.98
For loss of time while scows being repaired.....	1,610.36

\$3,442.34

—leaving a balance due by libelant to respondent of \$1,015.35, with interest from June 1, 1905, as an excess of the claim proved by the respondent over the claim of the libelant. It is as to the correctness of these findings of the commissioner that the court has to decide. The respondent has not excepted to the commissioner's report, and hence no ruling is necessary as to the rejection of item "c" of its counterclaim, or of the reduction made in item "b," or to the allowance to the libelant for the hire of its plant, and leaves only necessary for consideration the propriety of his rulings, first, in rejecting the libelant's claim of \$1,822.58 for repairs to the scows after their return; second, for the allowance of \$1,831.98 to the respondent for repairs done upon the scows pending the work, and of \$1,610.36 for loss of time while the repairs were being made on the scows.

The conclusion reached by the court is that the commissioner was right in rejecting the claim of libelant for \$1,822.58 for repairs made on the scows after their return, and that the exception to his report in that respect should be overruled. It is true that the libelant spent this sum before again putting them in commission, but it does not necessarily follow that the respondent had not reasonably complied with its undertaking to keep them in as good repair as when received, ordinary wear and tear excepted. Certain it is that the libelant should have had this question settled at the time the scows were returned, and not have received them and made the repairs without notice to the respondent. The allowance to respondent of the sum of \$3,442.34 for work done upon the scows pending the progress of the work, and for loss of time while such repairs were being made, presents for the consideration of the court the true meaning of the agreement under which these scows were hired, and whether or not the particular work charged for was what respondent, and not the libelant, should have done, and, if the libelant is responsible at all, whether the liability extends to all of the repairs in question, and whether the charges for loss of time incident to the work are reasonable. The court is quite clear that the libelant is in no manner liable for repairs of a structural character upon the scows found by the respondent during the progress of the work, to be desirable for its particular business in hand, and the court is likewise clear that the allowance of \$1,610.36 for loss of time of these scows while putting \$1,831.89 of work upon them is unreasonable. *Sovereign of the Seas* (D. C.) 139 Fed. 812. Should an allowance be made at all on account of these items of offset, that made on account of repairs should be modified so as to exclude the cost of the structural changes aforesaid, and the allowance for lay-off during the repairs and changes should be materially reduced. A striking illustration of this is found in the charge of \$873.12 for 51 days' loss of work on scow No. 10 at \$17.12 per day, whereas

the cost of the work covering the same period was \$9.12 per day, aggregating \$465.04; in other words, an allowance of 51 days to do \$465 of work, and charging for such time \$17.12 per day for the lay-off of the vessel, giving the respondent a handsome bonus for keeping the scow in the repair shop, instead of in the water. No formal charter party was entered into between the parties for the hiring of the plant, and what was the real undertaking between them can only be ascertained from the correspondence on the subject, in the light of the verbal explanations made by the actors of what occurred at the time of the transaction in question. In the letter of 23d of April, 1904, from respondent's vice president to the president of the libelant company, it is said:

"Confirming our conversation of this morning over the long distance phone, beg to state that we agree to take your tugboat E. J. Codd at \$1,200 per month, we to furnish coal, and your three scows, Nos. 9, 10 and 11 at 2¢ per cubic yard per day on government measurement, it being understood that we will keep the scows in as good repair as they are when received and return them in like manner, ordinary wear and tear excepted. It is also understood that you should deliver these scows and tugboat to us at Norfolk as soon as it is practicable to do so, and you are to pay \$1,400 for towing them from New London, Conn., to Norfolk, of which amount we agree to pay \$600, provided we keep the scows for six months or longer; or if you require the use of them sooner that we are to pay \$100 of the \$600 for each month that we keep them—that, if we keep the scows one month, we would pay you \$100 of this tow bill. If we keep them three months, we pay you \$300 of this tow bill, and so on. You have the privilege of taking them back at any time by giving us reasonable notice that you want them. By reasonable notice we understand that you would give us ten days' notice. Of course, we should prefer a longer notice if convenient for you to give it to us."

A change was made from \$1,200 to \$1,262 for the hire of the tug in subsequent correspondence, and it was agreed that the respondent would retain the plant, unless libelant called for its return, upon notice as contemplated in the letter above, during the period of the government work in removing Hospital Point, and the question of libelant's having the scows properly treated with a view of preventing destruction from worms was considered and agreed upon. The language of this letter, which embodied the substance of the understanding between the parties, seems too plain to admit of serious doubt. It clearly contemplated the delivery to and acceptance of the plant by the respondent in a "seaworthy" or what might be more properly described as stated by respondent's witness McCoy, a shipbuilder, a "good working condition for the work they were to do there," meaning the removal of mud from the cut off in question, within the harbor of Norfolk. This plant was brought down from New London to Norfolk, and turned over to respondent's representatives; but the question of the condition of the scows was raised, and fully considered before their formal acceptance, and the libelant spent some \$3,000, and as much as \$1,500 on a single scow, being scow No. 10, to place them in satisfactory condition for the work in hand, and, with a view of arriving at an understanding as to the delivery and acceptance of the scows, a meeting was held between the parties in the city of Baltimore on the 23d of May, 1904, at which the matter was settled, and, to the end of having no misunderstanding, the vice president of the respond-

ent then and there addressed to the president of the predecessor of the libelant the following communication:

"Dear Sir: Referring to our interview to-day, we understand the following to be the result: We agree to pay you for tug Codd \$1,262 a month instead of \$1,200. In regard to the scow hire, we agree to pay you for the yardage that the scows have produced in accordance with the statement enclosed herewith, it being understood that we will not take the three scows until they are finally overhauled and turned over to us, No. 11 having been completed and turned over to us on the 16th instant, No. 9 we understand was turned over to us on Saturday last, May 21st, and No. 10 is now under repairs."

By subsequent correspondence it is shown that scow No. 10 was accepted on June 21, 1904.

The repairs charged for, and which form the subject of the exception under consideration, were all made subsequent to this final acceptance of the scows, and at periods covering from one to five months thereafter, and in the opinion of the court the changes are made up chiefly of such items of repairs as became necessarily incident to the working of the scows, or of improvements rather of a permanent character in the structural make-up of the scows which respondent saw fit to make for its own convenience, and the better handling of the same. Manifestly improvements of the latter kind could not be made at libelant's cost, and without its knowledge and consent, and those of the former class were clearly such as the contract of hire contemplated the bailee should make. Whether it be that the understanding between the parties meant that the scows should be in a "seaworthy" or in a "good working condition for the work they were to do there," this condition evidently had relation to the time of their acceptance, and not that they were always to remain so during the indefinite period of the hire, and that they were to be so maintained by the libelant. Such a view is not only inconsistent with the plain terms of the undertaking, but at variance with everything that was done. Had that been the idea of the parties, the question of the condition of the scows at the time of acceptance would have been utterly immaterial, as the respondent would simply have had to lay off the scows for repair at libelant's expense. The letter last copied of May 23, 1904, contains this significant language:

"It being understood that we will not take the three scows until they are finally overhauled and turned over to us."

And in the first letter above copied of April 23, 1904, is this provision:

"It being understood that we will keep the scows in as good repair as they are when received, and return them in like manner, ordinary wear and tear excepted."

The repairs and improvements charged for being either of the kind for which libelant should not be held responsible, or of the character that respondent, and not the libelant, should have made, the exceptions to the commissioner's report allowing \$1,831.98 therefor and \$1,610.36 for loss of time of the scows while repairs were being made, should be sustained, and from this it follows that a decree should be entered in libelant's favor for \$2,426.99, instead of \$1,015.35 in favor of re-

spondent, with interest from June 18, 1905. This would at least seem to be more in keeping with the meting out of justice between the parties. To sustain the report would be to allow the respondent who chose to retain the scows in his possession to get them free of rent to the extent of the amount sued for of \$2,426.99, to have a decree over against libellant for \$1,015.35, and the latter to lose, in addition, the sum of \$1,822.58 found necessary to be expended to put the scows in working condition at the time of their return.

The court is not unmindful of the weight that should be given to a master's report, but cannot see its way clear to follow the conclusions reached in this case, as the same are, in the judgment of the court, plainly erroneous, and hence should not be adopted. *The Carib Prince*, 170 U. S. 655, 658, 18 Sup. Ct. 753, 42 L. Ed. 1181; *The Wildcroft*, 201 U. S. 378, 387, 26 Sup. Ct. 467, 50 L. Ed. 794; *The Sappho*, 94 Fed. 545, 36 C. C. A. 395.

A decree may be entered carrying out the views herein expressed.

UNITED STATES v. SIXTY-SIX CASES OF CHEESE et al.

UNITED STATES v. SEVENTY-NINE BAGS OF CHEESE.

(District Court, E. D. New York. February 22, 1908.)

CUSTOMS DUTIES—FORFEITURE—COMPLETED FRAUD.

Construing Customs Administrative Act June 10, 1890, c. 407, § 9, 26 Stat. 135 (U. S. Comp. St. 1901, p. 1895), providing that if any person "shall make or attempt to make any entry of imported merchandise by means of any fraudulent or false invoice, * * * by means whereof the United States shall be deprived of the lawful duties, * * * such merchandise * * * shall be forfeited," *held*, that it is not essential that there should be a completed fraud upon the United States, but that it is enough if the act or attempt is of a character calculated to deprive the United States of duty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Customs Duties, §§ 263, 264.]

In Rem. On information for forfeiture.

The full titles of these two cases are *United States v. Sixty-Six Cases of Cheese*, *Fifty Cases of Cheese*, and *Twenty-Five Bags of Cheese* (Constantine M. Crapsitis, Claimant), and *United States v. Seventy-Nine Bags of Cheese* (Michael Pollis, Claimant).

William J. Youngs, U. S. Atty., and S. Brewster Strong, Asst. U. S. Atty.

Everit Brown, for claimants.

CHATFIELD, District Judge. An information has been filed against a certain quantity of cheese seized by the agents of the Treasury Department after entry. The cheese had been imported subject to a specific duty, and the formal entry at the Custom House is charged to have been made by means of a certain false and fraudulent invoice, known to the importer to be false, in that the quantity of cheese was understated. The forfeiture is based upon the provisions of Act Cong. June 10, 1890, c. 407, § 9, 26 Stat. 135 (U. S. Comp. St. 1901, p. 1895).

Criticism of this information is made because no allegation is contained therein showing a completed fraud upon the United States. This is based upon the decision in the case of *United States v. Ninety-Nine Diamonds*, 139 Fed. 961, 965, 72 C. C. A. 9, 13, 2 L. R. A. (N. S.) 185, in which the court says:

"Section 9 creates and prescribes a punishment for no act which does not deprive the United States of some of its lawful duties."

The language of section 9 is:

"That if any owner, importer, consignee, agent, or other person shall make or attempt to make any entry of imported merchandise by means of any fraudulent or false invoice, * * * by means whereof the United States shall be deprived of the lawful duties or any portion thereof, accruing upon the merchandise or any portion thereof, embraced or referred to in such invoice, * * * such merchandise * * * shall be forfeited. * * *"

The case of *United States v. Ninety-Nine Diamonds*, supra, discusses what may be the effect of the words "by means whereof the United States shall be deprived of the lawful duties," and, while it applies these words to every portion of the statute, the entire decision is directed to the point that an actual defrauding of the government must be involved in the consequences of the fraudulent act. On page 971 of 139 Fed., page 19 of 72 C. C. A. (2 L. R. A. [N. S.] 185), the court uses the following language:

"As there is no evidence that it deprived, or was intended to deprive, the government of any of its revenues, the use of it did not constitute an offense under the law."

The prior cases of *United States v. Cutajar* (C. C.) 60 Fed. 744, and *United States v. Rosenthal* (C. C.) 126 Fed. 766, are in point, and are not overruled by the case of *United States v. Ninety-Nine Diamonds*, supra, which differs from them on the other proposition. The case of *United States v. Boyd*, 24 Fed. 692, seems to more nearly state (at page 694) the effect of section 9, in so far as the question now under discussion is concerned. The court says:

"If the act or attempt is to enter merchandise by a false statement, etc., of a character which is calculated to deprive the United States of duty, the statute is satisfied. The use of the future tense is consistent with this interpretation. If the statute had used the word 'will,' instead of 'shall,' no one would doubt that this would be the meaning."

While this case arose under the former statute, nevertheless the language considered is entirely the same, and the decision applicable to the present situation.

The exceptions to the information will be overruled.

UNITED STATES v. TWENTY BOXES OF CHEESE.

UNITED STATES v. TWO HUNDRED AND TEN HALF-CASES OF FIGS
et al.

(District Court, E. D. New York. April 4, 1908.)

1. CUSTOMS DUTIES—FORFEITURE—FRAUDULENT ENTRY—FALSE STATEMENT BY SHIPPER—INNOCENCE OF PERSON MAKING ENTRY.

Where merchandise is innocently entered by a person on an invoice fraudulently made out by the foreign shipper, it is not liable to forfeiture under Customs Administrative Act June 10, 1890, c. 407, § 9, 26 Stat. 135 (U. S. Comp. St. 1901, p. 1895), providing such penalty where an importer "or other person" makes a customs entry of imports "by means of any fraudulent or false invoice," etc.

2. SAME—FALSE STATEMENT OF WEIGHT—CONSUMMATION OF FRAUD.

Under Customs Administrative Act June 10, 1890, c. 407, § 9, 26 Stat. 135 (U. S. Comp. St. 1901, p. 1895), providing for forfeiture of imports entered by means of a false invoice, etc., the falsification must be such that if consummated it would deprive the United States of lawful duties. But if by itself, without further wrongful acts, it could not, in the regular course of procedure, produce such result, forfeiture is not incurred, even though there may have been wrongful intent.

In Rem. On exceptions to informations for forfeiture.

William J. Youngs, U. S. Atty. (S. Brewster Strong, Asst. U. S. Atty., of counsel).

Hatch & Clute (Walter F. Welch, of counsel), for claimant.

CHATFIELD, District Judge. Certain property, consisting in one case of 20 boxes of cheese, and in the other of 210 half-cases of figs and 59 cases of figs, has been seized by the officers of the customs service, and the United States attorney for the Eastern district of New York has filed a separate information asking for the forfeiture of these goods, alleging a violation of the provisions of Act Cong. June 10, 1890, c. 407, § 9, 26 Stat. 135 (U. S. Comp. St. 1901, p. 1895). The language of this section has been recently interpreted by this court, with reference to the meaning of the words "making or attempting to make an entry," and it was there held that the false invoice or false statement by means of which the entry was made must be of such a character that, if consummated, the falsification would deprive the United States of some of the lawful duties accruing upon the merchandise.

So far as the present information against 210 half-cases of figs and 59 cases of figs is concerned, the form of the allegation is the same as in the former case, and is, in effect, that a seizure has been made of certain goods entered by one Theodore Economu, as importer, owner, and agent, with intent to defraud the revenue of the United States, by declaring in the invoice and entry a smaller weight of figs than the amount which the said Economu knew was contained in the cases, with the further allegation that thereby the said Economu intended and attempted to defraud the United States of a portion of the duties due upon that merchandise.

The information against the 20 boxes of cheese, on the other hand, contains a statement: That a seizure has been made of 20 certain

boxes of cheese, of the value of \$1,193.39, entered by one Theodore Economu, on the 26th day of December, 1907, under entry No. 342,-585, the merchandise having been imported by means of the steamer Alice, from a foreign port, to wit, Patras, Greece; that on the 27th day of November, 1907, at Calamata, Greece, one Michalakeas was "the owner, importer, and consignee" of the said merchandise, and did then make the required invoice, wherein the said Michalakeas did declare an intention to enter the goods at the port of New York; that the weight of the said 20 boxes of cheese was 1,282 kilograms, when in fact the actual weight was 1,770 kilograms, as the said Michalakeas well knew; that the said Michalakeas made a false invoice, with the intent to deprive the United States of lawful duties upon a portion of the merchandise upon entry at the port of New York; and that thereby the said Michalakeas was guilty of making a false and fraudulent statement of the weight of the said cheese, whereby the United States was to be deprived of a portion of the lawful duties thereon.

Objection is raised to each of these bills of information on one ground, while a second or further objection is made to the latter bill with respect to the 20 boxes of cheese. These objections must be taken up separately.

Considering first the second objection to the information relating to the 20 boxes of cheese, let us consider what violation or ground of forfeiture is charged. The information sets forth a wrongful act upon the part of said Michalakeas, at a Grecian port, and that the false invoice was made with the intent to have the United States deprived of certain duties when the goods should be entered at the port of New York.

Section 9 of the Customs Administrative Act provides substantially as follows:

"If any owner, importer, consignee, agent, or other person shall make or attempt to make any entry of imported merchandise by means of any fraudulent or false invoice, * * * or by means of any false statement, written or verbal, * * * or shall be guilty of any willful act or omission by means whereof the United States shall be deprived of the lawful duties, or any portion thereof, accruing upon the merchandise, * * * such merchandise, or the value thereof, to be recovered from the person making the entry, shall be forfeited, * * * and such person shall, upon conviction, be fined for such offense * * * or be imprisoned. * * *"

It will be noted that there is no provision in this statute requiring knowledge on the part of the "person" referred to, except in so far as such knowledge is necessarily inferred from such language as "willful act," "false invoice," "false statement," and "fraudulent practice." The section is one in which, under some circumstances, knowledge and wrongful intent might be a necessary inference from the act itself. On the other hand, the language of the statute is capable of the interpretation that the falsity and fraudulent quality of the paper or information is made the basis of the forfeiture, and that the goods of a consignee or person making the entry might be forfeited and the amount recovered, because of the fraud of some other person, even in the event of entire innocence of that fraud in the mind of the per-

son entering the goods. So far as the criminal provisions of the section are concerned, scienter is not made a necessary allegation, except in so far as the acts prohibited imply some responsibilities, in order to make out any offense whatsoever. As in many other statutes, if a person shuts his eyes to wrongdoing, or becomes a party to the transaction, in such a way as to make himself responsible for the consequences, his knowledge, or lack of knowledge, of the actual wrongdoing, may be immaterial. The government seems to have proceeded on this theory in charging fraudulent practice against Michalakeas, in Greece, and in demanding forfeiture because of this fraud, with no allegation of fraud or guilty knowledge on the part of Economu, who actually entered the goods in the United States.

This point, however, has been recently passed upon adversely in the case of *One Silk Rug* (decided by the United States Circuit Court of Appeals, Third Circuit, upon the 30th day of January, 1908, and printed so far only in the form of Treasury Decision No. 28,779) 158 Fed. 974. The Circuit Court of Appeals states the position of the government, in that case, substantially as outlined above to be the government's position in the case at bar, and then uses the following language:

"We cannot accede to such a construction. This statute must be construed as a whole. * * * The statute, down to the last four lines, * * * had to do wholly with the forfeiture proceeding. * * * To determine who 'such person' and what 'each offense' is, we resort to the forfeiture clause. It follows therefore that unless such forfeiture clause requires a guilty scienter and intent on the part of the forfeitor, Congress had, by the crime clause, subjected to fine and imprisonment one guiltless of criminal intent."

The court then says that the words "fraudulent," "false," and "willful," quoted above, imply the necessity of a guilty scienter and intent, and that the remedy lies in legislative amendment rather than in a different construction.

This decision is at present the authoritative determination of the courts upon this section, and should be controlling in the present case. The information in question, however, is not to be considered insufficient, solely because of this failure to allege scienter. The allegations do not show falsity as to matters which by themselves would occasion any fraud upon the United States, nor effect the deprivation of any duty. The falsity alleged consisted of an understatement of weights of articles which are subject to a specific duty, and in which the final liquidation of that duty must be taken into account before it can be determined whether the United States would be or actually was deprived of any part of that duty. Exceptions are taken to each of the informations on this ground, and as has been said, following the language of the case of *United States v. Boyd* (C. C.) 24 Fed. 692, the fraudulent act must be one which is calculated to deprive the United States of duty, in order to satisfy the statute. And in the case of *United States v. Ninety-Nine Diamonds*, 139 Fed. 961, 72 C. C. A. 9, 2 L. R. A. (N. S.) 185, the court holds that a mere immaterial false statement, from which no deprivation could result, is insufficient to bring the act within the law. The tax to be paid is ultimately determined from a return made by the weigher or other official who

examines and certifies the dutiable amounts or quantities of goods. The duty is not finally figured out from the invoice, and, without the assistance of some further fraud or collusion on the part of the government employ  s, a mere misstatement in the invoice, of the quantity of goods in the importation, would result neither in any fraud upon the United States, nor any deprivation of duty. Government officers must be presumed to do their duty, and informations charging a deviation from the regular course of procedure must show a wrongful act or succession of wrongful acts, from which the deprivation of duty would result, if the attempt should not be frustrated. If known to the importer or consignee, and included by him with fraudulent intent, such use of the false invoice might be one step in an attempt to defraud the United States, but the full attempt should be charged.

The informations in question do not even allege that the government was or would be deprived of any duty, nor that the false invoice could have any effect, or was or would be used for liquidating the duty. The allegation of each information is that the false invoice was used in making an entry, with the intent in the person using it to deprive the United States of a portion of the lawful duty accruing on the goods entered. The information alleges wrongful intent, as if a criminal charge was the object of the allegations, but no other purpose or plan of operation, by which deprivation of duties or loss was or could be the result, is stated or suggested. An allegation of intent to commit a crime, without any allegation as to the commission of the crime, nor any statement of such facts as would constitute commission or an attempt at commission, is not of itself sufficient, either for the purpose of prosecution, nor as an information in a civil case. The exceptions being in effect a demurrer, and the allegations of the information therefore to be taken as true, nevertheless these allegations must be construed carefully, as they are all from which the court can determine the facts included in the charge.

In such a situation, where allegations of further supposititious facts have to be inferred, the information must be held defective.

THE WASHTENAW.

(District Court, E. D. New York. July 11, 1908.)

1. ADMIRALTY—PLEADING—SUFFICIENCY OF ANSWERS TO INTERROGATORIES.

Answers by a claimant in admiralty to interrogatories in an amended libel demanding particulars in respect to allegations of fraud in the answer, stating certain of such particulars, and that as to the others claimant has no knowledge or information, but expects to prove the allegations from cross-examination of libellant's witnesses and from an examination of its books, are not subject to exception for insufficiency, especially where libellant resists a motion by claimant to be permitted to make such examination.

2. SAME—POWERS OF COURT—DISCOVERY.

A court of admiralty has powers as broad as those of a court of equity to compel the production of books and papers, and, if satisfied of the justice of the application, by affidavit or otherwise, may require such production on motion.

3. ACCOUNT STATED—CONCLUSIVENESS—IMPEACHMENT FOR FRAUD.

A stated account is not conclusive, but may be impeached for fraud.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Account Stated, §§ 50-58.]

4. ADMIRALTY—RIGHT TO DISCOVERY.

Where a suit in admiralty to recover on a contract for repairs made on a vessel and on an account for extras, in which the claimant alleges fraud, has been referred to a special commissioner to take proofs, the claimant is not entitled to an order on the libelant for the production of books and papers in advance of such hearing on which it may obtain such production on motion or by a subpoena duces tecum.

In Admiralty. On motion for order for production of books and papers and exception to answer.

White & Case (Charles J. Fay, of counsel), for libelant.

Sullivan & Cromwell (William J. Curtis and Henry H. Pierce, of counsel), for claimant.

CHATFIELD, District Judge. Two motions are before the court; one by the claimant for an order directing the libelant to permit the claimant to inspect the books, documents, and papers of the libelant, as to certain entries in its time books, material books, pay rolls, cash books, ledgers, etc., and the other by the libelant upon exceptions to the answers of the claimant to certain interrogatories annexed to the amended libel in the action. The second motion will be considered first.

The libelant has sued for work alleged to have been done under contract, and as extras, in the repair of a vessel called the Washtenaw. The libelant has claimed that it has furnished accounts to the claimant, and that these have been accepted, and that the amount claimed is due as the balance of an account stated. The claimant has answered, denying that the work was done, and further alleging fraud on the part of the libelant in obtaining the approval of the various accounts upon which the account stated is based. The libelant has thereupon demanded, through its interrogatories, particulars of the items claimed to be fraudulent, and with respect to which fraud is claimed. In answer to these interrogatories, the claimant has specified some allegations and has denied any knowledge or information as to the particulars of the other allegations, but has answered that it expects to prove these from cross-examination of the libelant's witnesses, and from an examination of the books and papers of the libelant, together with the testimony of experts as to the work done.

So far as the motion upon the exceptions to these interrogatories is concerned, it would seem that the motion should be denied. The claimant has stated its position and disclaimed knowledge or the possession of testimony further than that set forth, and by these disclaimers the claimant must be bound. It is impossible for the court to require the giving of particulars as to testimony concerning which the party swears that it has no knowledge, and, as to evidence to be obtained from libelant's books, the claimant cannot be compelled to set forth the details of what he seeks to find, when he states in his sworn answer that no information is at hand, and that he desires to get the information by this examination.

But this very situation, and the statement of the claimant that it has not such information, bear strongly upon the disposition of the other motion, and upon the position of the court with respect to the compelling of the production of the books and papers required. It might be that an examination of these books and papers would enable the claimant to give further answers to the interrogatories, and, if an examination should now be ordered, the claimant might be compelled by this court, at a later date, to answer further. In this way the motion to sustain the exceptions to the answers already furnished could then be granted, but inasmuch as the libellant opposes such examination and demands further answers to its interrogatories, previous to that examination, it is considered by this court that the libellant's motion to have its exceptions sustained must be denied, and the answer allowed to stand as at present on file in the case.

As to the motion for discovery, a serious question has arisen at the outset. This application has been made upon affidavits and notice of motion. The situation is one where, in equity or with respect to an action at law, a bill for discovery might have been filed; but it is contended by the libellant that in admiralty this court has the power to compel the production of books and papers without resort to a separate action in equity, in the nature of a bill for discovery, and that the court has not only the right to but greater precedent for compelling the production of the books and papers upon motion even than when a similar question arises in an action in equity itself.

The libellant has cited the cases of *The Alert* (D. C.) 40 Fed. 836, *The Epsilon*, Fed. Cas. No. 4,506, 6 Ben. 378, 389, and *The Hudson* (D. C.) 15 Fed. 162, to show the authority of the admiralty court and its power to regulate its modes of proceeding and the practice in matters similar to that of discovery. The libellant has also cited the cases of *The Voyageur De La Mer*, 28 Fed. Cas. No. 17,025, and *Havermeyers & Elder Sugar Refining Co. v. Compania Transatlantica Espanola* (D. C.) 43 Fed. 90, and now calls attention to the case of *Deslions v. La Compagnie Générale Transatlantique* (Advance Sheets for June 15, 1908) 28 Sup. Ct. 664, 52 L. Ed. —. In the first two cases referred to, Judge Sprague and Judge Brown seem to recognize the right to order production of books and papers in connection with compelling the answers to interrogatories, although the particular motion was in each case denied, and in the case of *Deslions v. Compagnie Générale Transatlantique*, the Supreme Court of the United States has approved of the exercise by the District Court judge, upon the original trial, of the authority to direct the production of books, and that the claimant should have attempted to give secondary evidence, and to have asked for relief for the contumacy of the libellants, if they intended to rely upon the argument that the books were not produced; but in this last case a subpoena duces tecum had been served as well. The language of Story's Equity Pleadings, §§ 551, 552, and 555, also sections 484, 485, and 1495, states the history of bills of discovery and the authority of an equity court with relation thereto, and justifies the determination that a court of equity might refuse to assist a court of admiralty, if the court of admiralty has the authority to order the production of the papers themselves, upon application to it upon affidavits.

It seems to this court that a court of admiralty has the power, upon being satisfied as to the justice of the application for discovery, to compel the production. The growth of the admiralty law out of the civil law, and the exclusive authority which the admiralty court has retained to itself, all bear out the contention that, if the judge in a court of admiralty is satisfied as to the justice of the application, his powers are as broad as those of the court of equity itself. It would seem that the application may be made by affidavit, or that the taking of testimony can be compelled, if the production of witnesses is considered necessary; but in so far as the present application depends upon the power of the court to compel the libellant to obey the order of this court, for the production of such books and papers, it would seem that such a production could be ordered, and even upon affidavits, if they be deemed sufficient therefor; nor would any constitutional rights seem to be involved, as the matter would not seem to be within the decision of *Boyd v. United States*, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746, and *Interstate Commerce Commission v. Baird*, 194 U. S. 25, 24 Sup. Ct. 563, 48 L. Ed. 860.

The serious questions are: (1) Whether such a case has been made out on this application as would justify discovery in equity; and (2) whether the affidavits on this motion show a situation upon which an examination of the books and papers should be allowed prior to a hearing of the issue of an account stated, and the bringing of the books and papers into court by means of a subpoena duces tecum, or a motion during the trial, if any part of these books is to be put in evidence or used in bringing out evidence.

The issues in both actions have been referred to a special master to hear and determine. It will be necessary for the libellant to present the accounts the approval of which he claims to constitute his account stated, and it will be necessary for the libellant to determine whether he will rest upon the statement of the account, or whether he will treat the approval of the various charges merely as evidence, and will proceed to show the amount and value of the items making up that account. The statement of an account is not conclusive, and a defense of fraud might have the effect of actually defeating the cause of action, or of compelling an amendment to the complaint under which the actual items of the account might be proven. *Panama Telegraph Co. v. India Rubber Co.*, L. R. 10, Ch. Apps. 515; *Standard Lumber Co. v. Butler Ice Co.*, 146 Fed. 359, 76 C. C. A. 639, 7 L. R. A. (N. S.) 467; *Harrington v. Victoria Graving Dock Co.*, 3 Q. B. D. 549. In fact, in the present case, in spite of the charge of fraud made by the claimant, the amount already paid for extra work, and the amount as admitted upon the argument of these motions to be due, is so considerable that the libellant is, to a certain extent, justified in urging an immediate determination of what his recovery shall be; while, on the other hand, the claimant would also seem to be justified in putting the libellant to proof of his items, if the fraudulent practices charged can be substantiated as to any part of the work. The court is unable to understand why the claimant, if this case is to be tried before a master with hearings covering a considerable period of time, will be unable to obtain by means of a subpoena duces tecum or motion

any books from which it may wish to obtain evidence on its side of the case. It would seem as if the claimant were endeavoring to learn whether it can substantiate the defenses which it has charged. If this were being done with a view to settlement of the cause of action, perhaps it should be encouraged. The libellant, on the other hand, seems to be in a position where he might facilitate a settlement, if his claims are just, by a production of the books and papers demanded; but each side has taken its position advisedly, and maintained it earnestly, and the court does not feel that the occasion is one where discovery of the evidence is demanded ahead of the hearings before the master.

In some respects the case greatly resembles that of *McMullen Lumber Co. v. Strother et al.*, 136 Fed. 295, 69 C. C. A. 433; but it may be noted that the action was there brought in equity for an accounting, upon an allegation that there was no adequate relief at law, and that the discovery asked for was but the compulsory production upon the trial of the books from which the joint accounts could be balanced. Such a case is not shown here. The very relief demanded in the *McMullen Case* will be afforded by the taking of testimony before the master, and the reference to Story's Equity Pleadings previously made, to the effect that a bill of discovery is unnecessary, where the adequate relief can be had at law in the action itself, seems to justify the determination that the claimant does not need an examination of these books merely in preparation for trial, and that such examination as may prove to be necessary is easily within the control of the master.

The position taken by the claimant in its answer makes it improper to grant what, under the circumstances, would be an investigation to see if the allegations of fraud, which have been already made, were justified.

The motion for the production of the books and papers must therefore be denied, and the matter left to the special master for such production of documents as he may see fit to direct.

RAGLAND v. NORFOLK & WASHINGTON (D. C.) STEAMBOAT CO.

(District Court, E. D. Virginia. July 22, 1908.)

1. SHIPPING—CARRIAGE OF PASSENGERS—AUTHORITY OF MASTER—DELEGATION—ARREST.

The authority of the master of a vessel carrying passengers to arrest them cannot be delegated to minor officials or others on board, but, as far as is reasonably possible, must be exercised personally, at least to the extent of giving directions therefor.

2. SAME.

If the authority of the master of a vessel to arrest a passenger may be delegated at all, it must be to a person of experience and known to possess character, intelligence, judgment, and tact, and the authority so delegated should not be exercised without the master being called on to determine the necessity therefor, unless the ship or other passengers are endangered.

3. SAME—IMPRISONMENT OF PASSENGER.

Where a passenger on a steamship was arrested by a watchman, without justification, dragged down the saloon stairway by the collar, pushed

inside the freight room, and kept there in custody of another watchman for an hour, the shipowners are liable in admiralty as for a false arrest and imprisonment.

4. SAME—DAMAGES.

A passenger on a steamboat was arrested, without justification, by a watchman at night, dragged to the lower deck by the collar, and placed inside the freight room provided for second class passengers in charge of another watchman for an hour. He was greatly humiliated, but no serious harm was done him further than the indignity and inconvenience imposed for the time being. *Held*, that libelant was entitled to damages in the sum of \$1,000.

In Admiralty.

This is a libel in personam to recover damages for the false arrest and imprisonment of the libelant on board the steamer Norfolk, of the Norfolk and Washington (D. C.) Steamboat Company, on the night of the 25th of September, 1907. On the day named, the libelant, being in New York, bought a ticket over the Pennsylvania Railroad via Washington by the respondent's steamer to Norfolk. He left New York about 11 o'clock in the forenoon, and arrived at Washington about 5 o'clock in the afternoon, and at once proceeded to the steamer. Shortly after arriving on board, he saw the purser of the vessel, and asked him for a stateroom, and was told to come back at 9 o'clock that night, by which time the purser expected to have ascertained whether any passengers who had previously reserved accommodations, had failed to take the boat, and might thus be able to give libelant a stateroom. The evidence does not show that libelant returned to the purser's office as requested, but it is a fact that he did not get a stateroom. At this period of the year, and owing to the large crowds who were traveling by this steamship line to the Jamestown Exposition, the boat could not provide staterooms for all passengers; only those booking in advance procuring same. To meet the situation, and afford as much convenience to travelers as possible, the steamship company provided cots or mattresses, which were laid on the floor of the saloon; the forward portion of the saloon being set apart for men, and the after part for women. Some time about 10 o'clock at night, when the stewards came around to place the mattresses in position for use by passengers, the libelant was seated on a settee, having his suitcase with him. The person in charge of the mattresses asked him to move, but libelant refused, alleging that he was a first-class passenger, and entitled to a seat. The officer then went on to other parts of the saloon to see that the mattresses were properly arranged. Shortly thereafter, a second watchman, also on duty and engaged in the same business, approached the libelant from the end of the ship opposite from where the first watchman had come, and, finding libelant at the settee and his baggage on the floor, ordered him to move same, and himself also, as the space occupied by libelant and his suitcase was required to place a mattress there. Libelant, at the time the second officer approached, was talking to another passenger named Johnson, and some words passed between them as to the dirty condition of a mattress, which were overheard by the second watchman, who thereupon took exception to libelant's remarks, and, in the presence of a large crowd of passengers, cursed and abused him, causing him to be greatly humiliated, and caught him by the collar and dragged him to the stairway leading to the lower deck, and down the steps, finally taking libelant to the freight room door, when he pushed him inside the freight room, the place provided for second-class passengers, and directed another watchman there to keep libelant in there until he (the second watchman) let him go upstairs, or he promised to behave himself. Libelant, upon being thus put under arrest, demanded to see the captain, or some officer superior in authority to this watchman by whom he had been placed under arrest, which request was denied, on the ground that the captain was asleep, which the evidence shows was not the case. Libelant was confined on this freight deck under arrest and guard for about an hour, and then allowed to return to the saloon deck, where he resumed and kept the seat formerly occupied by him for the

remainder of the night, and until he left the vessel next morning in Norfolk.

The respondent charged: That libelant was boisterous in his conduct, and profane in his language, and refused to obey the orders of the officers of the ship, and for these reasons he was removed to the freight deck; that he was treated gently, with no more force than was absolutely necessary; that libelant was not cursed or threatened in any manner; and that his removal from the saloon was justifiable under the circumstances.

The controverted facts in this case are very few. There is considerable dispute as to whether Ragland was sitting down or standing up at the time the altercation which brought about this arrest took place, but that is not very material. The fact is that he was sitting down when he had the talk with Thompson, the first watchman, and, when Wilson came around later, he was standing up.

Thorp & Bowden, for libelant.

Loyall, Taylor & White, for respondent.

WADDILL, District Judge (after stating the facts as above). This is the case of a passenger placed under arrest. The preponderance of evidence establishes the truthfulness of libelant's version as to what occurred and the manner of his treatment. His witnesses were passengers, traveling salesmen, evidently persons of character and intelligence, entirely disinterested, who did not know libelant, nor he them. They resided in three different states, Louisiana, Mississippi, and Tennessee, and agree that the arrest and treatment of the libelant was outrageous, uncalled for, and neither justified or necessitated by anything libelant said or did. According to respondent's witness Wilson's own account of the transaction, there was no excuse or necessity for what was done. Officers of steamboats and passenger vessels should be exceedingly careful before putting a passenger under arrest. They are the servants of the passengers on their boats, paid for the purpose of treating them kindly. The trouble on this occasion largely arose from a misapprehension on the part of the captain of the steamer of his power and duty as master of the ship. The master of a passenger steamer is an exceedingly important officer. He should be of exceptional firmness, intelligence, and character, and more than ordinarily endowed with common sense and tact, and always gentle and courteous. He has vast powers in dealing with passengers in situations that are liable to and do arise on his vessel, and he may in a proper case, and after exhausting pacific measures, place a passenger under arrest; but to suppose, as he testified he did, that he could delegate this authority to minor officials or others on board, cannot be sanctioned. When the time comes to arrest passengers, an occurrence on a steamboat only second in importance to navigating the vessel in safety, it is his duty to properly care for and protect them, as far as is reasonably possible, and personally to exercise the responsible duties at hand, and at least to give personal direction to what is being done.

In the case of Chamberlain et al. v. Chandler, Fed. Cas. No. 2,575, Story, Circuit Judge, states the master's authority on a vessel as follows:

"The authority of a master at sea is necessarily summary, and often absolute. For the time he exercises the right of sovereign control, and obedience

to his will and even to his caprices becomes almost indispensable. If he chooses to perform his duties, or to exert his office in a harsh, intemperate, or oppressive manner, he can seldom be resisted by physical or moral force, and therefore in a limited sense he may be said to hold the lives and personal welfare of all on board in a great measure under his arbitrary discretion. He is nevertheless responsible to the law, and, if he is guilty of gross abuse and oppression, I hope it will never be found that courts of justice are slow in visiting him, in the shape of damages, with an appropriate punishment. In respect to passengers, the case of the master is one of peculiar responsibility and delicacy. Their contract with him is not for mere ship room and personal existence on board, but for reasonable food, comforts, necessities, and kindness. It is a stipulation not for toleration merely, but for respectful treatment, for that decency of demeanor which constitute the charm of social life, for that attention which mitigates evils without reluctance, and that promptitude which administers aid to distress. * * * It gives compensation for mental sufferings occasioned by acts of wanton injustice, equally whether they operate by way of direct or of consequential injuries."

Hughes on Admiralty, § 102, page 187, says:

"Any improper treatment of a passenger by any of the crew inflicted within the line of his duty is the subject of an action."

The Supreme Court of the United States, in *The City of Panama*, 101 U. S. 462, 25 L. Ed. 1061, also says:

"Owners of vessels engaged in carrying passengers assume obligations somewhat different from those whose vessels are employed as common carriers of merchandise."

Speaking of the power and duty of the master as to passengers on his ship, it is stated, in *Parsons on Shipping & Admiralty*, p. 636, that the captain must be, from the necessities of his employment, clothed with almost despotic authority over all on board his ship. The power of the master need not be, and therefore is not, so great in the case of passengers as over the crew. And the same writer, on pages 624, 625, says:

"The common carrier by water is always regarded as under a contract to supply his passengers with comfortable accommodations by day and by night."

This power of arrest is a very serious one, and on the occasion in question was delegated to watchmen, one of whom had been a street car conductor for the best part of his life, and on the ship two or three years, but who was more circumspect and of better temperament than the other, who was formerly a structural iron worker, and had only been on board 30 days, and exercised his authority with unnecessary harshness, without considering the rights of the passenger. One who is given authority to arrest passengers, if such authority can or should be delegated at all, ought to be a person at least of experience, and known to possess character, intelligence, good judgment, common sense, and tact, and arrests ought never to be made, unless the ship, or other passengers, are endangered, without the captain being called upon to determine the necessity therefor. The court cannot conceive of a ship's master who could not have smoothed down the situation as it was on this occasion, with a little judicious management, without having to make an arrest. All that was required was common sense and a little diplomacy on the part of those in charge of the ship.

In *1 Joyce on Damages*, § 452, citing *Kolzem v. Broadway, etc., Ry. Co.*, 1 Misc. Rep. 148, 20 N. Y. Supp. 700, and *Pearce v. Needham*, 37 Ill. App. 90, it is said:

"Where an arrest is made under circumstances indicating a wanton disregard of the rights of the persons arrested, punitive damages may be awarded, though there is no actual malice."

The right of recovery here is clear. The officers who testified for the steamer, with the exception of Mr. Wilson, knew very little of the occurrence. The purser and Mr. Ragland differ as to what took place between them. Against Wilson's statement are four or five passengers, who testify clearly and positively that the treatment accorded the libellant was without justification.

The only matter left to pass upon is the question of damages, which in this case, on account of the unprovoked, cruel and unnecessary conduct of the watchman, ought to be for a substantial amount, which the court finds to be the sum of \$1,000. It is rather a novel experience to the court to have to assess damages in a case of false arrest. The libellant clearly established his case, and the circumstances of his arrest were aggravated. There was no serious harm done him, further than the indignity and the inconvenience imposed for the time being, which was not very long. Under all the circumstances, the allowance indicated is proper. He is entitled to damages for the humiliation and indignity put upon him, and the court should be influenced by the circumstances of the case. In other words, there was no necessity for what was done, nor would it have occurred if an officer had been in charge of the boat who had the slightest tact. It arose because the master delegated his authority to a watchman, who had an idea that he could do whatever he pleased under such delegation. The sum allowed is not to pay libellant for what he lost. He was a passenger, entitled to good treatment. His time could not be valued. There is no dispute about the facts. Five disinterested passengers all testified to the occurrence; one of them going so far as to say that, if he had been approached in the manner libellant was by the watchman, and he had had a pistol, he would have killed him.

A decree may be entered for the sum named, with costs.

In re STROBEL.

(District Court, E. D. New York. June 16, 1908.)

BANKRUPTCY—FAILURE TO OBEY ORDER TO TURN OVER PROPERTY TO TRUSTEE—CONTEMPT PROCEEDINGS.

An adjudication in bankruptcy was made on an involuntary petition, verified by the petitioner, in which he alleged that he was a creditor of the bankrupt in the sum of \$3,500, and he was so given in the bankrupt's schedules. After the appointment of a receiver, the petitioner claimed ownership of certain property in possession of the bankrupt, and it was surrendered to him by the receiver on his giving a bond. A petition for confirmation of such action of the receiver was referred to a special commissioner, who found that petitioner was not the owner of the property, and determined its value and his report was confirmed by the court, and petitioner ordered to return the property or its value as so determin-

ed to the trustee in bankruptcy. On appeal such order was confirmed. *Held*, on motion by the trustee to punish petitioner for contempt in failing to obey such order, that the questions of the ownership and value of the property were res judicata, and that petitioner could not avoid compliance with the order by showing that he was in fact not a creditor; but that the \$3,500 claimed in the petition in bankruptcy was only the value of the property which he had delivered to the bankrupt as a bailee, and that his filing such petition and making such claim to be a creditor was through the mistake of his counsel as to his legal rights.

In Bankruptcy.

Benjamin F. Edsall (Albert C. Aubery, of counsel), for trustee.

Frank Trenholm (A. J. Dittenhoefer, of counsel), for petitioner.

CHATFIELD, District Judge. The present motion is an application to punish one Abraham M. Bachrach for contempt, because of his failure to turn over the sum of \$3,015.76, with interest, to the trustee in bankruptcy of one Leonard J. Strobel, individually and as surviving partner of the firm of Hines & Strobel.

A recital of the steps in this proceeding is necessary at the outset: The firm of Hines & Strobel was engaged in the manufacture of watch cases. By an arrangement with Mr. Bachrach, a contract was entered into, in August, 1904, under which Bachrach furnished gold, and Hines & Strobel were to manufacture watch cases for him, being compensated for the work which they did, and being obligated to return the gold, either in the form of watch cases or currency. It is now contended by Mr. Bachrach that this contract made the firm of Hines & Strobel bailees as to the gold furnished them. Subsequently, it appeared that the firm of Hines & Strobel had not turned over all of the gold furnished by Mr. Bachrach, or had manufactured some of the surplus metal and sold the watch cases made therefrom, and they were therefore indebted to Mr. Bachrach for the amounts so used. And a further arrangement was made under which Hines & Strobel were to give a chattel mortgage, on machinery and fixtures, for the amount of this indebtedness, and the arrangement between Bachrach and the firm as to the manufacture of watch cases was to go on. Nothing further happened until the summer of 1905, when certain creditors obtained judgments and made levies upon the property of the firm of Hines & Strobel. Mr. Bachrach then found that his chattel mortgage had been filed in the county of New York, instead of in Brooklyn, where the mortgagors resided, and, after consultation with his attorneys, it was decided to file a petition in bankruptcy. Such petition was prepared and verified by Mr. Bachrach, and contains an allegation that the firm of Hines & Strobel is indebted to the said Bachrach in the sum of \$3,500. This petition was filed upon the 17th day of August, 1905, a receiver appointed, and the property at the plant of the bankrupt firm turned over by the receiver to Mr. Bachrach. Upon an application for confirmation of the delivery of this property by the receiver, Mr. Bachrach gave a bond, and the matter was referred to a special commissioner, who decided that the property should be returned to the trustee. This report was confirmed by an order made August 2, 1906. Mr. Bachrach then made an application to resettle and amend this order, and for such further

relief as might be proper, and this motion was in turn denied, upon the 19th day of November, 1906, and a reference ordered to ascertain the value of the property declared to have been wrongfully withheld from the trustee; the receiver's accounting being stayed pending the conclusion of the matter. Upon this reference the special commissioner determined the value of the property to be \$3,015.76, and his report was confirmed by an order of this court upon the 12th day of August, 1907. An appeal was then taken to the Circuit Court of Appeals, and Mr. Bachrach gave a further bond, pending the appeal, to cover the sum of \$3,015.76, with interest and costs of the appeal. Upon this appeal a decision has been rendered affirming the order both with respect to the value of the property as found by the commissioner, and with respect to the question of wrongful taking from the receiver by Mr. Bachrach. An order having been entered upon the mandate from the Circuit Court of Appeals, the trustee has applied for and obtained the order to show cause now under consideration.

It is alleged, in the affidavits submitted by Mr. Bachrach in opposition to this application, that he has never knowingly taken the position of creditor to the firm of Hines & Strobel. On the contrary, Mr. Bachrach swears: That he supposed he was the owner of all the gold and had a chattel mortgage upon tools and machinery in the premises, but that, prior to the time of filing the petition in bankruptcy, he found that his attorneys had by mistake filed the chattel mortgage in the wrong county, and that his lien thereby was lost; that his attorneys, upon investigation, advised him to file a petition in bankruptcy and to buy in the property in bankruptcy; and that he verified the petition under their instructions without reading the same. This petition, as has been said, contains a categorical statement that Bachrach is a creditor of Hines & Strobel.

The allegation of the petition is in the following language:

"The claim of your petitioner, Abraham M. Bachrach, is as follows: Goods, wares, and merchandise sold and delivered, and materials furnished, and moneys advanced by Abraham M. Bachrach, to the alleged bankrupt above named, on or about and between the 26th day of August, 1904, and the 15th day of August, 1905, both days inclusive, amounting to the sum of \$3,500."

The verification is in the usual form required by the laws of the state of New York, and contains a statement that Abraham M. Bachrach, upon his oath, deposes and says:

"That he has read and knows the contents of the foregoing petition by him subscribed, and that the same is true," etc.

This petition was verified upon the 16th day of August, 1905, and according to the affidavits now presented was signed by Mr. Bachrach, as he claims, without reading the petition. An answer to the involuntary petition in bankruptcy had been interposed, and upon the hearing of the issues Mr. Bachrach was sworn as a witness before Judge Thomas in open court. Upon that hearing Mr. Bachrach testified from a written memorandum, and swore that Hines & Strobel, and Mr. Strobel, as surviving partner, were indebted to Mr. Bachrach for the balance due upon a considerable number of items contained in the memorandum from which he was testifying at the time. The

petition in bankruptcy was sustained and subsequently to this hearing, and after the receiver had turned over the property of the bankrupt to Mr. Bachrach, the petition to confirm that action of the receiver was also verified by Mr. Bachrach, upon the 22d day of January, 1906. This petition was prepared by the same attorneys who acted for Mr. Bachrach in the chattel mortgage transaction.

In the petition of January 22, 1906, Mr. Bachrach sets forth a written agreement between himself and the firm of Hines & Strobel, dated August 25, 1904, and alleges: That under this agreement he furnished to Hines & Strobel gold and silver for the manufacture of watch cases between August 26, 1904, and a short period prior to the filing of the petition in bankruptcy, and that at the time the receiver took possession of the property of the bankrupt certain watch cases, made out of gold and silver, were taken into the possession of the receiver, and later turned over to Mr. Bachrach. That this property was valued at \$1,045.65. Further, upon the 5th day of April, 1906, Mr. Bachrach was examined before the special commissioner, upon the reference resulting from the last-mentioned petition and Mr. Bachrach testified that the sum of \$3,500 mentioned by him in the petition in bankruptcy was made up of the gold delivered and money advanced to Hines & Strobel; between August 26, 1904, and August 15, 1905, and further on the 4th of May he testified that he had given testimony before Judge Thomas as to the indebtedness to him of the bankrupts and reiterated the statement that the bankrupts were indebted to him in the sum of \$3,500 at the time of filing the petition in bankruptcy.

The schedules of the bankrupt show an indebtedness to Abraham M. Bachrach of \$7,454.58, with interest secured by a chattel mortgage on the machinery and fixtures at 123 Middleton street, Brooklyn, for the sum of \$10,000. This is the mortgage which was improperly filed and therefore claimed to be invalid. The schedules further show an unsecured indebtedness to Abraham M. Bachrach of \$3,500, which is stated in the schedules to be the item claimed by Mr. Bachrach as a debt in the involuntary petition. Upon this reference the value of the property turned over to Mr. Bachrach by the receiver was found by the special commissioner to be \$3,015.76. The report of the commissioner was confirmed, and his finding in this respect was one of the matters considered upon the appeal to the Circuit Court of Appeals and affirmed by that court.

It is impossible to escape from the conclusion that this finding of fact is *res adjudicata* and cannot be disturbed. It is also impossible to reach any conclusion other than that Mr. Bachrach assumed at various times throughout the course of this proceeding that he had a right to claim an indebtedness against the bankrupt estate, both for the amount covered by the chattel mortgage, and for the amount of advances in gold and money subsequent to the giving of the chattel mortgage. It is also evident that as early as the date of verifying the petition of January 22, 1906, Mr. Bachrach made claim to the specific articles, including gold, silver, and watch cases, in the possession of the receiver, and that this claim was inconsistent with his position as a creditor of the estate. It will be seen from this that the

present application is not based upon newly discovered evidence, remembering also that the mistake in the filing of the chattel mortgage was found out before the petition in bankruptcy was filed. It is an irresistible conclusion that Mr. Bachrach's mistake, if any, was one of law as to his actual position in the matter, and that the advice given by his attorneys may have been the reason for this mistake; but no mistake of fact, and no deceit on the part of any one connected with the proceedings in bankruptcy, unless it be that of Mr. Bachrach's own attorneys, is shown. To a certain extent Mr. Bachrach's claim to the specific articles was involved in the issues considered by the special commissioner in the year 1906, and the confirmation of that commissioner's report, with the affirmance of the Circuit Court of Appeals, renders this question also *res adjudicata*, and it cannot be attacked, in the absence of any newly discovered evidence, or in the absence of fraud on the part of any person for whose acts either the bankrupt or the parties to the bankruptcy proceedings are responsible.

It appears, further, that Mr. Bachrach was sued by his attorneys for their services, and interposed his alleged claim against them for negligence with reference to the filing of the mortgage, and for deceit at the time of filing the petition in bankruptcy, and, while the attorneys have prevailed in the lower courts, the matter is not yet decided upon appeal; but, so far as this court is concerned, those questions would seem to be entirely between Mr. Bachrach and his attorneys, and to be a matter with which this court has nothing to do. In so far as Mr. Bachrach seems to have mistaken his legal rights, or to have assumed inconsistent positions at different times, this court would, if it had the power, endeavor to protect Mr. Bachrach; but it is impossible to see how any phase of the situation can be considered undetermined or within the control of this court upon a motion of this character.

The actual position of Mr. Bachrach would seem to be that he has a claim for \$7,454.58, with interest, which is unsecured, if the chattel mortgage be held invalid; that he has another claim against the estate for \$3,500, with interest; and that if he makes restitution according to the decision entered upon the mandate of the Circuit Court of Appeals, he will be compelled to advance to the bankrupt estate \$3,015.76, with interest and costs. The expenses of litigation cannot be considered, inasmuch as that is a hardship the responsibility for which cannot be put upon the other creditors of the estate. Against the amounts above enumerated (aggregating over \$14,000), Mr. Bachrach has received a certain amount of gold watch cases and materials, which he alleges netted him about \$1,000, but which have been decided in a manner binding upon this court to have been worth \$3,015.76. As has been said, that question cannot be reopened, and the payment by Mr. Bachrach of the sum of \$3,015.76, with interest, must be deemed to have been offset by the possession and use of the property which has been adjudicated to be of that value. This leaves Mr. Bachrach in the position of a general creditor for the sum of \$3,500, which was the attitude taken by him, perhaps through wrong advice and through mistake of law, and also a general creditor for the amount of his mortgage, if the mortgage itself be held invalid. This court can see

no benefit which could result to Mr. Bachrach from an attempt to fix responsibility for the mistake in the filing of this mortgage. If Mr. Bachrach should be absolved, and if the court should hold that the mortgage became invalid as a lien, through no fault of his, no relief could be given if the mortgage be in fact invalid, and any remedy must be sought by him outside of the bankruptcy.

We have therefore to consider merely whether any relief can be given to Mr. Bachrach, because, as he alleges, he should have proceeded by replevin or other appropriate remedy, rather than by making himself a general creditor in bankruptcy for that amount. The incidental expenses and hardship to Mr. Bachrach naturally appeal to the court, in its position as a court of equity, inasmuch as it would appear that the position taken by Bachrach has been the result of bad advice or negligence, which was not discovered until too late for his protection; but it is impossible to prevent or cure incidental hardships at the expense of other parties who are standing upon legal rights, and it would seem that the only question open, namely, that of bettering Mr. Bachrach's position with reference to the \$3,500 as to which he made himself a general creditor, must be determined as a matter of law, and that no equitable relief can be given against the other creditors.

The amount which Mr. Bachrach has been ordered to pay back being, as has been said, *res adjudicata*, the application to punish him for contempt must be granted, unless he deposits the amount directed within the time which may be specified upon the settlement of an order on this motion.

In re DARLINGTON CO.

(District Court, E. D. New York. May 12, 1908.)

1. SALES—REMEDIES OF SELLER—STOPPAGE IN TRANSITU—BANKRUPTCY OF BUYER.

The doctrine of stoppage in transitu, which was previously firmly established as a part of the general body of the law, is not abrogated by Bankr. Act, July 1, 1898, c. 541, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3418); and the fact that a consignee has been adjudicated a bankrupt, and a receiver or trustee appointed for his estate, does not affect the right of the consignor to stop the goods in transit.

2. SAME—DURATION AND TERMINATION OF TRANSIT.

A bankrupt company ordered goods from petitioner, which were shipped, to be delivered to the bankrupt at the point of destination on payment of the freight charges. The goods arrived, but were not received by the bankrupt, which wrote petitioner desiring to cancel the order; but before any action had been taken, and while the goods were in storage in possession of the carrier, the adjudication in bankruptcy was made and a receiver appointed. The receiver took no action in respect to the goods until after petitioner had served notice of stoppage in transitu on the carrier and demanded their return. *Held* that, no delivery having been made, such notice was in time, and title to the property did not pass to the receiver or trustee in bankruptcy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 838.]

In Bankruptcy.

Cornelius P. Kitchel, for petitioner.

James, Schell & Elkus and Robert P. Levis, for bankrupt.

CHATFIELD, District Judge. The Homer Laughlin China Company has filed a petition in this court for the modification of a general restraining order made herein September 30, 1907. The china company seeks to obtain from the Pennsylvania Railroad certain china now in storage in Brooklyn in a warehouse under the control of the railroad company. The petition is based upon an alleged stoppage in transitu, based upon the following facts:

The china company shipped from Ohio certain hogsheds of crockery; the shipments being completed upon the 31st of August, 1907. These goods all reached the freight station of the Pennsylvania Railroad in Brooklyn by September 10, 1907, and were placed in a storage warehouse by the 18th of September, 1907. On September 21st the Darlington Company notified the china company that it did not wish the goods and asked the china company to send for them under a proposed cancellation of the order by which they had been purchased. On the 30th of September, 1907, a petition in bankruptcy was filed against the Darlington Company, and a receiver appointed, who immediately qualified and entered upon his duties. On the 7th of October the china company made a demand upon the railroad company by filing a notice for the return of the goods to the china company in Ohio. The china company served this notice upon learning of the bankruptcy of the Darlington Company, and the railroad company retained the goods, inasmuch as it had actual knowledge of the bankruptcy proceedings and the appointment of a receiver. The receiver made no demand upon the railroad company until some days later, inasmuch as he knew nothing at that time of the whereabouts of these goods.

The freight charges upon the goods have never been paid, and storage charges have accumulated for which the railroad company has a lien on the goods. The china company is attempting to enforce its claim of a complete stoppage in transitu, while the receiver in bankruptcy takes the position that, inasmuch as the filing of the petition and the order appointing him receiver were notice to the world (*Muller v. Nugent*, 184 U. S., at page 14, 22 Sup. Ct., at page 269, 46 L. Ed. 405), his title to property of the bankrupt, which subsequently will become vested in the trustee, as of the date of adjudication, is somewhat stronger than the title obtained by an assignee of an insolvent person.

It may be assumed from the facts shown that the consignee, the Darlington Company, was to pay the freight charges, and that the goods were to be delivered to the consignee, at Brooklyn, N. Y. Nevertheless the right of stoppage in transitu could be exercised, according to the almost uniform application of that doctrine, until some act by the consignee made the transportation company its agent and terminated the operation of carrying. It is contended that the appointment of a receiver, with the making of a general restraining order as to all

property of the bankrupt, is a sufficient exercise of the right to possession to give the creditors in bankruptcy and their trustee greater rights to the goods in the possession of the common carrier than the bankrupt himself, or his creditors, if no bankruptcy had intervened, would have had. The fact that the railroad company seems to have possessed actual knowledge of the appointment of the receiver makes this argument more plausible, and inasmuch as refusal to deliver the goods to the consignor was because of this knowledge it would seem that the railroad company feared lest the receiver have the right to hold them responsible for a delivery of the goods to the consignor.

The doctrine of stoppage in transitu is of itself more or less anomalous. If a purchaser ships goods at a price f. o. b. at the point of shipment, and the consignee is liable at the point of delivery for both carriage and storage charges, the exact time at which title passes to the consignee, so that the rights of his creditors may intervene, is susceptible of different opinions. But the courts have almost uniformly held that, until delivery was made in some manner at the destination, the consignor might stop the goods and direct their return to himself, provided insolvency actually exists, and provided no demand has been made upon the carrier by the consignee sufficient to be a substitute for delivery or the exercise of the rights of ownership. It would follow from this last proviso that, if a receiver in bankruptcy demands from a common carrier goods consigned to the bankrupt before the service of any notice of stoppage in transitu, no doubt could arise, and the demand of the receiver, coupled with the authority vested in him by his appointment, should be sufficient to terminate all rights of the consignor, if he has not already succeeded in stopping the goods in transit.

But the present question is more difficult. Does the title of the receiver attach, and can the trustee, subsequently elected, benefit from the appointment of a receiver, unless the receiver acts and affirmatively exercises the authority given him by the court? The receiver is appointed to take and hold. He has no title, except as he exercises the authority to receive. The restraining order, forbidding any one from interfering with the possession of the receiver or from concealing or keeping out of the possession of the receiver any property of the bankrupt, is broad enough to cover only property of which the bankrupt himself could take possession; and it cannot be said that the receiver, until he exercises his authority, can be held to have terminated the right of the consignor to stop his goods in transit, until the receiver affirmatively demands from the carrier the possession of the goods, or notifies it that he elects or intends to make such a demand. It would seem to do utter violence to the principles of the right of stoppage in transitu to uphold a receiver in such contention. In the present case the railroad company may have known of the bankruptcy and of the receivership; but until the receiver determined to demand possession of the goods he was standing merely in the shoes of the bankrupt, but armed as an officer of the court, with authority to do whatever the court might consider the bankrupt had a right to do, or to take possession of whatever property belonged to the bankrupt. This would not interfere with the exercise by creditors of any

rights which they had, until those rights were terminated by the receiver or by the order of court; and under the condition of the law with reference to stoppage in transitu the goods in question were not the property of the bankrupt, beyond the reach of the right of stoppage, until the receiver or some creditor demanded of the company possession or control of the goods.

The right of stoppage in transitu has been recognized as against a receiver in bankruptcy in the case of *In re Burke & Co.* (D. C.) 15 Am. Bankr. Rep. 495, 140 Fed. 971; and the application of the doctrine is approved in the case of *In re Portuondo* (D. C.) 14 Am. Bankr. Rep. 337, 135 Fed. 692. Similarly, under the old bankruptcy statute, in the case of *In re Bearns*, Fed. Cas. No. 1,190, the courts in a bankruptcy proceeding approved the right of a creditor to stop goods in the hands of a carrier. This anomalous doctrine, which seems to have originally grown up in equity, upon the theory that a creditor who was vigilant and succeeded in getting back his goods before they reached the possession of the bankrupt, had a stronger equity than the creditors who knew nothing whatever about this particular sale, has for more than 150 years been applied by courts of law, until at the present time it is said that the doctrine is stronger in law than in equity. 26 Amer. & Eng. Ency. of Law, pages 1080, 1081. A reason for this can be readily seen, in that a principle applied as a principle of law is less elastic than when applied in a court of equity, which is balancing and considering the strength of different claims, upon the basis of justice between the parties.

The doctrine of stoppage in transitu can only be invoked where insolvency exists, and except for the provisions of the bankruptcy statutes of 1867 (Act March 2, 1867, c. 176, 14 Stat. 517) and 1898 (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]) the administration of insolvent estates in the United States has been under the various assignment acts of the different states. Such laws relating to assignments and the general doctrines of insolvency recognize preferences and preferential payments. But both the bankruptcy act of 1867 and that of 1898 make preferential payments within a certain period voidable, and provide against the recognition of preferences in the administration of the bankrupt estate. The theory of the present bankruptcy law would seem to be utterly hostile to the idea of returning to a creditor goods as to which title, but not actual possession, had passed to the bankrupt, and thus securing to the creditor who stops the goods payment in full, as against partial dividends to other creditors. But, at the time the bankruptcy law of 1867 and the bankruptcy law of 1898 were passed, the doctrine of stoppage in transitu was well known in the courts and in the general body of the law. The application of the doctrine of stoppage in transitu, since the passage of the bankruptcy act, and its recognition by the courts, indicate that it cannot be inferred from the bankruptcy statute that a principle of law, so recognized by the courts as to have become a legal right, was wiped out and intended to be disregarded, when no express evidence of that intent was set forth in the text of the law. For the sake of consistency, and in order to carry out the principle of the bankruptcy statute, that the filing of a petition and the appointment

of a receiver is notice to the world, and creates an inchoate title which cannot be disregarded by those who have in their possession any part of the bankrupt estate, as indicated in the Muller Case, *supra*, the doctrine of stoppage in transitu might have been excluded, if it had seemed wise to those framing the law so to do. But, as has been said, the trend of decision and the language of the statutes seem to indicate that no change in the doctrine of stoppage in transitu was made by either of the bankruptcy acts of the United States, and the present case must depend upon the determination of the issue involved according to the principle of that doctrine as set forth by decisions. That phase of the question has been already considered, and a conclusion reached in favor of the shipper.

The motion will therefore be granted.

In re DARLINGTON CO.

(District Court, E. D. New York. May 29, 1908.)

BANKRUPTCY—PROCEEDING FOR CONTEMPT—ADVERSE CLAIMANT OF PROPERTY.

The question whether the landlord of a bankrupt was guilty of contempt in refusing to permit the receiver to comply with an order of the court directing him to deliver certain property to a purchaser will not be determined summarily on affidavits, where there is a substantial controversy as to whether the receiver was in possession of the property, or whether it was in the possession of the landlord as a fixture.

In Bankruptcy. Proceeding for contempt.

Robert J. Fox, for petitioner.

William H. Hamilton, for respondents.

CHATFIELD, District Judge. The bankrupt went into possession of certain real estate under an arrangement which was intended to be consummated into a formal lease. Certain intricate relations between other parties and corporations existed preliminary to the situation which developed at the time of the bankruptcy. When a receiver was appointed, the owners of the building occupied by the bankrupt claim that they had already resumed possession. At any rate, the receiver took possession of the bankrupt's property in the building and used the building for the purpose of storage.

The Lamson Company made an arrangement with the bankrupt to install a cash carrier system and had begun its work. So much of the work as had been done is claimed by the Lamson Company to be admittedly not in the nature of fixtures, and not made a part of the real estate. The owners of the real property took possession of some goods under a sheriff's levy, but the cash carrier system does not seem to be a part of the chattels levied upon. Subsequently an arrangement was made with the receiver by which the Lamson Company was to remove the cash carrier system and to pay the bankrupt \$300 for the old material, paying in addition to the \$300, as a part of the price for the old cash carrier system, the value of the work that had been already expended for the bankrupt. Upon this arrangement an order was made directing the receiver to turn over

to the Lamson Company the cash carrier system and allow them to remove it from the premises. So far as he was able, the receiver carried out this arrangement; but the owners of the building stopped the removal, and have now been brought into court to be punished as for a contempt in interfering with the order directed to the receiver.

So far as any actual contempt is concerned, the owners of the building acted under advice of counsel and under a claim of title, and their contempt is not considered by the court to be willful or flagrant. But the question is rather, whether the owners of the real estate had the right to do as they presumed to do, and, if they had not that right, whether they should be punished for contempt, unless they purge themselves by complying with the order of the court. It is somewhat difficult to determine from the affidavits whether the receiver was actually in possession of the property in question, and, if he were not in possession, a question of title is certainly raised, which cannot be determined in a summary way. If he was in possession, then it would be necessary, through the contempt proceeding, to determine whether the receiver's title was superior to that of the owner of the real estate, and such a question would have to be determined on the taking of testimony, rather than upon affidavits. Further, if the receiver did not have a right to the possession of the property, and it belonged to the owner of the building, a readjustment may have to be made of the terms under which the \$300 was paid to the receiver.

Under all the circumstances, it seems best to send the question of possession to a commissioner, to determine upon the hearing of testimony, and the application to punish for contempt will be held until it is determined whether the respondents must purge themselves from that contempt before disposing of the application. The claimant may still, if it seems fit, bring suit for the goods it claims in any court having jurisdiction, and, if so, no reference will be ordered. If a reference is had, the question of title may also be considered, if the owners of the building assent thereto.

In re INDUSTRIAL COLD STORAGE & ICE CO.

(District Court, E. D. Pennsylvania. August 12, 1908.)

No. 1,983.

1. BANKRUPTCY—"TAXES" ENTITLED TO PRIORITY OF PAYMENT—WATER RENTS.

Water rents due to a municipality, which are levied on property annually as a tax is levied and made a lien in like manner, are "taxes," within the meaning of Bankr. Act, July 1, 1898, c. 541, § 64a, 30 Stat. 563 (U. S. Comp. St. 1901, p. 3447), which a trustee in bankruptcy is required to pay when levied against property of the estate in his possession.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, pp. 6867-6886, 7813.]

2. SAME—RENTS AND PROFITS OF MORTGAGED PROPERTY—RIGHTS OF MORTGAGEE.

A mortgagee of realty in Pennsylvania, whose mortgage exceeds the value of the property, is equitably entitled to have the rents and profits of such property collected by a trustee in bankruptcy of the mortgagor, after payment of the taxes, applied to the payment of interest on his mortgage.

In Bankruptcy. On certificate of referee.

Horace M. Rumsey, for trustees.

Hepburn, Carr & Krauss and Smithers & Lank, for bankrupt.

J. B. McPHERSON, District Judge. The facts upon which the present controversy arises are thus found by the learned referee, Joseph Mellors, Esq.:

"(1) In the month of February, 1904, the above-mentioned company became insolvent, and on the 4th day of March it made an assignment for the benefit of its creditors to the Central Trust & Savings Company.

"(2) On July 2d of the same year a petition in bankruptcy was filed against it in which the said assignment was set forth as an act of bankruptcy, and in August of the same year it was adjudicated a bankrupt.

"(3) On October 10, 1904, the said Central Trust & Savings Company, together with Joshua M. Gillespie and Howard M. Long, were elected trustees of said bankrupt estate.

"(4) At the time of the filing of said petition the assets of the bankrupt included, *inter alia*, real estate, consisting of a three-story brick house (occupied as a saloon) and lot situated at the northeast corner of American and Berks streets, in the city of Philadelphia, containing in front or breadth on American street 40 feet and extending 121 feet in depth. The bankrupt estate was also possessed of other real estate immediately adjoining the said real estate on the north and upon which was erected a partly completed cold storage plant.

"(5) At the time of the filing of the said petition in bankruptcy, the above-mentioned real estate was subject to a purchase money mortgage of \$40,000 given by the bankrupt company to August Beitney, which was on record at the time of the filing of the petition.

"(6) Subsequent to the adjudication in bankruptcy—that is, on September 9, 1904—the said Augustus Beitney began suit upon said mortgage in the court of common pleas of Philadelphia county. The said Central Trust & Savings Company and Joshua M. Gillespie, who were receivers, were made partners to the suit, but they made no defense thereto, and judgment was duly recovered on October 11, 1904. A writ of *levari facias* was issued upon said judgment.

"(7) On the 5th day of November, 1904, the trustees in bankruptcy (who had also been receivers and let the suit go to judgment without defense) filed a petition in the United States District Court and secured a restraining order restraining the said mortgagee from further proceedings in the matter. Upon the 5th day of December, 1904, the court referred the matter to the referee, who reported against the restraining order, and the petition therefore was dismissed, and the property was sold under said mortgage on the first Monday of December, 1905, and bought in at sheriff's sale by the mortgagee for a nominal sum.

"The property upon which the mortgage was secured was appraised by the appraisers in bankruptcy at the sum of \$10,000, which was brought to the attention of the trustees as well as the existence of the mortgage in question, and as well as other liens.

"(8) From the time of their election (October 10, 1904) to the time of the sale of said property (December, 1905), the trustees had possession of the premises and collected the rents thereof, but they did not pay the taxes, water rents, nor the interest upon said mortgage.

"(9) No proceedings were taken by the mortgagee to sequester the rents as by obtaining the appointment of a receiver before bankruptcy or by a direct application to the bankruptcy court."

Upon these facts the mortgagee, on whose behalf the property was bought in at the foreclosure sale, asked for an order directing the trustees to apply the rents received from the mortgaged property, first, to the payment of the taxes and water rent due to the city of

Philadelphia for the year 1905, and, second, to the payment of the interest that accrued upon the mortgage while the property was in the possession of the trustees. The referee made the order prayed for, and the appeal now before the court was taken by the trustees from his decision.

One of the exceptions filed by the trustees questions the referee's finding that the property was bid in at the sheriff's sale by the mortgagee, and avers that the purchaser was John P. Mathieu, that he bought subject to the taxes and water rent, and that he does not complain of the distribution of the rents in question among the general creditors. It is true that Mathieu was the nominal purchaser, and that the sheriff's deed was made to him; but I agree with the referee's finding that the mortgagee was the real party in interest, and that the title was taken and is held in his behalf. The dispute therefore is between the general creditors and the mortgagee himself, and is to be decided from that point of view.

With regard to the taxes and water rent due to the city of Philadelphia, there seems to be little difficulty. So far as the taxes are concerned, the command of section 64a (Act July 1, 1898, c. 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447]) is express:

"The court shall order the trustee to pay all taxes legally due and owing by the bankrupt," etc.

And the application of this provision to taxes accruing since the filing of the petition has been decided in several cases. *Collier* (6th Ed.) p. 529, note 22k; *Swarts v. Hammer*, 194 U. S. 441, 24 Sup. Ct. 695, 48 L. Ed. 1060. Whether the word "taxes" includes water rents due to a municipality is a question about which there is, perhaps, room for a difference of opinion. It was decided in *Re Stalker* (D. C.) 123 Fed. 961, that an assessment levied for a local improvement is a "tax" entitled to priority of payment under this section, while it was held by the same judge in *Re Broom* (D. C.) 123 Fed. 639, that a lessee's failure to pay water rents, in violation of a covenant in his lease, did not give the lessor or the municipality a claim to priority against the lessee's estate in bankruptcy. This ruling, however, is expressly put upon the ground that the lessee's obligation is contractual only, and therefore that the claim was not a "tax" against the bankrupt. In my opinion a water rent due to the city of Philadelphia is certainly within the spirit of section 64a. It is levied annually against the property as a tax is levied; it is made a lien by statute in like manner, and is enforced by the same remedies that are appropriate to the collection of a tax; and the amount due is similarly available for public purposes. The same reasons of policy that moved Congress to ordain priority for taxes justify the courts, I think, in giving the word a construction broad enough to include such other municipal claims as are practically indistinguishable in their nature and effect from taxes, strictly so called.

The equitable right of the mortgagee to have the balance of the rent applied to the unpaid interest upon his mortgage has been affirmed by some courts and denied by others. Under the facts found by the referee, I do not think that the right can be properly rested upon

the clause in the mortgage that conveyed the real estate to the mortgagee "together with the * * * rents, issues and profits thereof." The effect of such a clause has been the subject of dispute, but for present purposes it is sufficient to refer to *Savings Co. v. Shepherd*, 127 U. S. 502, 8 Sup. Ct. 1250, 32 L. Ed. 163, by which I regard the question as practically settled. That was a case in which a deed of trust (a mortgage by another name) expressly reserved to the mortgagor the right to take the rents of the real estate until default, etc., and the decision is therefore not precisely in point; but in the discussion of the questions arising in the case the court used the following language, which applies so closely to such a situation as is now before me that I feel bound by what is there laid down as the general rule:

"It is, of course, competent for the parties to provide, in the mortgage, for the payment of rents and profits to the mortgagee, while the mortgagor remains in possession; but when the mortgage contains no such provision, and even where the income is expressly pledged as security for the mortgage debt, with the right in the mortgagee to take possession upon the failure of the mortgagor to perform the conditions of the mortgage, the general rule is that the mortgagee is not entitled to the rents and profits of the mortgaged premises until he takes actual possession, or until possession is taken, in his behalf, by a receiver (*Teal v. Walker*, 111 U. S. 242, 4 Sup. Ct. 420, 28 L. Ed. 415; *Grant v. Phoenix Life Ins. Co.*, 121 U. S. 105, 117, 7 Sup. Ct. 841, 30 L. Ed. 905), or until in proper form he demands and is refused possession (*Dow v. Memphis Railroad Co.*, 124 U. S. 652, 654, 8 Sup. Ct. 673, 31 L. Ed. 565). See, also, *Sage v. Memphis & Little Rock Railroad Co.*, 125 U. S. 361, 8 Sup. Ct. 887, 31 L. Ed. 694.

"The principles announced in these cases are decisive against the claim of the trust company to the rents of the property represented by the two drafts delivered by the United States to Wilson. Bradley's deed pledged the property, not the rents accruing therefrom, as security for the payment of his notes. It is true it provides generally, that the mortgagor may remain in possession and receive rents and profits, until there is default upon his part; but the only effect of that provision was to open the way to compel him to submit to a sale and thereby lose possession. The deed did not give the mortgagee or the trustees the right, immediately upon such default, to take possession and appropriate the rents of the property. It only gave the trustees authority, when such default occurred, to sell upon short notice, and, in that way, oust the mortgagor, and suspend his right to further appropriate the income of the property. Even if the deed had expressly pledged the income as security for the debts named, the mortgagor, according to the doctrines of the cases cited, would have been entitled to the income, until, at least, possession was demanded under the deed, or until his possession was disturbed by a sale under the deed of trust or, in advance of a sale, by having a receiver appointed for the benefit of the mortgagee."

But, without regard to the clause in the mortgage concerning the rents, it seems to me that the equitable right of the mortgagee to have the rents applied to the payment of the overdue interest should be sustained for the reason given by the Supreme Court of Pennsylvania in *Wolf's Appeal*, 106 Pa. 545, namely: That a lien creditor under conditions similar to those now presented is in equity the real owner of the land, and is therefore entitled to have its rents, issues, and profits applied to the discharge of his lien. In that case it was held by the lower court that, when a debtor had made an assignment for the benefit of creditors, the assignee in possession was bound to apply the rents arising from real estate that was incumbered beyond

its full value to the payment of interest upon the liens before even wage creditors could successfully claim to share in the fund thus arising. Upon this point, the opinion of the court below (which was affirmed by the Supreme Court) is as follows:

"In November, 1874, Light Bros., as individuals and as a firm, made an assignment for the benefit of creditors. They owned in Lebanon county a rolling mill, forge, some houses, and a farm, from the management and renting of which by the assignees after January, 1875, certain profits accrued which they applied to the payment of a judgment against the assignors entered in 1867 and to the payment of interest on two other judgments, one entered to April term, 1873, and the other to January term, 1874. * * * These transactions were set out in their second and final account * * * and certain wage creditors of the firm excepted, alleging that the rents and profits accruing from the use of the assigned property since the assignment had been improperly applied to the judgments referred to. * * *

"Whether the real estate in Lebanon county was partnership property or held in common, it seems clear in either case that the wage creditors, as against the liens mentioned, were not entitled to the rents and profits which accrued, as did all of them, after January, 1875. The recent case of Jones's Appeal, 102 Pa. 285, seems to be decisive upon this point. There the real estate of a firm was partnership property and was assigned for the benefit of creditors. A mill upon the land was burned and its machinery so injured by the fire as to be sold for old iron. A crop of grass also was grown upon the land after the assignment, and the wage creditors claimed the proceeds of both crop and machinery. They were, however, awarded to lien creditors, and the Supreme Court expressly approves this part of the decree, although the opinion is mainly concerned about other questions. The principle of this decision seems to us to cover the case of rents. If the machinery which in that case helped to give value to the land, and the grass which grew upon it after the claims for wages had accrued, partook of its character to such an extent as, equitably at least, to belong to the lien creditors after severance, it would seem plain that the rents and farm profits here, which the land produced and which wholly accrued after these claims for wages had become due, ought to follow a similar course. The income or product of an assigned estate is held by the assignee in trust for all the creditors of the assignor according to their legal and equitable rights (Bausman's Appeal, 90 Pa. 180); and as all the judgments referred to were entered more than six months before the assignment was made, and therefore before the labor was performed, it is hard to see why the substantial owners of the property have not at least an equitable right to the whole of what it produces. Burkholder's Appeal, 94 Pa. 524, regards the lien creditors of an assignor in the same light, viz., as substantial owners of his real estate, and divides among them the interest on deferred payments, even after the land has been sold by order of court."

From this ruling a wage creditor took an appeal, but the Supreme Court affirmed the decree of the court below, saying:

"The appellant sought to object to the account on the alleged ground that he was a preferred creditor of the assignor. The court found that his claim was not sustained, that he had no interest in the account to which he excepted, and therefore no standing to file exceptions. In case of a sale of the land it is very clear his claim could not be allowed to the prejudice of a prior lien creditor. We think the mere rents of the land in the hands of assignees, not being the product of business managed and carried on by them, but solely the product of the land itself, should be applied on those prior liens which would be entitled to the proceeds of the lands, if sold. This we understand to be the ground on which the court ruled the case. The conclusion is sustained for reasons expressed in Bausman's Appeal, 90 Pa. 180, and Burkholder's Appeal, 94 Pa. 524."

See, also, *Gibble's Estate*, 134 Pa. 366, 19 Atl. 681.

These decisions are entitled to much weight in a controversy before a federal court concerning the effect of a Pennsylvania mortgage; but, aside from their weight, it seems to me that the equity of the situation is with the mortgagee. Any other ruling would permit an assignee or a trustee to take possession of the debtor's real estate—this being inadequate to pay the liens against it—and deliberately divert the rents issuing out of the land from the creditor who has a lien upon it, and has therefore in equity the first claim upon what it produces, and apply them to the profit of general creditors who have no such lien, and whose claims, indeed, may have come into existence with full knowledge, actual or constructive, that the debtor's land was incumbered beyond its value. For many purposes the relative rights of creditors are to be regarded as fixed when the act of bankruptcy takes place, or the petition is filed. In this aspect, the mortgage creditor now before the court was the equitable owner of the bankrupt's real estate in August, 1904, and the trustees were bound to administer the property in subordination to his rights. What they ask to do, however, is to take the rents of what was really his property, and divide them among the other creditors. This, I think, cannot be done.

The order of the learned referee is affirmed.

BROWN v. MORGAN et al.

(Circuit Court, N. D. Iowa, W. D. August 15, 1908.)

No. 281.

1. ATTORNEY AND CLIENT—ATTORNEY'S LIEN ON JUDGMENT FOR SERVICES.

An attorney has a lien at common law upon a judgment recovered by him in favor of his client for the amount of his fee and disbursements in the cause, and the Iowa statute (Code, § 321) specifically giving such lien, as construed by the Supreme Court of the state, is merely declaratory of the common law with an additional provision for giving notice of lien by an entry in the judgment docket.

2. SAME—SUIT TO ENFORCE LIEN.

An attorney who has recovered a judgment in favor of his client in a federal court in Iowa, and entered notice of a lien on such judgment on the docket in conformity to the state statute, may maintain a suit in equity in such court against the parties to the judgment to enforce his lien.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attorney and Client, § 426.]

3. COURTS—JURISDICTION OF FEDERAL COURT—ANCILLARY SUIT.

Such suit is ancillary to the original suit and within the jurisdiction of the court, without regard to the amount involved or the citizenship of the parties.

[Ed. Note.—Supplementary and ancillary proceedings and relief in federal courts, see note to *Toledo, St. L. & K. C. R. Co. v. Continental Trust Co.*, 36 C. C. A. 195.]

In Equity. On demurrer to bill.

The bill alleges: That in March, 1901, the defendant Morgan employed the complainant, who was then and is now an attorney and counselor of

this court, to prosecute a suit in equity against the defendants school districts to recover of them some \$8,000 upon certain bonds issued by said districts; that complainant, pursuant to such employment, brought suit in this court in behalf of defendant Morgan and prosecuted the same to final judgment or decree, whereby the defendant Morgan recovered judgment against said school districts December 31, 1902, in the sum of \$5,601 and costs; that complainant thereafter entered, in the proper judgment docket opposite the entry of judgment, notice of a lien upon the amount owing by the school districts upon such judgment to the defendant Morgan in the sum of \$2,200 for his services in procuring such judgment, as authorized by the statute of Iowa; that partial payments have been made upon his said claim and lien, but that there is still due and owing him from the defendant Morgan for his services in such proceedings of principal and interest the sum of \$1,044. And the prayer of the bill is that complainant's lien for his services in behalf of the defendant Morgan in said suit be established for said amount, and that the same be enforced against said judgment and the school districts by proper orders or process of this court. The bill also alleges that complainant is a citizen of Iowa, that the defendant Morgan is a citizen of South Dakota, and the several school districts school corporations existing under the laws of Iowa. The defendant Morgan appears generally and demurs to the bill for want of equity, and also upon the ground that the court is without jurisdiction because the school districts are corporations of the state of Iowa and citizens of the same state as complainant, and that the amount now owing to complainant is insufficient to confer jurisdiction upon this court.

P. A. Swayer and R. H. Brown, for complainant.

O. J. Taylor and J. W. Hallam, for defendants.

REED, District Judge (after stating the facts as above). If this suit is to be regarded as an entirely new or original suit, the jurisdiction of this court must fail, because the amount involved, exclusive of interest and costs and the citizenship of the parties, are such that it may not rightly be prosecuted in this court. But is it an original suit with reference to the line which separates the jurisdiction of the federal courts from that of the state courts, or does it belong to that class of suits which are ancillary or auxiliary to a prior suit, either for the enforcement of the judgment or decree in the prior suit, or to protect the rights of third parties which arise or grow out of the prior proceedings? If it is of the latter class, the citizenship of the parties, or the amount involved, is immaterial, for the jurisdiction rests upon and is supported by that of the prior suit. *Minnesota Co. v. St. Paul Co.*, 2 Wall. 609, 17 L. Ed. 886; *Freeman v. Howe*, 24 How. 450, 16 L. Ed. 749; *Krippendorf v. Hyde*, 110 U. S. 276, 4 Sup. Ct. 27, 28 L. Ed. 145; *Julian v. Central Trust Co.*, 193 U. S. 93, 24 Sup. Ct. 399, 48 L. Ed. 629.

It is true that in these cases the money or property sought to be recovered by, or impressed with some equity in favor of a third party was in the registry of the court, or in its custody, through its marshal or receiver, and if, in this instance, the school districts had paid the amount of the judgment against them into court, there would be no doubt that complainant could by proper proceedings in that suit have required that his lien for services be satisfied therefrom. The fact that it has not been paid into court is not important, for the judgment is within the control of the court, and the amount due thereon is potentially within its control for the purpose of distribution by it

when paid to whomever it rightfully belongs. *Hatcher v. Hendrie*, 133 Fed. 267, 68 C. C. A. 19.

The principle upon which the cited cases rest seems equally applicable where the subject-matter of the controversy is embraced within, or arises out of, the controversy in the prior suit. *Root v. Woolworth*, 150 U. S. 401, 14 Sup. Ct. 136, 37 L. Ed. 1123. *Lamb v. Ewing*, 54 Fed. 269, 4 C. C. A. 320; *Hatcher v. Hendrie*, 133 Fed. 267, 68 C. C. A. 19.

In *Minnesota Co. v. St. Paul Co.*, above, Mr. Justice Miller, at page 633, 2 Wall. (17 L. Ed. 886), said:

"It is objected that the present bill is called a supplemental bill, and is brought by a defendant in the original suit, which is said to be a violation of the rules of equity pleading, and that the subject-matter and the new parties made by the bill are not such as can properly be brought before the court by that class of bills. But we think that the question is, not whether the proceeding is supplemental and ancillary, or is independent and original in the sense of the rules of equity pleading, but whether it is supplemental and ancillary or is to be considered entirely new and original in the sense which this court has sanctioned with reference to the line which divides the jurisdiction of the federal courts from that of the state courts. No one, for instance, would hesitate to say that, according to the English chancery practice, a bill to enjoin a judgment at law is an original bill in the chancery sense of the word. Yet this court has decided many times that when a bill is filed in the Circuit Court, to enjoin a judgment of that court, it is not to be considered as an original bill, but as a continuation of the proceeding at law, so much so that the court will proceed in the injunction suit without actual service of subpoena on the defendant, and though he be a citizen of another state, if he were a party to the judgment at law."

Lamb v. Ewing, 54 Fed. 269, 4 C. C. A. 320, was a new action brought in a Circuit Court of the United States upon a bond given in a prior action in the same court between other parties. It was objected to the jurisdiction that the amount involved, being less than \$2,000, was not sufficient to confer jurisdiction upon the Circuit Court. It was held by the Court of Appeals, this circuit, upon the question of jurisdiction, that the action was but a continuation of the prior one, and that a third party whose rights arose out of the prior proceedings could maintain an action in the same court for the protection of those rights, regardless of the amount involved or the citizenship of the parties. See, also, 1 *Bates*, Fed. Eq. § 97, as to when suits will be regarded as ancillary or auxiliary to a prior suit.

The jurisdiction of this court over the subject-matter and of the parties in the prior suit of the defendant Morgan against the school districts is unquestioned, and the judgment recovered by Morgan in that suit is the result of the efforts of the complainant as his counsel. Upon such a judgment the attorney recovering it, under the later common law at least, would have a lien for the value of his services and disbursements in procuring the same. The origin of such lien may be somewhat obscure, but it seems to have arisen by analogy to other cases of lien. *Cowell v. Simpson*, 16 Vesey, 275, and note. That it existed is certain. *Ex parte Price*, 2 Vesey, Sr. 407; *Welsh v. Hole*, 1 Doug. 238; *Read v. Dupper*, 6 T. R. 366; *Stevenson v. Blakelock*, 1 Maule & S. 535.

In *Welsh v. Hole*, 1 Doug. 238, Lord Mansfield said:

"An attorney has a lien on the money recovered by his client for his bill of costs. If the money came to his hands, he may retain it to the amount of his bill. He may stop it in transit if he can lay hold of it. If he apply to the courts, they will prevent its being paid over until his demand is satisfied. I am inclined to go still further and hold that, if an attorney give notice to the defendant not to pay till his bill shall be discharged, a payment by the defendant after such notice would be in his own wrong, and like paying a debt which has been assigned, after notice."

In *Read v. Dupper*, 6 Term R. 366, Lord Kenyon held that a party should not be permitted to run away with the fruits of a cause without satisfying the legal demands of his attorney by whose industry, and in many instances at whose expense, those fruits were obtained.

Such was the settled practice of the English courts, and the rule in this country is the same, though in some of the states it is modified by statute. *Jennings v. Bacon*, 84 Iowa, 403, 51 N. W. 15; *Martin v. Hawks*, 15 Johns. (N. Y.) 405; *Rooney v. Railroad Co.*, 18 N. Y. 368; *Andrews v. Morse*, 12 Conn. 444, 31 Am. Dec. 752, and note; *Weeks v. Wayne Circuit Judges*, 73 Mich. 256, 41 N. W. 269; *In re Wilson & Grieg* (D. C.) 12 Fed. 235; *National Bank v. Eyre* (C. C.) 3 McCrary, 175, 8 Fed. 733.

In *Rooney v. Second Avenue Railroad Co.*, 18 N. Y. 368, it is held that before the Code nothing was better settled than that an attorney had a lien upon the judgment recovered by him for his services, that the measure of those services was the taxable costs recovered in the action, and to that extent the attorney was regarded as the equitable assignee of the judgment; but because the judgment had been recovered through the instrumentality of the attorney, and his money and labor and talents had been expended for that purpose, the courts have declared that he shall have a lien upon it to the extent of his claim against his client, and that such lien is unaffected by the Code. That stands as it did before. See, also, *Marshall v. Meech*, 51 N. Y. 140, 10 Am. Rep. 572; *Matter of Knapp*, 85 N. Y. 284.

The rule is not changed by the Iowa statute. The Code of 1897 of that state provides:

"Sec. 321. An attorney has a lien for general balance of compensation upon: (1) Any papers belonging to his client which have come into his hands in the course of his professional employment. (2) Money in his hands belonging to his client. (3) Money due his client in the hands of the adverse party, or attorney of such party, in an action or proceeding in which the attorney claiming the lien was employed, from the time of giving notice in writing to such adverse party, or attorney of such party, if the money is in the possession or under the control of such attorney, which notice shall state the amount claimed, and, in general terms, for what services. (4) After judgment in any court of record, such notice may be given, and the lien made effective against the judgment debtor, by entering the same in the judgment or combination docket opposite the entry of the judgment."

In *Jennings v. Bacon*, 84 Iowa, 403, 51 N. W. 15, and other cases, the Supreme Court of that state holds that this statute is but declaratory of the common law, and is a substantial enactment thereof; that it omits no part thereof, and adds nothing thereto, except the provision for giving notice to be entered on the judgment docket. In other cases that court holds that, where the notice is given by en-

tering it upon the judgment docket, a subsequent reversal of the judgment does not discharge the notice, and it is sufficient to protect the lien, though the cause of action is settled by the parties, or another judgment is recovered in another court by another attorney engaged to prosecute the action. *Winslow v. Railroad Co.*, 71 Iowa, 197, 32 N. W. 330; *Gibson v. Railroad Co.*, 122 Iowa, 565, 98 N. W. 474; *Parsons v. Hawley*, 92 Iowa, 175, 60 N. W. 520.

It is true that in some of these cases it is said the lien under the statute is not upon the judgment, but upon the amount owing by the adverse party, and such is the language of the statute; but this is said in those cases where it was sought to fix the amount due the attorney from the amount of the judgment, or where it was sought to escape from the lien because the judgment had been reversed, and notice of the lien, as entered upon the judgment docket, was claimed upon the judgment. The Supreme Court of the state, however, has uniformly sustained the lien when notice thereof has been given by entry upon the judgment docket, notwithstanding the judgment may have been subsequently reversed, and the lien under the statute is only upon the money due from the adverse party.

The statute secures the lien to the attorney, and complainant has given notice of his lien in the manner required by that statute. The statute does not provide how the lien shall be enforced, and the procedure does not seem to be very well settled; but the Supreme Court of the state has held that, as to money due upon the judgment, it may be by a suit in equity, as other liens may be. *Crissman v. McDuff*, 114 Iowa, 83, 86 N. W. 50; *Hubbard v. Ellithorpe* (Iowa) 112 N. W. 796. When an attorney entitled to a lien obtains possession of papers belonging to his client, or collects money due him from the adverse party, he may retain the papers or money until his compensation is paid or satisfied, and he cannot be required to surrender either until he is paid. *Foss v. Cobler*, 105 Iowa, 728, 75 N. W. 516; *Wylie v. Coxe*, 15 How. 415, 14 L. Ed. 753; *In re Paschal*, 10 Wall. 483, 19 L. Ed. 992; *McPherson v. Cox*, 96 U. S. 404, 24 L. Ed. 746. In fact, the right to retain in such case seems to be his only protection. *Foss v. Cobler*, above. But if the attorney is to be regarded either as the equitable assignee of the judgment to the extent of the amount of his unpaid compensation for recovering the same, or as the equitable owner to the extent of his lien, of the amount evidenced by the judgment in either case the judgment creditor is a trustee of the attorney to that extent, and equity is the proper forum in which to enforce the lien. It may be that he could recover the amount due him in a law action against the judgment debtor. If so, that debtor would be entitled to have the amount paid by him credited upon the former judgment. It is entirely regular therefore that the attorney should apply to the court in which the judgment is recovered for the protection and enforcement of his rights therein, or his lien upon the amount due thereon from the judgment debtor. Possibly, it might be done in a more summary manner than by an ordinary suit in equity, but it is no objection that relief is sought in that manner wherein the rights of all parties may be fully protected. *Hubbard v. Ellithorpe* (Iowa) 112 N. W. 796; *McPherson v. Cox*, 96 U. S. 404, 24 L. Ed. 746, above.

The case is unlike that of *Wolfe v. Lewis*, 19 How. 280, 15 L. Ed. 613, where an attorney recovered a decree of foreclosure of a mortgage for his client, the amount of which was paid into court by the defendant without a sale of the premises. The attorney thereupon procured an order for his dismissal as attorney from the case, that he might bring up a general account against the client for services in other matters in no way connected with the foreclosure suit, and the matter of such account was referred to a master in the foreclosure proceeding. This was done without notice to the client, and a large amount was awarded to the attorney out of the proceeds realized by the foreclosure for services in no wise connected with that suit. Held, that the proceeding was wholly unauthorized and should not have been sanctioned by the court.

In *Cain v. Hockensmith Co.* (C. C.) 157 Fed. 992, the debt had been attached before the attorney was employed to collect it. Held, that his lien was subordinate to that of the attachment.

The general appearance of the defendant waives any defects in the service of the subpoena, if any there be.

The demurrer to the bill is therefore overruled, with leave to the defendants to answer by the September rules.

It is ordered accordingly.

MEYER v. CONSOLIDATED ICE CO.

(Circuit Court, E. D. New York. July 8, 1908.)

1. EXECUTION—SUPPLEMENTARY PROCEEDINGS—EXAMINATION OF DEBTOR UNDER NEW YORK STATUTE—AFFIDAVIT.

An affidavit, in support of an application for examination of a judgment defendant in proceedings supplementary to execution, under Code Civ. Proc. N. Y. § 432, made by the attorney for the judgment creditor on allegations of personal knowledge, held sufficient, especially when not attacked by answering affidavits.

2. COURTS—FEDERAL COURTS—PROCEEDING UNDER STATE LAWS.

A United States court, proceeding under the laws of the state providing for proceedings supplementary to execution, as authorized by Rev. St. § 916 (U. S. Comp. St. 1901, p. 684), is not affected by a provision of such laws that a witness cannot be compelled to attend in such proceedings at a place without the county of his residence or place of business; but such court may issue subpoenas for witnesses within its district or to compel the attendance of witnesses from other districts who live within 100 miles, as provided by Rev. St. § 876 (U. S. Comp. St. 1901, p. 667).

[Ed. Note.—State laws as rules of decision in federal courts, see notes to *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553.]

3. SAME—FEDERAL COURT IN NEW YORK—PROCEEDING AGAINST CORPORATION DEFENDANT.

A United States court within the state of New York, which has not by general rule adopted the laws of the state providing for proceedings supplementary to execution since January 1, 1878, when Rev. St. § 916 (U. S. Comp. St. 1901, p. 684), was finally enacted, which provides that such courts may enforce such remedies to reach the property of a judgment debtor "as are now provided in like causes by the laws of the state * * * or by any such laws hereafter enacted which may be adopted by general rules of such Circuit or District Court," has no power to enter-

tain supplementary proceedings against a corporation judgment debtor; such proceedings not having been authorized by the state laws prior to 1878.

At Law. Proceedings supplementary to execution.

Gustavus A. Rogers (Benjamin Tuska and Saul E. Rogers, of counsel), for Meyer, judgment creditor.

Thomas D. Adams (B. B. Gattell, of counsel), for Consolidated Ice Co., judgment debtor.

CHATFIELD, District Judge. The judgment creditor herein obtained judgment against the defendant in an action for tort in this court, upon the 25th day of June, 1908. Since that time execution has been issued and returned unsatisfied, and the judgment creditor has now applied to this court for an order for the examination of the defendant.

It is shown by the affidavits that the defendant is a Maine corporation, and the record in the suit shows that it was doing business in the state of New York, and within the Eastern district of New York, at the time of that action. The affidavits in this proceeding, which is brought supplementary to execution, state that the defendant no longer does business within the state of New York, has not a business agency nor a fiscal agent or agent in the state, but had in the Southern district of New York a person designated at the time the corporation began to do business within the state as a person upon whom process might be served, under section 432 of the Code of Civil Procedure of the state of New York. On the 20th of June, 1908, the judgment creditor, upon an affidavit of one Gustavus A. Rogers, obtained the present order in proceedings supplementary to execution, directing the judgment debtor—that is, the defendant corporation—to appear at a term of the Circuit Court for examination, and also directing subpoenas to issue to the directors, trustees, officers, and agents of the corporation, to appear and give oath as to their knowledge of its property and affairs. Upon the date fixed for this examination, the corporation appeared specially by attorney, and certain witnesses also attended. It appeared by the record that the order had been served upon the corporation according to the provisions of section 2452 of the New York Code, and that individual subpoenas to testify had been served upon the witnesses who attended.

Objection was made on behalf of the corporation, and on behalf of each witness, to the jurisdiction of the court, and it is claimed that the papers upon which the order for examination of the corporation was made are insufficient, in that the corporation is not shown to be without the scope of section 1812 of the Code of Civil Procedure of New York, as made applicable by section 2463 of the same. Further objection is made that the affidavits on which the order was made are insufficient, in that they do not show the sources of information from which the affiant has stated his actual knowledge as to the allegations made. But it is considered that this objection is insufficient, under the decision of the Appellate Division in the case of *Stewart v. Lyman*, 62 App. Div. 182, 70 N. Y. Supp. 936. It may be assumed

that, if the papers show that an allegation based upon alleged actual knowledge is not within the knowledge of the affiant, or if the form or subject-matter of the allegation is such that actual knowledge could not be had, then the presumption would be against the person making the allegation, and it would be necessary for the source of his information to be shown, as has been held in *Buhl v. Ball*, 41 Hun (N. Y.) 61; *Cole v. Core*, 121 App. Div. 632, 106 N. Y. Supp. 306; *Gumbes v. Hicks*, 116 App. Div. 120, 101 N. Y. Supp. 741, and other cases. It may be admitted that the affidavits in supplementary proceedings, while, perhaps, not necessarily as exact as in attachment and arrest, nevertheless should substantially set forth the requisites in the same manner; but it is considered that on this particular application the positive allegation by the attorney in the case, of personal knowledge, when not attacked by answering affidavits, will be considered sufficient for the purpose of the application in which it was made.

This brings us to the objection as to the exception under section 1812. Articles 1, 2, 3, and 4, of title 2 of chapter 15, of the Code of Civil Procedure of the state of New York contain various provisions as to the bringing of suits by and against corporations, domestic and foreign, in the state courts of New York, the appointment of receivers, the issuing of process, etc. Section 1812 makes certain of these sections applicable to a domestic corporation of the state, and to a corporation created by and under the laws of another state, or a trustee, director or other officer thereof, where the corporation or association does business within the state or has within the state a business agency or a fiscal agency, or an agency for the transfer of its stock. This particular section is referred to in section 2463, which is as follows:

"This article does not apply where the judgment debtor is a corporation created by or under the laws of the state, or a foreign corporation specified in section 1812 of this act, except in those actions or special proceedings brought by or against the people of the state. Nor does it authorize the seizure of, or other interference with, any property which is expressly exempt by law from levy and sale by virtue of an execution; or any money, thing in action, or other property, held in trust for a judgment debtor, where the trust has been created by, or the fund so held in trust has proceeded from a person other than the judgment debtor; or the earnings of the judgment debtor for his personal services, rendered within sixty days, next before the institution of the special proceedings; when it is made to appear, by his oath or otherwise, that those earnings are necessary for the use of a family, wholly or partly supported by his labor."

By this it is provided that the entire article relating to the subject of supplementary proceedings does not apply to a domestic corporation of the state, nor a foreign corporation specified in section 1812 of this act.

It may be stated, in passing, that there can be no question as to the authority of the United States courts to conduct examinations supplementary to execution, this having been considered in the case of *Ex parte Boyd*, 105 U. S. 647, 26 L. Ed. 1200, and the provisions of section 916 of the Revised Statutes (U. S. Comp. St. 1901, p. 684), upon which the decision in the case of *Ex parte Boyd*, supra, is based, are explicit upon the subject. This section is as follows:

"Sec. 916. The party recovering a judgment in any common-law cause in any circuit or district court, shall be entitled to similar remedies upon the same,

by execution or otherwise, to reach the property of the judgment debtor, as are not provided in like causes, by the laws of the state in which such court is held, or by any such laws hereafter enacted which may be adopted by general rules of such circuit or district court; and such courts may, from time to time, by general rules, adopt such state laws as may hereafter be in force in such state in relation to remedies upon judgments, as aforesaid, by execution or otherwise."

This provision was adopted by Act June 1, 1872, c. 255, 17 Stat. 197 (U. S. Comp. St. 1901, p. 684). No rule has been made by the Circuit Court for this district, nor has any general rule been adopted applicable to the entire circuit, since October 1, 1878, and we are therefore left to test the matter under the New York law as it existed upon the latter date, and on January 1, 1878. *Ex parte Boyd*, supra.

Section 2463 of the Code of Civil Procedure of New York seems to have been adopted by chapter 26, p. 34, of the Laws of 1886, while section 1812 was adopted by chapter 428, p. 501, of the Laws of 1875. Section 916 of the Revised Statutes (U. S. Comp. St. 1901, p. 684), was readopted upon the 1st day of January, 1878. It will thus be seen that section 1812 of the Code of Civil Procedure of the state of New York became a law between the time of originally passing section 916 of the Revised Statutes and its last enactment; but section 2463 is of much later date. The statutes of the state of New York relating to supplementary executions in force between the years in question—that is, in force prior to 1878—as shown by Bliss' Edition of the Code of 1877, provided, in section 292, for the examination of a judgment debtor, and contained the following:

"On an examination under this section, either party may examine witnesses in his behalf, and the judgment debtor may be examined in the same manner as a witness."

But this provision was held, in *Hinds v. Canandaigua & Niagara Falls R. R. Co.*, 10 How. Prac. (N. Y.) 487, and *Sherwood v. Buffalo & New York City R. R. Co.*, 12 How. Prac. (N. Y.) 136, not to apply to corporations.

Section 295 of the same edition of the Code provides that witnesses may be required to appear and testify on any proceedings under this chapter, in the same manner as on the trial of an issue. Section 298 provides for the appointment of a receiver. In 1880 a new revision of the Code of Civil Procedure of the state of New York seems to have provided, in section 2444, for the examination of corporations, and subsequent legislation has repealed the provisions for the examination of witnesses under subpoena. But these changes (that is, of 1880) are subsequent to the adoption of section 916, Rev. St. in 1878, and subsequent, as has been said, to any general rule in this district.

The present Code of Civil Procedure of the state of New York, in section 2459, provides that a judgment debtor or officer of a corporation, required to attend in its behalf, being a resident of the state or having an office within the state, for the regular transaction of business, in person, cannot be compelled to attend, at a place without the county wherein his residence or place of business is situated. This provision is a re-enactment of some of the language of section

292 of the Code of Civil Procedure of 1877; but it cannot be considered that such a provision is binding upon the United States court. If an execution could properly be issued to the United States marshal for the Eastern district of New York, and an order for examination can be had within the territory over which the execution would run, then the order for examination would certainly be effective throughout the Eastern district of New York, and would include more than one county. It could hardly be said that, in adopting the procedure of the state Code, Congress had intended to limit the jurisdiction of the United States court in the extent of execution of its own process geographically, for the boundaries of the United States courts are defined by sections of the Revised Statutes creating the courts, and process runs accordingly. Further, the New York Code, providing that witnesses may be summoned, has given the United States courts, under the adoption of this section, authority to summon witnesses, and in civil cases, under the provisions of section 876 of the Revised Statutes (U. S. Comp. St. 1901, p. 667), subpoenas may run within 100 miles. The most that can be urged would be that inasmuch as the New York Code limits the running of subpoenas of the state courts in supplementary proceedings to a county throughout whose territory execution can be issued, by analogy the United States court could only subpoena witnesses to attend throughout the district over which the United States marshal has jurisdiction to levy an execution; but legislating by analogy from other statutes is hardly a function of the court, and inasmuch as the subpoenas of the United States courts are especially given authority within a radius of 100 miles, in civil cases, it does not seem that this court should limit the right of subpoena in a particular kind of case, because of similarity or legislation in the state of New York, when the New York statute is not expressly applicable.

A further point, to the effect that the Maine corporation had obtained the privilege of doing business within the state of New York and had done business therein, at which time it had designated the person upon whom process might be served, and that because of these facts it should be presumed to still be doing business, and therefore be within the exceptions of section 2863, of course, falls, if section 2863 falls; but it may be said that the positive averment in the affidavits that the corporation is not doing business would seem to be sufficient ground for withholding from it any privilege which it might have if doing business, and this question would seem to raise an issue of fact, rather than one of law or jurisdiction.

Inasmuch, however, as the statute in force in the United States courts must date back to the law as it existed at a time when a corporation could not be examined, the entire proceeding must be dismissed.

EVANS v. NEW YORK & P. S. S. CO., Limited, et al.

(District Court, S. D. New York. December 19, 1906.)

1. SHIPPING—LOSS OF GOODS—LIABILITY OF CARRIER.

A steamship company, which, on the arrival of its vessel, placed cargo of a shipper in a warehouse on the wharf, which it had the right to use, and from there made delivery to the shipper, the goods not having been stored for the account and risk of the shipper, remained responsible therefor until delivery and is liable for a shortage due to some of the goods having been stolen from the warehouse.

2. WAREHOUSEMEN—CONTRACT CREATING—NEGLIGENT LOSS OF GOODS.

A steamship company for a stated sum acquired the right to use a pier, and also a room in a warehouse belonging to the owner of the pier, which such owner undertook to keep locked and guarded outside of business hours in connection with the other parts of its warehouse. The company placed certain goods to be delivered to a consignee in the room on Saturday afternoon, and on Monday morning it was discovered that a part thereof had been stolen. *Held*, that the owner of the warehouse was a bailee for hire against whom a demand and refusal to deliver raised a presumption of negligence which was not overcome by evidence that a guard was constantly maintained over the warehouse, where the goods taken were more than half a ton in weight and in large packages.

3. ADMIRALTY—PARTIES.

One who is bound to indemnify a party liable in admiralty and against whom such party has a right of action over, although not cognizable in admiralty, may, under the equity of the fifty-ninth rule, be brought into the original suit in admiralty by petition of such party or as an original respondent in order that the rights of all parties may be adjusted in a single suit.

4. WAREHOUSEMEN—WORDS AND PHRASES—"STORED."

Where a steamship company had a right to use a wharf belonging to a certain warehouse, and also to use the warehouse, and removed the cargo of a vessel and placed it in the warehouse from which it was stolen, the cargo was not "stored," in a technical sense, so as to render the warehousemen liable as such; it not having been delivered to them and a warehouse receipt taken.

In Admiralty. Action on bill of lading.
See 145 Fed. 841.

Frank E. Bradley (Mr. Ingram, of counsel), for libelant.
Convers & Kirlin, for the steamship company.
Beard & Paret, for William Beard and others.

HOUGH, District Judge. The libelant was the owner of certain rubber laden on the steamship *Capac* belonging to the respondent steamship company. The vessel arrived in dock on the evening of May 31, 1905, but the rubber remained on board until noon of Saturday, June 3d, when it was removed from the vessel and put into an adjacent warehouse belonging to the respondents Beard. The discharge of the rubber was completed by 4 p. m., and shortly thereafter the warehouse was closed by the employes of Beard, and work ceased until the following Monday. At 9 a. m. of that day the employes of Beard opened the warehouse, and it was immediately discovered that a considerable quantity of the libelant's rubber had disappeared. It is inferable from the testimony that it was stolen, but

exactly when, how, by whom, or under what circumstances remains undiscoverable. The libelant's agents had paid the freight on Friday, June 2d, and on the following Monday morning sent a clerk to get the rubber. This clerk was advised of the shortage, and (on conflicting evidence) I find was also advised of the fact that the rubber had disappeared between Saturday evening and Monday morning, and while it remained in Beard's warehouse.

The steamship company had not "stored" the rubber in the warehouse in the technical sense of the word, viz.: It had not delivered it to the Beards as warehousemen and procured a warehouse receipt therefor. The Beards own both the warehouse and the wharfage rights appertaining to the adjacent pier where the steamship lay, and for a stated sum paid by the steamship owners the latter had acquired from the Beards not only the right to use the pier and adjacent bulkhead, but also to use the room in which the rubber was deposited, for a time which had not expired at the date of the discovery of the loss. On the morning of each business day this room was opened by Beard's employes, and the steamship company was entitled to place therein anything that it pleased. Each evening it was closed, also by Beard's employes, and thereafter until the morning of the next business day the doors, windows, fastenings, and approaches of and to this room were watched and cared for by the servants of the Beards in like manner as was the rest of their extensive wharf and warehouse property, of which this room was but a small part. The room communicated with other parts of the establishment not rented to the steamship company, and the keys thereof were always in the possession of Beard's servants. The rubber lost consisted of about 20 packages weighing in all over 1,200 pounds.

The steamship company has pleaded the single defense that it stored the rubber with the Beards in pursuance of the authority contained in the bill of lading after the libelant upon due notice had neglected and refused to take delivery thereof. The delay on the libelant's part in sending for the rubber was unusual, and, if the shipowner had really exercised the authority conferred upon him by the bill of lading and stored the goods for libelant's account and risk, the case would have presented a different aspect. This was not done. The right so to do may have existed, but it was not exercised. The goods were not stored for libelant's account, and nothing was done by the shipowner to terminate or change its carrier's liability down to the time that the libelant's agent appeared and demanded his rubber. When such appearance and demand was made, the shipowner's representative did not refer the libelant's representative to any warehouseman to get what remnant of the rubber remained, but himself made delivery thereof, as, indeed, under the circumstances, I think he was bound to do. I entertain no doubt of the liability of the steamship company.

Points other than the above were argued at the hearing, but this is the only defense in the answer, and I decline to consider defenses not pleaded.

That the Beards are responsible both to the carrier and owner of the rubber seems to me clear. They assert that the contract between

themselves and the carrier was but a lease of the room from which the rubber disappeared, and that they therefore should not be regarded as bailees of the property placed therein. This would be true if they had not also undertaken for hire duly paid to watch and care for the room outside of business hours. *Beers v. Simpson*, 2 L. J. (O. S.) K. B. 212; *Sherman v. Commercial Printing Co.*, 29 Mo. App. 31. But their agreement to watch the room during nights and Sundays in like manner as they did their other premises renders the transaction a depositum and themselves bailees for hire, against whom a demand and refusal to deliver raises a presumption of negligence. *Fairfax v. N. Y. C. & H. R. R. Co.*, 67 N. Y. 11. In endeavoring to rebut this presumption, they have shown a system of elaborate watching, and proved that the watchers failed to ascertain that anything was happening during a time when some one stole and carried away more than half a ton of material packed in bags of an average weight of about 70 pounds. From such failure to note so remarkable and difficult an occurrence a jury would be warranted in finding a verdict against them, and I arrive at a similar conclusion.

Whether, however, the warehousemen are liable in admiralty presents a question not in my opinion finally settled by authoritative decision. Exceptions to this libel were overruled in 145 Fed. 841, upon the ground that on the allegations of the libel there had been a delivery of the rubber to the Beards in order that the latter might in turn deliver to the libellant, which fact rendered the matter one of admiralty jurisdiction; the storage being incident to the contract of carriage. I do not think that the evidence sustains this allegation. Nevertheless under the settled practice of this court, I cannot dismiss the libel as against the Beards. It seems clear that neither the libellant nor the steamship company could have maintained an original suit in admiralty against the Beards, because the negligence resulting in the disappearance of the rubber from the land warehouse did not give rise to a maritime tort, and neither was the contract between shipowner and warehousemen a maritime contract. Having found, however, that the carrier is responsible to the libellant, the former clearly has his remedy over against the warehousemen, and, in order to prevent circuitry of action and multiplicity of suits, it would have been, under our practice, competent for the shipowner to have petitioned the warehousemen into this proceeding, and, if this could have been done, no reason appears why the warehousemen may not be proceeded against as an original respondent. It is generally considered that the fifty-ninth rule grew out of the decision of *Brown, J.*, in *The Hudson* (D. C.) 15 Fed. 162. The reason for the rule, as put by the same judge in his return to petition for writ of prohibition in *Re New York, etc., S. S. Co.*, 155 U. S. 525, 15 Sup. Ct. 183, 39 L. Ed. 246, is that he who is "primarily liable and bound to indemnify" shall be brought into the original action in order that the rights of all parties interested in the same occurrence shall be adjudicated in one proceeding. It was on this principle that *The Alert* (D. C.) 40 Fed. 836, was decided, and cited with approval in *The Barnstable*, 181 U. S. 467, 21 Sup. Ct. 684, 45 L. Ed. 944. It is quite true that in *The City of Lincoln* (D. C.) 25 Fed. 836, the same distinguished judge

was at great pains to satisfy himself that the party sought to be brought in by petition was guilty of a marine tort; but I know of no case in which the question was discussed whether a person alleged to be ultimately liable, but not for reasons that would have warranted an original suit in admiralty, could be brought in under the equity of the fifty-ninth rule, except *Salisbury v. 70,000 Feet of Lumber* (D. C.) 68 Fed. 916, and in that the reported opinion does not reveal the discussion. As counsel for the third party, I there urged before the same judge that the limit of admiralty power to avoid circuity of action was to bring into an admiralty suit only those persons against whom a cause of action in admiralty presently existed, which, after seizure of the res by the libellant, was not the case as against the third party. The contention was overruled, and the form of decree directed shows clearly the ground of the assumed jurisdiction, viz., the right to demand indemnity from the party petitioned against.

More recently, the rule has been stated in this court as "requiring the appearance of any additional defendant who may be responsible for the claim or a part thereof." *Dailey v. City of New York* (D. C.) 119 Fed. 1005. This rule has been very frequently applied in unreported matters, and within a few days stated as authorizing anyone against whom a right of action over exists on the part of the original respondent or claimant to bring in such other person that "all the matters can be disposed of in one trial." *The Crown of Castile* (D. C.) (N. Y. Dec. 6, 1906) 148 Fed. 1012.

Solely, therefore, upon the ground that the Beards are bound to indemnify one who is liable in admiralty, I retain this libel against them.

Let a decree be entered against both the respondents, with a direction to collect first from the Beards; any amount not recovered upon due execution against them to be paid by the steamship company. Costs to follow the decree, and an order of reference granted if the amount is not agreed upon.

DAVID E. FOUTZ CO. v. S. A. FOUTZ STOCK FOOD CO.

(Circuit Court, D. Maryland. July 2, 1908.)

TRADE-MARKS AND TRADE-NAMES — UNLAWFUL COMPETITION — USE OF PROPER NAMES.

In 1867 David E. Foutz and Solomon A. Foutz, partners, under the name S. A. Foutz & Bro., began to manufacture certain animal remedies which became widely and favorably known and advertised. Solomon A. Foutz sold out to his brother, who greatly extended the business, which on his death was conducted by his widow, who thereafter formed plaintiff corporation, to which the business formulas, trade-marks, etc., were transferred, and plaintiff on January 28, 1908, registered the word "Foutz's" in the Patent Office as its trade-mark. Stanley A. Foutz, son of Solomon, an attorney, organized defendant corporation under the name S. A. Foutz Stock Food Company, and commenced to sell other animal remedies intended for the same purpose as those prepared by complainant under names embracing the name "Foutz's," and cautioned purchasers to look for the name "S. A. Foutz" and the pansy trade-mark to get the genuine. *Held*, that defendant's act constituted unlawful competition, and that its corporate name should be amended to include the full name "Stanley A. Foutz," and that

the word "Foutz" on defendant's packages, circulars, advertisements, and literature should only be used in connection with a statement that the material was prepared from the formulas of "Stanley A. Foutz," and that the goods were not prepared by complainant successor to the original Foutz Company.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, § 84.

Unfair competition, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.]

In Equity.

Crain & Hershey and Elmer J. Cook, for complainant.
W. Harry Holmes, for defendant.

MORRIS, District Judge. This is a case of alleged unfair competition in business. Both corporations have their principal places of business in Baltimore, Md., and were organized by persons connected with the Foutz family, resident in Maryland.

The bill alleges: That about 50 years ago two brothers, David E. Foutz and Solomon A. Foutz, partners trading as S. A. Foutz & Bro., manufactured and extensively sold certain remedies known as "Foutz's Horse and Cattle Powders" and "Foutz Liniment," which became well-known articles of commerce. In 1867, about 40 years ago, Solomon A. Foutz sold out, for a considerable sum of money, his interest in the business to his brother and partner, David E. Foutz, and David E. Foutz became the sole owner of all the secret formulas, names, good will, stock of goods, and materials connected with the business of manufacturing and selling the Foutz cattle medicines and remedies, and he continued the business under the name of S. A. Foutz & Bro. until his death, in 1877. Under the sole proprietorship of David E. Foutz, the business was greatly extended, and large sums were spent in advertising; the said David E. Foutz having spent in 1871 and 1872 as much as \$55,000 in advertising in those two years. The bill alleges that the cattle remedies became extensively known as the Foutz remedies, and particularly certain remedies designated as "Foutz's Celebrated Horse and Cattle Powders," "Foutz's Superior Poultry Food," "Foutz's Certain Worm Powder," "Foutz's Certain Colic Cure," "Foutz's Healing Powder," and "Foutz's Liniment," and the name "Foutz's" became widely known as distinguishing the preparations and remedies manufactured by the said S. A. Foutz & Bro., and the said word "Foutz" has acquired a secondary meaning indicating the medicines and remedies prepared by the said David E. Foutz, trading as S. A. Foutz & Bro., and by the complainant as his successor, which preparations are generally known to the trade and to users, and distinguished from all other preparations, by the use in connection therewith of the word "Foutz's." That the said David E. Foutz, trading as S. A. Foutz & Bro., continued the said business as the sole proprietor of said preparations, formulas, and trade-marks, widely extending the said business, until his death, in 1877, and thereafter said business was continued by his widow as the sole proprietor under the same name until 1903, when she caused the plaintiff corporation, the David E. Foutz Company, to be formed, which took over and became proprietor of the business,

including the formulas, names, good will, stock, and materials, and continued to use the word "Foutz's" as a trade-name for the various preparations before mentioned. On January 28, 1908, the plaintiff caused to be registered in the United States Patent Office the word "Foutz's" as its trade-mark for remedies for the ailments and diseases of horses, cattle, and other stock, alleging that it had been continuously in such use by the complainant and its predecessors in business since 1858.

The bill then alleges: That Stanley A. Foutz, a son of the Solomon A. Foutz, who, as before recited, about the year 1867 sold out his interest in the business to his brother, David E. Foutz, with the design and intention of acquiring the profits to be gained by selling the Foutz remedies—resulting from their long established reputation—and of substituting for the said remedies other articles of its own make, organized and incorporated in November, 1904, the S. A. Foutz Stock Food Company, the defendant, and went among the trade and customers of the complainant, and by means of many and different false and fraudulent misrepresentations has been selling to the old customers of complainant the preparations of the S. A. Foutz Stock Food Company as the same goods that said customers had been for many years obtaining from the complainant and its predecessors. That the said S. A. Foutz Company of Baltimore City advertised its preparations as "S. A. Foutz's Condition Powders," "S. A. Foutz's Poultry Food," "S. A. Foutz's Stock Food," "S. A. Foutz's Liniment," "S. A. Foutz's Healing Powder," "S. A. Foutz's Colic Tablets," and other similar preparations. That for the past 30 or 40 years the complainant's preparations—"Foutz's Horse and Cattle Powders"—have been known to the trade interchangeably as "Foutz's Condition Powders" and "Foutz's Powders," and have been listed on the drug catalogues and jobbers' price lists throughout this country and foreign countries as "Foutz's Condition Powders," and the complainant has received many orders from customers calling for "Foutz's Condition Powders" or "Foutz's Powders," meaning "Foutz's Celebrated Horse and Cattle Powders," and the complainant alleged that the name "S. A. Foutz's Condition Powders" was adopted by the defendant and its predecessor to more readily deceive the public and enable the defendant and its predecessor to acquire the trade and business of the complainant by unfair and fraudulent competition.

The bill recites that the S. A. Foutz Stock & Food Company of Baltimore City, incorporated in 1904, became insolvent in 1906, and all its assets were sold, and Stanley A. Foutz became the purchaser and thereupon caused to be incorporated the S. A. Foutz Stock Food Company, under the laws of the territory of Oklahoma, and transferred to it the said assets, and that said S. A. Foutz Stock Food Company of Oklahoma still continues to commit the before-mentioned frauds upon the public, and by its agents and salesmen are making false statements with regard to the business of both complainant and defendant, and is greatly and irreparably injuring the complainant's business and is fraudulently selling its goods as the goods made by the complainant, and depreciating the good name and reputation of the complainant's goods.

The defendant by its answer, by way of defense, asserts: That the only similarity in the goods of the parties to the suit is the word "Foutz's," and that is the proper name of the organizer, president and largest stockholder of the defendant corporation, whose name is Stanley A. Foutz; that in the manufacture of its goods the defendant uses formulas made by said Stanley A. Foutz; that it has adopted for its trade-mark a pansy conspicuously displayed on all its circulars and wrappers; that the name "S. A. Foutz's" is printed in large, bold type on said wrappers with the words "manufactured only by S. A. Foutz Stock Food Company, Baltimore, Md."; and that there is no similarity in color, shape, or size between the packages of its goods and those of the complainant.

The facts appear to be as stated in the bill of complaint and in the answer. The business of preparing and selling the Foutz cattle remedies having been established for so many years, and the preparations having come to be widely known as Foutz's medicines and preparations, and the complainant having become the sole and exclusive owner of the long-established business, with its formulas, trade-names, and good will, it is obvious that no one can carry on the same business, in the same territory, using the name "Foutz," without manifest injury to the complainant. It is also quite obvious that Stanley A. Foutz, whose father had sold his share in the business to the complainant's predecessor, and who is himself a lawyer and not a manufacturer of horse and cattle medicines, went into the rival and competing business for the reason that the use of the family name "Foutz" would at once give to this business venture the advantage of the established reputation that the Foutz remedies had acquired by years of use and advertising. The defendant puts on his circulars this caution:

"Always look for the name S. A. Foutz and the pansy trade-mark and you will get the genuine. Accept no other. Manufactured only by S. A. Foutz Stock Food Co., Old York Road, Baltimore, Md."

This caution would naturally import that the S. A. Foutz preparations were the genuine; that is to say, the preparations known as the "Foutz" remedies.

In *Herring, etc., Safe Co. v. Hall's Safe Co.*, 208 U. S. 554, 28 Sup. Ct. 350, 52 L. Ed. 616, the matter of the use of a proper name is very fully discussed and the law settled. The complainant in that case had acquired the good will, trade-names, and the business of manufacturing safes established by Joseph L. Hall, under whose proprietorship the safes made by him had acquired great repute and were known and designated as "Hall's Safes," and to this good will the complainant company had succeeded. Discussing the use of the name "Hall" by a rival company, the court said (page 559 of 208 U. S. and page 351 of 28 Sup. Ct. [52 L. Ed. 616]):

"Some of the Halls might have left it and set up for themselves. They might have competed with it. They might have called attention to the fact that they were the sons of the man who started the business. They might have claimed their due share, if any, of the merit in making 'Hall's' safes what they were. *White v. Trowbridge*, 216 Pa. 11, 18, 22, 64 Atl. 862. But they would have been at the disadvantage that some names and phrases, otherwise truthful and natural to use, would convey to the public the notion that they were continuing the business done by the company, or that they were in some

privity with the established manufacture of safes which the public already knew and liked. To convey that notion would be a fraud, and would have to be stopped. Therefore such names and phrases could be used only if so explained that they would not deceive. The principle of the duty to explain is recognized in *Howe Scale Co. v. Wyckoff, Seamans & Benedict*, 198 U. S. 118, 25 Sup. Ct. 609, 49 L. Ed. 972. It is not confined to words that can be made a trade-mark in a full sense. The name of a person or a town may have become so associated with a particular product that the mere attaching of that name, without more, would have all the effect of a falsehood. *Walter Baker & Co. v. Slack*, 130 Fed. 514, (85 C. C. A. 138). An absolute prohibition against using the name would carry trade-marks too far. Therefore the rights of the parties have been reconciled by allowing the use, provided that an explanation is attached. *Singer Manufacturing Co. v. June Manufacturing Co.*, 163 U. S. 169, 200, 204, 16 Sup. Ct. 1002, 41 L. Ed. 118; *Brinsmead v. Brinsmead*, 13 Times L. R. 3; *Reddaway v. Banham* (1896) A. C. 199, 210, 222; *American Waltham Watch Co. v. United States Watch Co.*, 173 Mass. 85, 87, 53 N. E. 141, 43 L. R. A. 826, 73 Am. St. Rep. 263; *Dodge Stationery Co. v. Dodge*, 145 Cal. 380, 78 Pac. 879. Of course, the explanation must accompany the use, so as to give the antidote with the bane. * * * The name of the defendant company of itself would deceive unless explained. * * * We are not disposed to make a decree against the Halls personally. That against the company should be more specific. It should forbid the use of the name Hall, either alone or in combination, in corporate name, on safes, or in advertisements, unless accompanied by information that the defendant is not the original Hall's Safe & Lock Company or its successor, or, as the case may be, that the article is not the product of the last-named company or its successors. With such explanations the defendants may use Hall's name, and if it likes may show that they are sons of the first Hall and brought up in their business by him, and otherwise may state the facts."

In *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118, it was said:

"Where the name is one which has previously thereto come to indicate the source of manufacture of particular devices, the use of that name by another unaccompanied with any precaution or indication in itself amounts to an artifice calculated to produce deception."

What would be a reasonable and practical differentiation to be observed by the defendant to prevent unlawful confusion and unfair competition? In the first place, it would seem that the defendant's name should be as different as the facts allow. This can be done by amending the corporate name so as to read the Stanley A. Foutz Stock Food Company. The date of the incorporation and the name of the state or territory granting the same should be given. On the packages, circulars, advertisements, and literature made use of by the defendant, it should be stated that the formulas used are those prepared by Stanley A. Foutz, and the goods are not the remedies prepared by the David E. Foutz Company, successor to S. A. Foutz & Co., originally established in Baltimore about the year 1858.

The use of the present name of the defendant corporation should be enjoined, and the defendant, its officers, agents, salesmen, employes, and servants, should be enjoined and restrained from representing the defendant's goods as being of the manufacture of the old firm or its successors, and from representing the same as that which the old customers of the complainant and its predecessors have been accustomed to purchase.

In re SCHOMACKER PIANO FORTE MFG. CO.

(District Court, E. D. Pennsylvania. August 18, 1908.)

No. 2,745.

1. LANDLORD AND TENANT—RENT—ACCEPTANCE OF SURRENDER OF PREMISES.

Where the trustee of a bankrupt removed its property from the premises occupied by it as lessee under a lease which still had more than a year to run, and surrendered the keys to the lessor, who accepted them, but stated that it was only for the purpose of renting the premises for the benefit of the bankrupt, and at once asked an increased rental, and within the year contracted for extensive repairs to be made at once, such action was an acceptance of the surrender and a waiver of any right which might have existed under the terms of the lease to hold the bankrupt for rent thereafter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, § 788.]

2. BANKRUPTCY—CLAIM ENTITLED TO PRIORITY.

Where a lease to a bankrupt corporation required it to make all repairs on the premises, and the landlord was compelled to pay for certain repairs made by the health department which constituted a lien, he was entitled to prove the same against the estate of the bankrupt as an unsecured claim, but not as rent entitled to priority.

In Bankruptcy. On certificate of referee concerning claim of landlord to priority.

C. Wilfred Conard, for trustee.

Gilbert F. Schamberger, for claimant.

J. B. McPHERSON, District Judge. The following extract from the opinion of the learned referee (Alfred Driver, Esq.) sets forth his finding of certain facts, and these, without more, sufficiently support his order of May 27, 1908, in which he refuses priority to the landlord's claim, but directs the trustee to pay a specified sum for use and occupation of the premises, and permits the amount paid by the landlord for repairs to be claimed for as an unsecured debt:

"Fannie E. Mastbaum has filed proof of debt, claiming that there was due to her at and before the filing of the petition in bankruptcy in this case the sum of \$7,896.12, and that the consideration of said debt is as follows:

"As to \$7,800, the same is claimed for the rental of 1518 Chestnut street, Philadelphia, from March 1, 1907, to April 1, 1908, under and by virtue of a lease of said premises to the bankrupt, of which premises the claimant is the owner.

"As to \$96.12, the consideration is that under the terms of said lease all repairs were to be made by the tenant, and that repairs were made by the board of health for which a lien was filed against said premises and the claimant as owner was compelled to pay said lien.

"The bankrupt is a Pennsylvania corporation, and on February 16, 1907, a bill in equity by a stockholder of said corporation was filed in court of common pleas No. 1 of Philadelphia county, in which it is alleged that said corporation has ceased practically to do business and is insolvent and unable to pay its debts and obligations, and on February 20, 1907, the court appointed receivers of all the property and assets of said corporation, and ordered that security be entered in the sum of \$80,000. The receivers filed bond in said sum, which was approved on February 23, 1907.

"Said corporation had leased said premises for three years from April 1, 1905, and had paid rent for said premises under said lease at the annual

rent of \$7,200, payable in equal monthly payments of \$600 in advance, in full to the 1st day of March, 1907. On the 21st day of February, 1907, two days before the receivers appointed by the state court qualified, the petition in bankruptcy was filed, and on February 25, 1907, the district court appointed a receiver, and the receiver's bond in \$50,000 was filed and approved on the same day. On March 14, 1907, the said company was adjudged a bankrupt, and on April 12, 1907, a trustee was appointed.

"The claimant is demanding said sum for rent under the following clause of the lease:

"(8) If lessee shall, during the term of this lease, show an intention to remove his goods from said premises without having satisfied lessor as to the payment of the rent for the balance of the term, or if lessee shall desert said premises or make an assignment for the benefit of creditors, or file or allow to be filed against him a petition in bankruptcy or insolvency, or if he suffer a judgment to be entered against him, or his goods on the premises to be levied upon under process of law, then in every such case the whole rent for the balance of the term of this lease, or any continuation thereof, shall become due and payable forthwith."

"On June 26, 1907, the trustee filed a petition for re-examination of said claim, in which it is alleged that all of the property of the bankrupt was removed from said premises upon March 15, 1907, on which day said premises were delivered by the receiver to the claimant as the owner thereof, and the keys to said premises were surrendered to the attorney and agent of the owner, and the petitioner says there is due from the estate of the bankrupt only such rent as has accrued to the 15th day of March, 1907, amounting to \$290.37, and that the sum of \$96.12 claimed for repairs is not for rent and is entitled to participate only, if at all, as a common claim.

"The claimant filed answer to said petition, and says that in accepting the keys to said premises acceptance of absolute surrender of the premises was refused, and that the lease was not treated as at an end, but, on the contrary, the keys were taken and retained with the receiver's permission for the purpose of renting the premises for the benefit of the bankrupt, and that no rights under the lease were waived, and that the premises up to April 1, 1908, would be treated as leased to the bankrupt, and denying that \$290.37 only was due, claimed \$7,896.12, which includes said sum of \$96.12 paid for repairs as due and owing for rent under the Bankruptcy Act.

"The following statement of facts was agreed upon by the claimant and the trustee:

"It is agreed that the facts with reference to the vacation of the property 1518 Chestnut street by the receiver of the Schomacker Piano Forte Manufacturing Company are as follows, to wit: That all of the property of the said bankrupt was removed from the premises of the claimant upon the 15th of March, 1907, by the receiver in bankruptcy, upon which day the said property and the keys thereof were surrendered by the receiver, through its attorney, William Maul Measey, Esq., to the said claimant as the owner thereof by delivering the same to Gilbert Frank Schamberg, Esq., attorney and agent of the owner of said property.

"At the time said surrender was made and said keys were delivered, Mr. Schamberg stated to Mr. Measey that he would not accept the keys as a full surrender of the premises, but that the owner proposed to stand upon her legal rights as contained in the lease, but that he would accept the keys for the purpose of renting the property on behalf of the bankrupt estate. To this Mr. Measey replied only that he intended the surrender to be absolute. Thereupon Mr. Schamberg wrote to Mr. Measey a letter stating the terms upon which he intended to accept the surrender, to which letter Mr. Measey replied, stating the terms upon which he intended to surrender.

"Pursuant to these letters and this conversation Mr. Schamberg, through Felix Isman, a real estate agent in Philadelphia, placed a "For rent" sign upon said property, and endeavored to rent the same, said sign being placed by said Isman on the inside of said premises.

"It is agreed that Fannie E. Mastbaum is the owner of the premises in question, to whom the bankrupt had been in the custom of paying its rent and whom the bankrupt has recognized as owner and lessor.

"It is further agreed that the record of proceedings in C. P. No. 1 of Philadelphia county in Re Justus Gray v. Schomacker P. F. Mfg. Co. shall be in evidence."

"Afterwards evidence was taken before the referee by which the following facts are shown: In July, 1907, counsel for the trustee sent a messenger to the office of the agent of the claimant to learn what sum was asked for the rental of said premises, and the answer was that they were asking a rent of \$10,000 per year. Upon inquiry if this was final, the agent said a smaller offer might be made, said about \$8,000, and the agent said: 'I don't believe you could get it for eight, but you might offer that.' I said: 'Nothing smaller than eight?' And he said: 'Nothing-smaller.'"

"Again, about the middle of January, 1908, another messenger was sent by counsel for the trustee to the office of the agent of the claimant to ascertain the rental asked for said premises, and this messenger was told that they were asking \$8,000 rent, and the figure would not be smaller whether taken for one, three, or five years. He was also informed that the building was not quite complete, that the building could be seen at any time after it was completed, and the rent would be \$8,000 a year.

"The claimant called a witness who had charge of the premises for the purpose of leasing them, and he said that no definite offer to lease the premises that could be considered had been made; that an offer had been made by one person to take the building on a five-year lease beginning at \$4,000, and scaling upwards to \$6,000, and that no serious offer had been made by any one for a period covering the lease of the former tenant. This witness testified that on December 18, 1907, a contract was made by the owner to put the property in 'what we call rentable condition' for \$6,000. This contract included installing a new heating plant, leveling the first floor and changing the stairway so as to make the upstairs entirely separate from the first floor, and that these alterations under the contract were to be finished in 60 days—that is on February 18, 1908—and that at the time the witness testified, January 29, 1908, 'they were figuring for a lease.'"

"The trustee testified that no permission had been given by it to the owner, or to any agent of the owner, to make repairs, or alterations, or to do anything to the property, at any time, and that the trustee had not entered the property since the keys were given up.

"By clause 12 of the lease it is agreed, inter alia, as follows:

"(2) That lessee may sublet parts of these demised premises, but must not sublet as a whole without the written consent of lessor. (3) That for the consideration of the low rent lessee does hereby bind himself, his heirs and assigns, to accept the premises in their present bad condition, put them in good tenantable order and keep them so at his own cost and expense, the intent of this clause being that lessor shall not expend one cent on these premises, inside or out, during the terms of this lease or any extension thereof.

"Upon the agreed statement of facts, and upon the evidence showing the increased rental demanded by the claimant for the premises, and upon the fact that a contract was made for extensive alterations, far exceeding in scope and expense ordinary or tenantable repairs, in this: that by such alterations, among other things, the entire character of the premises was changed so that the store and the other parts of the building were entirely separated from the other, and said increased rental being demanded and said alterations made without notice to or knowledge of the receiver, or trustee, of the bankrupt, it is manifest that the claimant by her acts determined the lease and assumed complete ownership and dominion over this property, doing with it as she chose, and entirely ignoring her declaration in the letter of March 15, 1907, that possession of the keys would be retained 'for the purpose of placing a "For rent" sign in the premises, and endeavoring to secure a tenant for the benefit of the present tenants. I desire it distinctly understood that in accepting these keys we do not waive any rights which we hold under the lease, nor do we purpose exercising any rights which belong to the tenants, * * * and all acts done by us will be done in their behalf.'"

"It is not proved when the contract to make the extensive and costly alterations was first contemplated, nor whether it was finished on the day appointed.

How could the lessee have the enjoyment or use of these premises during the time that such alterations were being made? How could the lessee be benefited by a demand of \$10,000 for rental of premises for which, under the lease, the rental was \$7,200? It is clear that the claimant was endeavoring to rent the premises at an increased rent not for the tenant's, but for her own benefit.

"It is not contended that, if a tenant at a rent of \$10,000 had been obtained, the difference in excess of the rent paid by the bankrupt company would have been paid over to its trustee. It is not shown by the lessor that any effort was made to rent the premises for the same rental as that paid by the tenant. On the contrary, the rent was largely increased.

"Upon the facts, it is found that the acts of the lessor in immediately increasing the rent, and afterwards in making permanent improvements to the premises, brought the lease to an end at the time the possession was surrendered by the receiver."

With this finding of facts I fully agree. The evidence shows clearly, I think, that the landlord was not sincere in professing to qualify her acceptance of the surrender, but that she was intending to make a profit, if possible, by leasing the premises again at a higher rent. Moreover, the true nature of her possession was disclosed by the kind and extent of the alterations that she proceeded to make, and by this action she treated the premises unmistakably as her own, and thus denied in the most effective manner any continuing right of the bankrupt estate under the lease. The referee was justified in his inference of fact that the lessor had brought the lease to an end at the time when possession was surrendered by the receiver.

It is unnecessary, therefore, to consider the validity of the landlord's contention that the bill in equity filed in the court of common pleas of Philadelphia county was "a petition in insolvency" within the meaning of the lease, and that the effect of beginning such a proceeding was to make the rent for the remainder of the term immediately due and payable, and thus to convert it into a fixed liability several days before the petition in bankruptcy was filed. Manifestly the ground for this contention disappeared when the surrender of the lease was accepted. The landlord could not resume the term and continue to claim its equivalent, namely, the remainder of the rent. Having elected to take the premises, the claim for this part of the rent (whatever the claim may have been worth) must be regarded as abandoned.

So far as the item for repairs is concerned, nothing need be added to what the referee has said:

"As to the claim of \$96.12 for repairs: This claim is not a part of the rent. The lessee undertook to make all repairs at its own expense. The lessor was obliged to pay above sum for repairs made by the board of health. For this sum the lessor has a claim against the bankrupt estate as a general creditor. It has not been shown that this claim under the lease, or otherwise, should be allowed priority in payment."

The referee's order is affirmed.

GETTS v. JANESVILLE WHOLESALE GROCERY CO.

(District Court, W. D. Wisconsin. August 13, 1908.)

BANKRUPTCY—VOIDABLE PREFERENCE—KNOWLEDGE OF DEBTOR'S INSOLVENCY.

Evidence considered, and *held* insufficient to sustain the burden of proof resting on a trustee in bankruptcy to show that a creditor at the time of receiving payment from the bankrupt had reasonable cause to believe him insolvent, so as to render such payment voidable as a preference; it being shown, among other things, that within a month prior to such payment, and when the conditions were practically the same, the creditor accepted the bankrupt as surety on a note, on receipt of which it shipped to the principal goods of substantial value, which it had previously refused to ship.

In Equity. Suit by trustee in bankruptcy to recover preference.

Richmond, Jackman & Swansen, for trustee.

William G. Wheeler, for defendant.

SANBORN, District Judge. Suit in equity to set aside a payment of \$900 made on two judgments by confession recovered by defendant against S. J. Barry, bankrupt, May 17, 1907. The adjudication was July 24, 1907. Suit is brought on the ground that the payment was made while Barry was insolvent, and that the effect of the enforcement of the payment would be to enable defendant to obtain a greater percentage of its claim than other creditors of the same class; also, that defendant, at the time of receiving the money, had reasonable cause to believe that the bankrupt, in making the payment, intended thereby to give a preference.

The facts are that some time prior to his bankruptcy Barry was in the retail grocery business at Oregon, a small village in Wisconsin, near Janesville, where defendant carried on a wholesale grocery business. Barry was then associated with one F. W. Coward, as a partner. Some time prior to November, 1906, Barry and Coward dissolved the partnership, and Barry continued the business. On November 10, 1906, Barry called on defendant at Janesville for the purpose of settling up his account, and it was adjusted by his giving a note for \$332.04, due in 60 days. He also asked for credit with defendant, and was requested to give a property statement. The secretary of defendant wrote a statement of the items given by Barry. The statement was signed by the latter, and showed that he had a farm of 127 acres near Oregon, worth \$100 an acre, and that his stock of goods was worth \$4,000. It further showed that the farm was incumbered by a mortgage for \$4,800. His debts were put in at less than \$1,000; the net amount of his property being stated at \$11,200. As a matter of fact, Barry's title to the farm was subject to a life estate of his father, then 82 years old, which was worth about \$2,000, and he owed debts amounting to nearly \$8,000, and, instead of being worth \$100 an acre, the farm was worth only \$75 an acre, and the stock of goods was worth much less than \$4,000. Barry was probably insolvent at the time of making the statement by at least \$2,000. However, defendant had no knowledge of the facts, and no reasonable cause for believing that the statement was untrue. It extended further credit

to Barry. In February, 1907, his stock of goods was largely destroyed by fire. It was insured, and he obtained \$700 from insurance thereon, besides some salvage. Barry then ceased business as a merchant, except to dispose of the goods saved, became a wage-earner, and was such at the time of filing his voluntary petition, July 23, 1907. Defendant learned of the fire shortly after its occurrence, and in April, 1907, its attorney, and also its manager, were informed that the stock of goods shown by the statement to have been worth \$4,000 had been settled for by the insurers for about \$700, and that a small amount of goods was saved. They also learned that Barry had gone out of the business and was working by the day. With this information of Barry's condition, defendant apparently supposed that he had no property except the real estate, which was shown in the statement to be worth \$12,700, subject to a mortgage of \$4,800. For this reason defendant desired to make its claim, then amounting to \$327.49, a lien on the farm. With this end in view, defendant sent an attorney to Oregon to procure a note or obtain some disposition or satisfaction of the claim and to look up the situation and decide what to do. When he arrived at Oregon he interviewed an attorney, Mr. Haskell, and also talked with the cashier of the local bank. Mr. Haskell informed him that he had some small claims against Barry, and advised him not to bring suit on the claim because it might precipitate bankruptcy proceedings, but that, if he got a judgment note and filed it against the farm and kept quiet for three months (meaning four months), the claim would become a lien and could not be disturbed by bankruptcy proceedings. Mr. Tallman, attorney for the defendant, says that Mr. Haskell may have been the first one to suggest the taking of a judgment note. The cashier of the bank informed Mr. Tallman that Barry had this farm and was good for a reasonable amount. This was on the 15th day of May, 1907, two months before the bankruptcy. On the same day Mr. Tallman took an ordinary promissory note from Mr. Coward in favor of defendant for \$654.84, being the amount due from Coward to the company. Mr. Tallman returned to Janesville with the notes, but was instructed by the president of the defendant to return to Oregon the next day and obtain a judgment note from Coward, with a surety. Mr. Tallman returned, accordingly, and asked Mr. Coward to obtain Mr. Barry as surety. The amount due from Mr. Coward included some goods still in possession of the defendant, amounting to about \$400, which defendant would not ship to Coward until they were paid for or the amount properly secured. It was arranged that, if Mr. Coward could procure Mr. Barry as surety on a judgment note, these goods would be shipped to Mr. Coward, and it was stated to Mr. Barry that Mr. Coward, out of the proceeds of these goods, would be able to pay a considerable part of the amount of the note. Mr. Barry, accordingly, signed the judgment note with Mr. Coward. When Mr. Tallman returned to Janesville, he was instructed by the president of the company to enter up judgment at once on both of the notes. Accordingly, on May 17, 1907, he went to Madison and entered up judgment by confession on both notes. Some time prior to the 17th of June, Mr. Barry desired to secure the payment of a debt due from him as a guardian or trustee

to his bondsmen, and learned for the first time that the judgments had been entered and had become a lien on his farm. It therefore became necessary for him to procure a release of the judgments, if possible, in order to secure the fiduciary claim. Thereupon he borrowed \$1,000 of his sisters, taking from them two certificates of deposit on the bank of Oregon for that amount, and went to Janesville, and told the president of the defendant that he wanted to satisfy the judgments, and asked some concession in the amount, and it was finally agreed that, if he paid \$900, the judgments would be discharged. Mr. Tallman and Mr. Barry, accordingly, went to Madison, where the money was paid and judgments released; Mr. Barry giving his sisters a mortgage on the farm for the amount borrowed of them. In April, 1907, two checks given by Barry to defendant on the Bank of Oregon were protested for want of funds; Barry's deposit then amounting to only \$55, and the checks exceeding his account.

The question for decision is whether defendant took the payment while having reasonable cause to believe it was intended as a preference. Barry's insolvency and consequent intent to prefer are clear, but whether reasonable cause so existed is one of much doubt. This is generally a question of difficulty, and the case is no exception to the rule. While defendant had knowledge of facts which might justly make it suspect Barry's solvency, yet it trusted him by taking his signature as security for \$654.84, and on the strength of that security it turned over to him his principal goods, valued at \$400. This and other circumstances make the question one of reasonable inference from facts and circumstances, some of which are not entirely clear, nor sustained by clear or unmistakable testimony. Thus, the testimony of Mr. Haskell of his interview with Mr. Tallman depends, not on his present recollection, but on a memorandum made by him some time after the interview, although before he knew that his recollection would be material to any controversy.

Many decisions on the subject have been made, both under the act of 1867 (Act March 2, 1867, c. 176, 14 Stat. 517) and the act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]). Those under the earlier act which find no reasonable cause are now rather stronger as precedents in favor of the preferred creditor, because insolvency by the act of 1867 consisted in the inability to meet claims as they matured, while by the later act a much broader test is prescribed, and those which find reasonable cause existed are now weaker as precedents against the preferred creditor. The leading case under the act of 1867 is *Grant v. National Bank*, 97 U. S. 80, 24 L. Ed. 971, followed by the Circuit Court of Appeals of this circuit in the case of *In re Eggert*, 102 Fed. 735, 43 C. C. A. 1, 4 Am. Bankr. Rep. 449. In the *Grant Case*, the court states the rule as follows:

"It is not enough that a creditor has some cause to suspect the insolvency of his debtor; but he must have such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency, in order to invalidate a security taken for his debt. To make mere suspicion a ground of nullity in such a case would render the business transactions of the community altogether too insecure. It was never the intention of the framers of the act to establish any such rule. A man may have many grounds of suspicion that his debtor is in failing circumstances, and yet have no cause for a well-grounded belief of the

fact. He may be unwilling to trust him further. He may feel anxious about his claim, and have a strong desire to secure it, and yet such belief as the act requires may be wanting. Obtaining additional security, or receiving payment of a debt, under such circumstances, is not prohibited by the law. Receiving payment is put in the same category in the section referred to, as receiving security. Hundreds of men constantly continue to make payments up to the very eve of their failure, which it would be very unjust and disastrous to set aside, and yet this could be done in a large proportion of cases if mere grounds of suspicion of their solvency were sufficient for the purpose. It is on this distinction that the present case turns. It cannot be denied that the officers of the bank had become distrustful of Miller's ability to bring his affairs to a successful termination, and yet it is equally apparent, independent of their sworn statements on the subject, that they supposed there was a possibility of his doing so. After obtaining the security in question, they still allowed him to check upon them for considerable amounts in advance of his deposits. They were alarmed, but they were not without hope. They felt it necessary to exact security for what he owed them, but they still granted him temporary accommodations. Had they actually supposed him to be insolvent, would they have done this?"

Defendant in this controversy was undoubtedly suspicious and anxious to secure its claim. It knew that goods stated to be worth \$4,000 in November, 1906, had been settled for by insurers for \$700 in April, 1907. It knew that Barry's checks had been protested, and that he was out of business and hard up. It was informed, if we may credit Mr. Haskell's memorandum of a past recollection, that there was some danger of Barry's bankruptcy, although at that time he was a wage-earner, and apparently could not be made an involuntary bankrupt. On the other hand, it relied on Barry's property statement, and trusted him, within a month before receiving the payment, by taking his signature as surety on a note of more than \$600, and in reliance thereon delivered goods worth some \$400.

The burden of proof to show reasonable cause is on the trustee. The presumption of law is that defendant did not have reasonable cause to believe a preference was intended (*In re Pfaffinger* [D. C.] 154 Fed. 523), and I am clear that the evidence does not overcome this presumption. The inferences are not clear. Some of the evidence is inconclusive. In this situation of the proof, the fact that the creditor did trust the bankrupt by accepting him as a surety for a substantial sum is entitled to considerable weight. *Coder v. Arts*, 152 Fed. 943, 82 C. C. A. 91. This is not a case where the attorney of the creditor "traveled as close to the edge of actual knowledge as he could without obtaining it," because he trusted the bankrupt by taking the Coward judgment note, thus showing belief in Barry's solvency. *Stevens v. Oscar Holway Co.* (D. C.) 156 Fed. 90; *Hussey v. Richardson Roberts Dry Goods Co.*, 148 Fed. 598, 78 C. C. A. 370.

The bill of complaint, as amended on the hearing, is dismissed, with costs.

THE HILARIUS.

(District Court, E. D. New York. June 14, 1908.)

1. SHIPPING—INJURY TO STEVEDORE—BREAKING OF WINCH—LIABILITY OF VESSEL.

An injury to a stevedore resulting from the breaking of a winch being operated by another stevedore, even if due to the fact that the machinery was not kept properly oiled, cannot be charged to the negligence of the vessel which furnished the winch, where no complaint was made as to its condition or notice given to the officers by the winchmen.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, § 350.]

2. SAME—EVIDENCE CONSIDERED.

Evidence considered, and held insufficient to charge a vessel with liability for the breaking of an eccentric strap on a winch, by which a stevedore was injured, but rather to show that the breaking was caused by the improper manner in which the winch was operated by the winchman, who was a fellow servant with the stevedore injured.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, § 357.]

In Admiralty. Suit for injury to stevedore.

Wilford H. Smith, for libellant.

Convers & Kirlin and Charles R. Hickox, for claimant.

CHATFIELD, District Judge. The libellant alleges fault on the part of the steamship because of the breaking of an eccentric strap due to a defective condition of a winch, while the claimant makes a general denial, alleges contributory negligence, and also claims that the accident was occasioned through the acts of a fellow servant, or through the improper management of the winch by the winchman, who was in the service of the stevedore and not of the steamship. The allegations of fault were with relation to the condition of this eccentric strap, and, as the case finally went to trial, must be gathered from the evidence rather than the pleadings. The allegations of fault were indefinite, but the claimant answered ready, and no motion was made with respect to these allegations until after the libellant had begun his case.

The testimony for the libellant shows that the winch made a rattling noise on the Saturday preceding the accident, and the winchman testifies that on Monday his reversing lever worked hard. The expert produced for the libellant testified, after inspecting the broken strap, that the break might have been occasioned through lack of oil, because of which the strap might have become heated, and sufficient friction have resulted to cause the break; but this expert also testified that the strap might be broken by reversing the lever when the steam pressure was on. We can dismiss the question of the rattle, for the libellant's expert testified that, if the strap was in the condition in which it was produced at the trial, none of the bolts had worked loose, and all of the testimony shows that the condition of the strap had not been changed in any way since the accident. The claimant has produced the affirmative testimony of two officers of the ship, to the effect that the winchman at all times when operating this winch, and even immediately preceding the accident, ran the winch and low-

ered the draft at a high rate of speed. These witnesses say that, when each draft of rails had been raised to a position over the hatch, the winchman ran the draft down under a full head of steam, and then reversed his lever without shutting off steam. The experts for the claimant and libelant each testified that this would of itself be likely to break the eccentric strap or some other portion of the engine. One of the doubtful points in the case is that the testimony of the claimant's witnesses is so positive upon this point that it is hard to explain why the winch did not break previous to the accident, if it had been continuously used in this manner. The winchman, on the other hand, testified that he started the drafts down, shut off the steam, and let the weight of the draft operate the winch without steam until the draft reached a point where a signal was given to the winchman, and that he then stopped the fall with his reversing lever, and again turned the steam on slowly to start the winch, in order that the rails might be drawn under the coaming of the hatch to the position where they were to be loaded. There is no evidence to sustain the libelant's contention that the accident was caused through lack of oil, except that the libelant's expert has stated it might have occurred in that way, and it seems to the court that the need of oil would create a condition of the winch which should be called to the attention of the officers of the steamer by the winchman, and neglect to remedy the condition after due notice must be shown before the vessel can be held liable therefor. The testimony shows that the winch was oiled before work was begun on Monday morning, and an overheating or use of the winch when dry, under the guidance of an experienced winchman, cannot be deemed negligence on the part of those furnishing the machinery, if the winchman allowed the condition to go on and said nothing. The *St. Gothard*, 153 Fed. 855, 83 C. C. A. 37.

A difference of opinion and of testimony has arisen over the question whether the load of two rails would run down if the winch were set in what may be called reversed position without the application of steam, and, as has been said, the claimant alleges that the winchman not only reversed his lever and started the fall down, but also stopped the cable at the bottom with a full head of steam throughout the entire operation. It is unnecessary to determine this point, although there would seem to be a preponderance of the testimony indicating an improper or careless handling of the winch by the winchman in order to make rapid progress. If the winchman so handled his winch as to reverse his lever with the steam on, and thus produced a condition which all of the experts admit would break the winch, then the responsibility for the accident must rest upon the winchman, who is a fellow servant of the libelant. If the accident occurred through applying the steam too rapidly after stopping the fall at the bottom of the hold, again the winchman must be held responsible. Taking the winchman's story as true, and assuming that no steam pressure was on at the time of the accident, and that the break occurred merely by stopping the run of the fall when he received the signal from the man at the hatch, it is impossible to gather from the testimony any explanation of what occurred which would throw liability upon the officers of the steamer. Perhaps the winchman should have used

steam, and the engine thus have been kept in control, if it can be believed that the fall would run down under the weight of the draft. Perhaps the winch was not able to withstand the shock of a sudden stoppage or reversal of the lever under such conditions, but the steamship officers were not responsible for the manner of using the winch (*The Baron Innerdale* [D. C.] 93 Fed. 492; *The St. Gothard*, supra), and, in fact, the testimony shows that they did complain and warn the stevedores as to the method of operation by the winchman.

The whole weight of the testimony is against any negligence on the part of the steamer or its officers, and this makes it unnecessary to consider whether the libelant was guilty of contributory negligence, although it may be said that the position in which the libelant was found after the accident, inasmuch as the testimony shows plainly that he was struck by the rails under the effect of a sudden jerk, rather than by being in their way as they ran down, is not of itself sufficient upon which to base contributory negligence so as to prevent a recovery.

The libel must be dismissed.

CLARKE v. ATLANTIC STEVEDORING CO.

(Circuit Court, E. D. New York. June 27, 1908.)

1. MASTER AND SERVANT—CONTRACT OF HIRING—ACTION FOR BREACH.

A complaint alleged that plaintiff received a letter from defendant's superintendent, stating that "I have work immediately for 200 colored longshoremen, and can guarantee the above number continuous work, providing they are good men," etc.; that, pursuant to said letter, plaintiff and 96 other colored men, who had assigned their claims to him, went to work for defendant, and were employed and paid by it to a certain time, when they were discharged, and their places filled by white men. *Held*, that such complaint did not state a cause of action for breach of contract; the letter being no more than an advertisement or invitation, the terms of any contracts being matters to be settled between the parties when the hirings were made.

2. SAME—TERM OF EMPLOYMENT.

A contract of hiring which does not state the term, in the absence of a statute or custom fixing the term, is terminable at will.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 19.]

On Demurrer to Complaint.

Wilford H. Smith, for plaintiff.

Hunt, Hill & Betts (George Whitefield Betts, Jr., of counsel), for defendant.

CHATFIELD, District Judge. The plaintiff in this action is the assignee of 96 colored longshoremen, who went to work at the suggestion and apparently under the direction of the plaintiff, who had received a letter from one Charles M. Tiffany, superintendent of the defendant, which is as follows:

"New York, May 3rd, 1907.

"Mr. William Clarke, New York City—Dear Sir: I have work immediately for 200 colored longshoremen, and can guarantee the above number continuous

work, providing they are good men. This Company pays the usual rate of wages, namely, 30¢ per hr. for day and 45¢ per hr. at night. We propose to keep colored men at work as long as they fulfill their part of the program. Attached letter-head will show you the work we do.

"Yours truly,

Chas. M. Tiffany, Supt."

The plaintiff and his 96 assignors went to work for the defendant, and were employed and paid up to the 6th day of July, 1907, when they were discharged and their places filled by white longshoremen. The plaintiff on his behalf, and because of the transactions with each of his assignors, has claimed \$1,000 damages each for breach of what he alleges was a contract to furnish continuous employment at a reasonable rate of wages. The complaint alleges that the defendant has failed to give employment to each of the plaintiff's assignors from the time of the breach until the present date.

The defendant has demurred, and claims (1) that the letter was not an offer by the acceptance of which the defendant would be bound to employ any particular person; (2) that, if a contract existed, its duration was indefinite, and in fact amounted to but an employment at will; (3) that the inducement was offered by the superintendent of the defendant, and that the defendant was an undisclosed principal; (4) that the advertisement called for 200 men and that but 96 appear to have gone to work, thus showing a lack of compliance on the part of the libelant. It is unnecessary to discuss these last two grounds. It is impossible upon demurrer to determine whether 96 or 200 men answered the advertisement; the record merely showing that 96 of these men have assigned their claims to the libelant. Nor does the record show the authority of the person who signed the letter. The letter is written upon the paper of the defendant, and the complaint states that the plaintiff went into the service of the defendant, and that the contract signed by the superintendent was made with the defendant.

It can hardly be determined upon the face of this pleading that a prima facie contract with the defendant is not alleged, if the matter was in any sense a contract between the plaintiff's assignors and any person or corporation whatever. We must, therefore, consider the first two grounds of the demurrer, and these would seem to be well founded. The letter recited is at most an advertisement or inducement to enlist the interest and offer of services by the plaintiff. It is manifest that the plaintiff as an individual could not do the work of 200 men, and the letter certainly contemplated the presentation to the defendant either of an offer to furnish longshoremen, or of longshoremen to be put to work, and all arrangements are left in abeyance, and by the terms of the letter would seem to be matters for adjustment at the time of hiring. The statement of a need is not the offer of a position, unless the terms are definite and the offer is so worded as to indicate intent to make a contract by acceptance. *United States v. Baltic Mills Co.*, 124 Fed. 38, 59 C. C. A. 558.

As to the other objection—that, if an arrangement was made, it was terminable at will—the question would seem to be disposed of by the previous discussion. But, in so far as the plaintiff may have shown by his complaint that he and his assignors went to work under

a contract of which the letter in question is a written memorandum (assuming for the purpose of this argument that the complaint has been so worded that a contract of this nature might be proven under it, even though on its face it appears to be an allegation of an offer and acceptance), nevertheless the demurrer should be sustained. A contract of hiring, indefinite with respect to the term for which the contract shall run, in the absence of allegations that the term of the contract is fixed by statute or custom, is at most a contract terminable at will. Many cases in the state court supporting this proposition could be cited, and a number of these are referred to, with a quotation from *Wood on Master and Servant*, p. 272, in the case of *The Pokanoket*, 156 Fed. 241, 84 C. C. A. 49, which shows the existence of the same rule in the federal courts.

The allegation of the complaint that the colored men were replaced by white, and the date of their discharge showing that the discharges all took place at one time, indicate a complete departure from the intent or mental attitude of the defendant's superintendent, as evidenced by the statement that "we propose to keep colored men at work as long as they fulfill their part of the program." This change of purpose may have caused hardship to a number of innocent workmen, but the matter must be determined according to the parties' legal rights, and not from the standpoint of sympathy or approval of the economic questions involved, and it seems to the court that the plaintiff has shown no agreement with the defendant by which it bound itself to continue the plan of employing colored workmen longer than it might see fit so to do; nor is any contract on the part of the defendant set forth under which the defendant agreed not to change its mind.

The demurrer must be sustained.

THE CARROLL THE NANSEMOND THE ROANOKE

(District Court, E. D. Virginia. July 30, 1908.)

SALVAGE—RESCUE OF BARGES ADRIFT IN GALE IN CHESAPEAKE BAY—RIGHT TO SALVAGE COMPENSATION.

The tug *Dauntless*, with a barge in tow, navigating Chesapeake Bay at night in a gale on the way from Baltimore to Norfolk, was signaled for assistance by another tug having five barges in tow. Anchoring her own barge in Hampton Roads, the *Dauntless* then found that four of the other tug's barges had gone adrift, and was asked to find them and take off their crews. She found three of them anchored in mid-channel a mile east of Thimble Light; the other having been sunk and her crew saved by the light keeper. The three were in great peril with the sea washing over them and their masters and crews in fear of losing their lives. At their request the *Dauntless* undertook to tow them to safety, and did so, taking first one on which there were a woman and a child, then the other two. The service commenced at 11:30, and continued until 9 in the morning, during which time weather conditions improved but little and was attended by considerable danger to the crew who were obliged to go on board the barges. Held, that the service was not one of towage, but of salvage, and one of merit, and that the *Dauntless* was entitled to an award from the one first rescued

equal to $12\frac{1}{2}$ per cent. of the value of the vessel, cargo, and freight money and an award of $7\frac{1}{2}$ per cent. from each of the others.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Salvage, §§ 80-83.

For other definitions, see Words and Phrases, vol. 7, pp. 6312-6315; vol. 8, p. 7794.

Awards in federal courts, see note to *The Lamington*, 30 C. C. A. 280.]

In Admiralty. Suit to recover for salvage services.

This libel was filed by the master of the tug *Dauntless*, in behalf of himself and crew and all persons interested as salvors, against the barges *Carroll*, *Nansemond*, and *Roanoke*, to recover for alleged salvage services rendered them and against their cargoes and freight money, under the following circumstances:

On the 25th day of January, 1908, the *Dauntless*, from Baltimore, had in tow the schooner *Malcolm B. Seavey* for the capes of Virginia, and the barge *Pocomoke* for the port of Norfolk, and arrived at the Middle Grounds in Chesapeake Bay, where she anchored the barge at 3:30 p. m. of January 26th, then proceeded to Cape Henry and dropped the schooner, returned to the barge, and picked her up again about 7:30 p. m. About that time the wind became very heavy from the south southwest, blowing a gale, with the sea running very high, causing the tug and tow to labor considerably, retarding her progress so that by 10 o'clock p. m. she had only reached a point halfway between Thimble Light and Old Point. About this time the *Dauntless* observed a tug and tow of five barges proceeding into Hampton Roads, laboring very heavily in the wind and sea then prevailing, and, as the *Dauntless* was passing, a signal of four whistles was blown by the other tug, which afterwards proved to be the *Bohemia*, indicating need of assistance, which signal was answered by the *Dauntless*, and she at once proceeded to anchor her barge in Hampton Roads, and returned to the relief of the distressed vessels. She met the tug *Bohemia* just below Old Point Light, about 11:30 p. m., with only one barge in tow; the remaining four barges having parted their hawser and gone adrift. The captain of the *Bohemia* requested the *Dauntless* to proceed to the barges to take off their crews, and render such assistance as was needed, while the *Bohemia* continued with her one barge to Norfolk. As the *Dauntless* passed Thimble Light, signals were sounded indicating that one of the barges had been lost, and the crew was saved by the lighthouse keeper, as the *Dauntless* afterwards learned. The *Dauntless* then proceeded down and found the remaining barges, the *Carroll*, *Nansemond*, and *Roanoke*, anchored near midchannel, about a mile east of Thimble Light, all of them awash with the heavy seas continually breaking over them, laboring heavily at their anchors, and their masters and crews in great fear of losing their lives. The *Dauntless* spoke the barges in turn, and was earnestly besought by the masters on each to take the barges in tow immediately, as they were in danger of sinking. The master of the *Dauntless*, ascertaining that the *Roanoke* had on board the master's wife, who was in great fear, and hysterical, at great peril to his own tug and those on board took this barge in first, nearly an hour being consumed in the endeavor to get a line fast to her, on account of the heavy gale and high seas, and she was taken to and anchored safely off Lambert's Point January 27th, about 2:30 a. m., the distance being some 15 miles. The *Dauntless* then returned immediately to the *Carroll* and *Nansemond*, reaching them about 4:30; the weather conditions remaining all this time practically the same, though with some slight moderation. When the *Dauntless* reached the *Nansemond*, the captain of the barge informed the master of the tug that he had sprained his back and needed assistance to get up his anchor, and two of the crew of the tug, after some dangerous maneuvers, jumped from the tug on board the *Nansemond*, and got up her anchor, when the hawser of the *Nansemond* was passed to the *Carroll* and made fast, and the *Dauntless* passed her line to the *Carroll*, and, after the *Carroll* had succeeded in getting her anchor partly up, the tug proceeded to tow the two barges into port; but before reaching Old Point Light she had to stop in order to get the *Carroll's* anchor entirely up, so that it would not catch

in and foul the cable. This was about 6 a. m. of the 27th, and about this time a severe gale from the northwest broke over the tug and barges, making navigation very difficult; but the Dauntless finally brought both barges up to Lambert's Point, and anchored them safely about 8:30 of the same morning.

Floyd Hughes, for libellant.

Hughes & Little, for respondents.

WADDILL, District Judge (after stating the facts as above). The fact of this being a proper case for an allowance for salvage is manifest. The claim is very much stronger against the Roanoke than the other barges, because at 12 or 1 o'clock, when the barges Carroll and Nansemond engaged the Dauntless to take them in tow, they were all certainly in desperate condition, and the only reason the service was not rendered to the Carroll and Nansemond first was that the Roanoke was apparently in the greater distress, necessitating that she should be taken in immediately, and no higher service could be rendered than saving the woman and child on the Roanoke. While the Dauntless was not exposed to very great danger, there was undoubtedly some, and the service she performed was meritorious in everything that she did for an abandoned tow. The Bohemia had abandoned her tow—for what reason the court does not know—and one of the barges so set adrift sank. No denial is made by the master of the Bohemia of the truthfulness of Capt. Scott's statements that the captain of the Bohemia relied on him to do what he himself should have done to have rescued this scattered tow, which certainly at that time was in very great danger. That all the barges were not swamped, as might have been expected, was very fortunate, because they were anchored in a very exposed place, with the weather such as it was on that occasion. As to the promptness of the service and the circumstances under which it was rendered, it commenced at 12 o'clock midnight, and ended about 9 o'clock the following morning; the Roanoke being taken at 12 o'clock at night, and the other barges at 4 o'clock in the morning, in the month of January, in the roughest and worst kind of weather. The court does not think that the undertaking was either intended as, or contemplated to be, a towing service. The barges were not looking for a tug for towing purposes in that vicinity at that time of the morning. The explanation of the barge masters that they thought the Dauntless was rendering the service for the Bohemia cannot be accepted. The facts do not sustain that view in any aspect; but certain it is the service was twice tendered and availed of and rendered each time. The masters and crews on the several barges were anxious and insistent to be taken in at 12 o'clock, but at 4 o'clock, when the force of the storm had considerably abated, they were not quite so uneasy. They could have refused the services of the tug on both occasions, but were careful not to do so, and, on the contrary, solicited and accepted aid in their then dire distress, and the court thinks they acted wisely, having regard to the lives of the people on board and the value of the barges and cargoes, in employing the Dauntless to bring them into a safe harbor. They got the first tug available to bring them in, and they ought to pay for the

service rendered, which was unquestionably a salvage service of a high order of merit.

After careful consideration, the court thinks that the libelants have proved that they are entitled to a salvage award, and that an allowance of $12\frac{1}{2}$ per cent. of the value of the Roanoke and of her freight money and cargo values should be made, and for the Carroll and Nansemond allowances of $7\frac{1}{2}$ per cent. each, including their respective freight moneys and cargo values; and, counsel having agreed that the Roanoke and her freight money and cargo was worth \$11,000, $12\frac{1}{2}$ per cent. of which is \$1,375, and that the value of the Carroll and her freight money and cargo was \$6,000, $7\frac{1}{2}$ per cent. of which is \$450, and that the value of the Nansemond and her freight money and cargo was \$7,625, $7\frac{1}{2}$ per cent. of which is \$501.87, doth allow to the libellant, as against the Roanoke, the sum of \$1,375, against the Carroll \$450, and against the Nansemond \$501.87, and decrees may be entered in favor of the libellant for these sums awarded respectively against the barges named, their cargoes and freight money.

In re OLANSKY et al.

(District Court, E. D. New York. May 4, 1908.)

BANKRUPTCY—DISCHARGE—FRAUDULENT CONCEALMENT OF PROPERTY.

Where, on the hearing of objections to the discharge of bankrupt partners on the ground of having fraudulently concealed property from their trustee, it was shown that they aided and assisted in a transfer of the partnership property to a creditor by means of the foreclosure of a chattel mortgage previously given by them more than four months prior to the bankruptcy, the question whether such acts were sufficient in law to bar their discharge depends on the validity of the chattel mortgage and its foreclosure, and a discharge will not be granted until that question has been determined in a proper proceeding therefor.

In Bankruptcy. On application for discharge.

McGuire, Horner & Smith, for objecting creditor.

Williams, Folsom & Strouse, for bankrupts.

CHATFIELD, District Judge. The bankrupts herein filed an involuntary petition in bankruptcy on the 12th day of June, 1907. From prior to January, 1907, until the 13th of June, 1907, the bankrupts had had business relations with the firm of Dixon & Dewey, which firm went into the hands of a receiver for liquidation in the state courts prior to the time of the bankruptcy herein. One Harry S. Dewey of this firm was acting as receiver, appointed in the state court proceedings, and a brother, James E. Dewey, went into actual possession of the plant and property of H. Olansky & Co., which subsequently became bankrupts under a claim arising from a chattel mortgage to secure the sum of \$20,000, and given by the bankrupts to the firm of Dixon & Dewey, in the month of January, 1907, at a time when the firm of H. Olansky & Co. owed to the firm of Dixon & Dewey several thousand dollars, and after which further goods were sold and credit given to the bankrupts, for which the \$20,000 chattel mortgage was intended to be security.

It is unnecessary at this time to consider at all the validity of this chattel mortgage. This question, as well as that of the sufficiency of the foreclosure, must be raised by the appropriate action on behalf of the trustee. The testimony on the present reference shows that a city marshal held what purports to have been an auction, and turned over the property upon a bid to the firm of Dixon & Dewey, upon a sale testified to have been held in the process of such foreclosure. Certain articles of machinery on the premises, and capable of passing into the possession of the trustee in bankruptcy, were not specifically mentioned in the schedules attached to this chattel mortgage; but the mortgage contained the words "all other machinery now on the premises."

The bankrupts kept no regular books, and in the spring of 1907, under the suggestion of Mr. Dewey, made up a set of books in the ledger of which the first seven pages were subsequently pasted together and rewritten, and, while these books do not completely set forth the assets and liabilities of the firm, nevertheless the evidence seems to show that they did more or less accurately set forth the transaction with reference to which entries were made. There is some testimony (Horner, p. 93) as to ledger references, which would indicate that some books had been kept; but there is no evidence to indicate that the failure to keep books was with the intent to deceive or defraud their creditors.

Subsequent to the filing of the petition in bankruptcy and of the alleged foreclosure, one Eustace Conway was appointed receiver, as successor to Harry S. Dewey, of the firm of Dixon & Dewey, and Mr. Conway allowed matters to run along, leaving James E. Dewey in possession of the property, but disavowing any possession as receiver, or any responsibility for the acts of James E. Dewey, and Mr. Conway in the testimony claims that he has a right to elect, and that he had exercised no election, with reference to taking possession of the property; it never having been determined by him whether the assets of the firm of Dixon & Dewey would be increased by the taking of such possession. There is considerable doubt thrown upon the operations of James E. Dewey as manager for Harry S. Dewey as receiver; there being some testimony to show that James E. Dewey's operations had been the opposite of profitable to the estate.

In this condition of affairs, an application for discharge was made on behalf of the bankrupts. The bankrupts, and also a daughter of the bankrupt Olansky, were for a considerable period of time retained in the employ of James E. Dewey as employés, and there salaries were paid by him. The daughter is also shown by the testimony to have made a considerable portion of the entries in the books which were written up in the spring of 1907. Certain creditors, formerly represented as attorney by Eustace Conway, the successor to the state receivership, retained other counsel at Mr. Conway's suggestion, and these counsel have filed, as attorneys for the objecting creditors, specifications in opposition to the discharge of the bankrupts. The testimony now on file and under consideration was taken upon a reference of these specifications, and the special commissioner has reported that the discharge of the bankrupts should be denied, on the ground that the bankrupts had concealed from their trustee certain property, with

intent to defraud their creditors; but the special commissioner has found in favor of the bankrupts on an objection to the effect that the bankrupts had failed to keep proper books of account. Upon the hearing before the special commissioner no testimony was offered as to the sufficiency of the proceedings to foreclose the chattel mortgage, nor was the chattel mortgage put in evidence; the attorneys for the bankrupt claiming that the burden of proof in attacking this foreclosure was upon the objecting creditors. Exceptions on the part of the bankrupts have been filed to the special commissioner's report; the bankrupts claiming that the evidence showed no concealment on the part of the bankrupts of any property, title to which passed to the trustee, and also that no fraudulent acts on the part of the bankrupts with relation to the property of the estate, or property to which the estate has a claim, have been shown. The objecting creditors defend the special commissioner's report as justified by the testimony, and it may be conceded that the report should be sustained, unless clearly in error.

The difficulties in this entire proceeding seem to have arisen from the relations existing between the firm of Dixon & Dewey and the alleged bankrupts, and it is apparent that the bankrupts attempted at all times to pay the claims of Dixon & Dewey, and made no effort to reserve any of their property for the benefit of any creditors except Dixon & Dewey. Mr. Conway occupies the somewhat anomalous position of being desirous of obtaining any benefits which might have resulted to the firm of Dixon & Dewey, and also of endeavoring to save for the other creditors of the bankrupt any property which can be rescued by these creditors, and which is not available to him as the receiver of Dixon & Dewey. It is difficult to see what advantage will accrue to the estate by the refusal to grant a discharge; but it is also difficult to escape from the conclusion that the bankrupts were endeavoring, through all of these transactions, to keep their property in the hands of Dixon & Dewey, or the assignee of that firm, and no other explanation or motive for the acts of the bankrupt is apparent, aside from the employment of the bankrupts by this receiver.

The conclusion of the special commissioner that they were concealing property from the trustee in bankruptcy, in that they were aiding the purchasers under the alleged foreclosure, would seem to be sustained by the testimony. Whether the bankrupts had a right to do this depends upon whether the foreclosure was valid, and the question of the discharge of these bankrupts should be left undetermined until the validity of the chattel mortgage and the sufficiency of the foreclosure thereof has been passed upon by some court having jurisdiction thereof. If the alleged chattel mortgage was invalid, and the transactions under it should be set aside as an attempt to defraud the creditors of the bankrupts while they (the bankrupts) were insolvent, then the discharge of the bankrupts should be refused, inasmuch as they assisted therein. If, on the other hand, the foreclosure of the chattel mortgage was valid, and the possession of the property by the receiver of Dixon & Dewey was under a claim of law, which attached to all of the property in the possession of that receiver, then the fact that the possession and ownership of some of the property is

not now insisted upon by the receiver of Dixon & Dewey would make the acts of the bankrupts insufficient as a matter of law to prevent their discharge.

The application for a discharge will be denied, and the report, as modified, confirmed; but the bankrupts may reapply for a discharge within the 18-month period, if they have obtained a determination in their favor as to the validity and good faith of the chattel mortgage transaction.

THE DAUNTLESS.

(District Court, D. Maryland. May 15, 1908.)

COLLISION—STEAM AND SAILING VESSELS.

Evidence considered, and *held* to establish the fault of a tug for a collision with a schooner at night; it appearing therefrom that the schooner carried proper lights, and that she kept her course, which placed the duty on the tug to keep out of her way, and that the pilot in charge did not give proper attention to the schooner.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, § 55.]

In Admiralty. Suit for collision.

Robert H. Smith, for libelants.

Foster & Foster, for respondents.

MORRIS, District Judge (orally). Undoubtedly the libellant has the burden of establishing, by a reasonably satisfactory preponderance of proof, the negligence of the tug. On the other hand, the steam vessel is, by the rules of navigation, to keep out of the way of the sailing vessel, and she has that burden to sustain, and to exculpate her it must appear that she has done all that was reasonably possible to keep out of the way of the sailing vessel.

In a case of this kind much attention must be given to the probabilities of the case, looking to the facts which are established, and it appears to me that, even if the testimony of the two witnesses from the schooner is entirely disregarded, the case sought to be made in her behalf is much the more probable. If their testimony is true, then the schooner did all that was required of her. If it is not true, then those two witnesses, the mate and the man at the wheel, have combined together to give perjured testimony. Johnson, the mate of the schooner, was a man 68 years of age, a navigator of experience, and his testimony as read to me impressed me favorably. He does not claim to have seen more than it would have been natural for him to have seen under the circumstances. And the man at the wheel seemed to be careful and candid in his statements. He says he did not see the tug at all, but told of the directions he had from the mate as to keeping his course in the presence of the tug, and he seems to have spoken truthfully when he says that the mate constantly observed the tug and walked backward and forward and gave him his orders. Now, in such a case, any change in the course of the schooner must be made by the man at the wheel by orders from the mate. He could not see for himself whether there was any danger or not, and therefore it

is not to be supposed that he, in a fright, lost his head and made a change of course. Whatever change he made was by the express direction from the mate who was watching the tug approach, and therefore it is readily to be believed that the mate's orders were given in consequence of what he observed.

Now, as to the lights: It seems to me that the preponderance of evidence is that the schooner displayed the proper lights. As to the testimony from the tug, it all rests very much upon the pilot. I do not think that his testimony shows that he was much impressed with the necessity of his keeping out of the way of the schooner. He speaks of having given warning, calling the attention of the schooner, as if she were another steam vessel that was obliged to maneuver on her own behalf in order to keep out of the tug's way. He says that he changed his course a half a point, and notwithstanding that, as he says, the schooner seemed to hang on to his starboard bow, he does not seem to have made any sufficient effort to keep out of the way. The way she seemed to him to luff, and the fact that she still seemed to hang on to his starboard bow and be coming toward him, was sufficient to impose upon him every possible exertion to avoid a collision; but I cannot see from his testimony that he was very much impressed by that duty. He speaks of having changed his course a half a point, and to have stuck to that for some time, and he struck me as being very slow in making a decided change in order to clear the schooner. Now, when you come to his account of how the collision happened—that is to say, that the schooner, having come along to within about 50 yards, and being in a position nearly abreast of the tug and where she should have gone clear, and then, as he says, without any reason that any one can see, that she made such a decided change in her course as to go off to the westward so as to run in the starboard bow of the tug—it all seems in the highest degree impossible. There was no reason for doing it unless those on the schooner were frightened and lost their heads, and there is no reason to suppose that that was the case. It seems to me in the highest degree improbable that the schooner made such an absurd and unjustifiable change in her course as would have been necessary to bring about a collision in the way those on the tug have stated it.

Now, as to the way the vessels came together: It appears to me that that is just as consistent with one theory as with the other. It seems to me that there is quite sufficient evidence all the way along of a want of caution on the part of the tug, and that, if the tug had been as careful as she should have been—even taking the pilot's own account of what happened—the tug would have been more active and would have taken more energetic measures to have avoided the risk of collision which was apparent and which the pilot himself says he could see. I think he had an opportunity to do a great deal more than he did do, according to his own account. It seems to me it is one of those cases of which there are many, in which the dilatoriness of the steam vessel allows a sailing vessel to get so close to her that the collision is inevitable before she makes a change in her course. I think that the proof sustains the allegations of the libel and that the libelant must succeed.

There appears to be some difficulty as to the value of the schooner. She was an old vessel, built in 1865. That is a matter that will have to go to a master, unless you can agree upon her value.

LOMBARD S. S. CO., Limited, v. LANASA & GOFFE S. S. & IMPORTING CO. OF BALTIMORE CITY.

(District Court, D. Maryland. July 1, 1908.)

1. SHIPPING—CHARTER—DAMAGES FOR FAILURE TO DELIVER VESSEL.

The failure to deliver a ship under a charter at the time agreed upon when she was to start on a voyage to Jamaica for a cargo of bananas, in consequence of which the voyage was not made, did not entitle the charterers to recover as damages from the owners the value of bananas which in the meantime were lost by being blown down by a storm, but which had not been cut and prepared for shipment in anticipation of the ship's arrival; the proximate cause of the loss being the storm, and not the default of the vessel.

2. SAME—CHARTER HIRE.

A steamship was chartered by respondents for a term of six months for a monthly hire. It was understood by both parties that with other vessels she was to be used in making regular trips from Baltimore to Jamaica for bananas; a round voyage being made every two weeks. She was to be delivered on March 5th to start on the first voyage, but was not tendered until the 11th, when respondents refused to receive her until the 19th, the time she should have started on her second voyage. She was then delivered and completed the charter. *Held*, that respondents were within their rights and were liable for her hire only from the 19th.

In Admiralty. Suit for charter hire.

George Whitelock and John B. Deming, for libelants.

Robert H. Smith and William P. Hall, for respondents.

MORRIS, District Judge (orally). This was a charter party between the agent for the owners of the steamship *Oxus* and the respondents, who are importers of bananas in Baltimore, for the use of the ship for six months at an agreed sum per month. There had been a previous charter of the ship, and each party knew exactly what use the ship was chartered for; that is to say, she was chartered to run on regular voyages to bring fruit from Jamaica to Baltimore in connection with other steamers running regularly, and arranged to arrive in Baltimore one or two steamers a week. The ship was to be delivered to the charterers on the 5th of March. Repairs having been made upon her to a considerable amount, the shipwrights refused to deliver her until their bill was paid. The owners and the principal agent being in London, there was delay in providing the money. It resulted in the ship being libeled and detained until the 11th of March. On that date the charterers refused to take her. They said:

"The purpose of our sending her out, as you well knew, necessitated our sending her out on the 5th of March. The purpose of that voyage has been frustrated by her detention, and therefore we will not take her until we would have sent her out on the next turn of her trip to Jamaica, which would be on the 19th."

On the 19th she was again tendered and was accepted and kept in use for the remainder of six months for which she was chartered. In the interval between the 5th of March and the 19th, there had been a loss of fruit in the island of Jamaica, and it is that loss which the respondent is now attempting to charge against the steamer—that is to say, to deduct it from the hire which would otherwise be due—and the question the court has to determine as to that is: First, whether it was such a loss as is properly chargeable against the steamer; and, second, is the loss sufficiently proved in order to enable the court to state just what that loss was.

The agreement being to deliver the vessel to the charterers on the 5th of March, and the business she was chartered for being known, if the charterers had ordered the fruit to be cut and ready for her, I think that the charterers would be entitled to recover the loss, if any had happened by the overripening of the fruit. If they had ordered a specific cargo to be prepared, and that fruit had been prepared and cut for shipment, if there was a loss by the decay of the fruit, I think that would be a loss which could be recovered as damages; but in this case now in hand there was no cargo cut and prepared for shipment. The charterers had general contracts with the growers of fruit in Jamaica to take their fruit, and under the contracts the growers of the fruit were entitled to notice, and were not to cut the fruit for shipment and delivery until they were notified of the expected arrival of the steamer. (The court here quoted the clause referred to from one of the contracts). So it was not a purchase of a specific lot of fruit, but the fruit was not to be cut for delivery until notice was given and ships were provided. On the 5th of March, the day on which the ship was held up by the libel of the shipwrights, there was a cablegram sent to the agents of the charterers in Jamaica, stating that the ship was detained and would not sail, and thereupon they gave directions to the different plantations from which they expected to receive the fruit not to cut until they were notified. The fruit did not rot on the trees, but there came a windstorm during the week when the steamer would have arrived, if she had sailed on the 5th of March, which blew down considerable fruit, it may be assumed the fruit which was nearest approaching to ripeness, and that fruit was lost because it was blown down, but not because it was overripe.

It does not seem to me that the proximate cause of the loss of that fruit was the nonarrival of the Oxus. It was the windstorm which blew it down. If it had not been blown down, it could have been used for loading subsequent steamers which were arriving weekly making regular trips.

For another reason I should have great difficulty, if I thought the loss was chargeable against the steamer, in determining what was the amount of the loss—what was the damage that was done. The witnesses are all exceedingly loose in their statements of how much fruit was blown down by this breeze. They refused to exhibit their books in which they had recorded the number of bunches. They had no original memoranda; the original memoranda having been taken very loosely on banana leaves on the plantation, and were destroyed. The parties refused to produce their books, and there was no means

of determining whether the claim they then made, at the time of taking the testimony, was the same claim they made at the time of entering upon their books the loss by the storm. In a case of this kind there ought to be very clear proof of the loss, if it is to be allowed. I should, on that ground, refuse to sustain the contention of the respondent in the case.

There only remains the question from what day the hire of the ship is to be calculated. It is admitted that it could not be claimed before the 11th of March, when the ship was tendered. On that day the charterer refused to receive her, and for good reason. The respondents then claimed that they had chartered the ship for a definite purpose known to the owners, and if she was sent out on the 11th of March the charterers would have three vessels returning to Baltimore at the same time loaded with fruit, and there would probably be a glut and a loss, and they refused to accept the ship then. It does not seem to me that was unreasonable, as the delay had frustrated the purpose for which the ship was chartered. But on the 19th, which would have been the sailing date for the second voyage if the ship had been delivered on March 5th, the respondent did accept her and sent her out. That delivery seems to have been in a way agreed to. At any rate, the parties thereafter went on under the charter as if it had begun on March 19th, for the six months which it had to run. I think that, as the charter party provides that the charterer shall pay for the use of the ship the stipulated hire per month, the respondents are only chargeable for the time they actually had the vessel in use, which was from the time of the delivery to them of the vessel on the 19th of March.

THE BRANDIO.

(District Court, D. Maryland. June 28, 1908.)

1. COLLISION—SUIT FOR DAMAGES—CONFLICTING EVIDENCE.

Conflicting estimates by the witnesses in a collision case in respect to speed and distances must be tested by the ascertained facts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, § 274.]

2. SAME—INEVITABLE ACCIDENT—NAVIGATING IN ICE.

A steam vessel overtook and passed another in a river clogged with ice. She was the faster vessel, but, after taking the lead, she was impeded by the ice, and finally was stopped, when the overtaken vessel, then following in her wake, ran into her. It appeared that such following vessel kept an efficient watch on the one ahead, and when she stopped immediately starboarded her helm and reversed, but could not overcome her headway before coming up with the other vessel, nor get out of her track because of the interference of the ice. *Held*, that the collision was due to inevitable accident, and that neither vessel was in fault.

In Admiralty. Suit for collision.

Daniel H. Hayne, for libellant.

Robert H. Smith, for respondent.

MORRIS, District Judge (orally). I do not feel that I am called upon in this case to find that any of the witnesses have willfully misstated the matters as to which they have testified. Much of the testimony from witnesses on behalf of the Pawnee consists of estimates of time and distances and speed, as to which there is great liability to mistake, great liability to be swayed by inferences, and great liability on the part of the most honest witness of being led to testify in favor of a theory which he has already formed in his mind. It is the duty of the court, as far as possible, when there is a very great discrepancy in testimony, to take hold of such ascertained facts as tend to reconcile conflicting estimates.

There are many statements of the witnesses in this case in respect to speed and distance which, I think, must be tested by the surrounding circumstances of navigation. In the first place, a great deal of the case on behalf of the Pawnee is based on the supposed superior speed of the Pawnee after she had passed the Erandio, and the supposed resulting distance between the vessels when the Pawnee blew danger signals. Undoubtedly, the Pawnee was the swifter vessel. When she passed the Erandio, it was probably in a space of clear water at the point of passing and at a high rate of speed compared to that of the Erandio; but immediately after that the circumstances were somewhat changed. The Pawnee met ice, increasing ice, and the Erandio naturally, and almost inevitably, fell into the clear water of her track. It would be hard to keep a following vessel parallel to the track of the leading vessel under the circumstances, and not to have her sheer into the clear water. So that while the leading vessel, the Pawnee, was breaking the track, the Erandio was sailing in a clear channel. The one was losing her normal speed, and the other was going faster than would be normal for her to go in a channel clogged with ice. So, I think, a good deal of the discrepancy as to the supposed distance between the two vessels is explainable as having been the result of the theory of the witnesses on the Pawnee that the leading vessel was going much faster than she was, and the following vessel was not going as fast as she actually was.

It is very difficult to estimate distances in the situation in which those on board of the Pawnee were. Their attention was engaged with other matters. They had the ice to contend with. They were about to make a turn in the river. They had many things to engage their attention. There was no special reason why they should be looking back at the Erandio until they struck the ice and began to lose their headway. Therefore I am inclined to think that the testimony of those on the Erandio, whose business it was to watch the vessel in front, and who, as far as I can find, were alert and attentive to their duties, is preferable to the testimony of those who were simply looking backward from time to time and making an estimate of distances.

In order to find that there was such a distance as estimated by the witnesses for the Pawnee, I should have to find that the testimony of those on the Erandio, viz., that they saw the stopping of the leading vessel in the ice, that they at once put the helm hard astarboard, and reversed the engine full speed astern, before they heard the danger signals given by the Pawnee, was willfully false. If that testi-

mony is not true, then it is willfully false, because they have all testified most positively that before they got the signal they had observed the stopping of the Pawnee in the ice, and that, as soon as they observed it, they made the only maneuver possible for them to make, and it was a proper maneuver. They put their engine full speed astern and put their helm hard astarboard, in the hope that they might stop the Erandio, and if she did not stop she might be able to avoid a collision by going to the port side of the Pawnee, notwithstanding the ice. I think I must take the statements of these witnesses as substantially true. It was their business to watch the Pawnee. She was ahead of them in full, plain view, in broad daylight. It is not to be supposed that those on the Erandio, although watching the Pawnee when she was losing her headway and gradually slackening her speed, could at once tell that she was about to stop; but they saw it, as I can judge from their testimony, when it was first plainly noticeable, and, when it was plainly noticeable, they made the maneuver already referred to. I do not see what else they could have done under the circumstances. The fact the blow was so light, and that the damage was not greater, is strong evidence that they had very nearly checked the headway of their vessel. The fact that they did come up on the port side of the Pawnee is evidence that they did starboard their helm and, I think, hard astarboard it. The reason they did not increase the distance was that there was hard ice on their port side, and therefore they could not do as much with a hard astarboard helm as they might have done under other circumstances.

It is a case not without difficulty, but the best judgment I can form about it, after giving close attention to the testimony and listening to the very able arguments, which have aided me very much, is that it was a case of inevitable accident. I think the Pawnee did, under the circumstances, all that could be asked of her. She did not give the signal as soon as she began to lose headway in the ice. No doubt, they expected from moment to moment that they would be through the heavy ice, and that they would be able to resume their former speed; but they did give the signal as soon as they thought it was reasonably necessary and reasonably proper. The following vessel, the Erandio, I think, as soon as she noticed the loss of headway, and surely as soon as she got the signal, made the only maneuver she could make, and it was not successful. It is the case of two vessels in a river clogged with ice and their navigation hampered by the presence of the ice. In such a situation an accident is exceedingly probable, although all ordinary care is observed. It is to be borne in mind that, although the Pawnee was the leading vessel at the time of the collision, she had a few minutes before been the overtaking vessel, and had pushed ahead of the Erandio, and in a measure had participated in bringing about the situation which led to the risk of collision.

Although cases of inevitable accident are rare, it seems to me this is one, and I will sign a decree in conformity with this view of the case.

THE PHILADELPHIA.

(District Court, E. D. Pennsylvania. July 14, 1908.)

No. 2.

WITNESSES—FEES—PARTIES IN INTEREST.

Where one of the members of an unincorporated pilots' association appeared on behalf of himself and the other members as claimant of a vessel owned by the association when libeled in admiralty, and defended the suit, other members of the association, who appeared as witnesses, being each an owner of an undivided interest in the vessel, were parties in interest in the suit and are not entitled to witness fees or mileage.

In Admiralty. On appeal from clerk's taxation of costs.
See 160 Fed. 742.

H. Alan Dawson, for libellant.

J. Frank Staley, for respondent.

HOLLAND, District Judge. The present issue comes before the court upon an appeal by the respondent from the clerk's taxation of costs. The action is one in rem upon a libel in admiralty filed by the Staples Coal Company against the steam pilot boat Philadelphia, upon which process was issued and the pilot boat attached by the marshal. Claim for the pilot boat was made, and answer filed, and the defense of the case conducted by John P. Virdin, one of the owners of the pilot boat, on his own behalf, as well as on behalf of the other owners. The answer filed is entitled as follows:

"The answer of John P. Virdin, part owner of the steam pilot boat Philadelphia, on his own behalf, as well as on behalf of the other owners of the said pilot boat."

The court dismissed the libel, and the respondent filed a bill of costs amounting to \$1,048.15, in which there was charged, inter alia, witness fees and mileage for the attendance as witnesses of the said John P. Virdin and 12 other pilots; such charge for the said 13 pilots amounting to the sum of \$144.10. At the taxation of the bill of costs before the clerk libellant objected to the allowance of this item of \$144.10 upon the ground that the said 13 pilots were part owners of the pilot boat, and as such were parties to the cause, and therefore not entitled to claim or to be paid witness fees or mileage. The clerk sustained this objection in an opinion filed, which is before the court. This cause now comes before the court upon an appeal by the respondent from the clerk's taxation of costs in disallowing \$132.60 of the said item of \$144.10. The balance of \$11.50 represents the fee and mileage of the said John P. Virdin, from the disallowance of which no appeal is taken.

The record in the respondent's appeal shows that the pilot boat is owned by the Pilots' Association for the Bay and River Delaware, which is an unincorporated association. The constitution of this association provides that the pilot boats or vessels owned by it shall be "conveyed to the president thereof, in trust for the use and benefit of the association and subject to its direction and control"; and it is further provided, in the third article, that the "ownership in the

property of the association shall be equal, each member taking the same interest or share as every other member, to be evidenced by certificates, said certificates specifying the interest or share of each holder." All the pilots who were witnesses and questioned in regard to the matter testified that each was part owner of the pilot boat Philadelphia, and the clerk, in passing upon the question in an opinion filed disallowing the witness fees, said:

"It nowhere appears that the association is incorporated, and therefore we may assume that it is an association of a number of persons joined together for the purpose of owning and operating pilot boats. Whether the pecuniary interest of the members therein is equal or not is immaterial. The libellant by law is given a lien on the vessel, which is their property, which he exercises by process of attachment. They voluntarily appear to defend their property, which is thus endangered, and by means of one of their number, as agent, make claim to the vessel and respond to the libel, and thus become parties to the cause; their interest being, not the interest of the question only, but also in the event."

The conclusion of the clerk would seem to be in accord with the practice in the courts of this state and in the federal courts in this district. A party testifying in his own behalf is not entitled to witness fees or mileage, whether suing or defending for himself or in a representative capacity, or testifying for another joined with him. 11 Cyc. 114; Elizabeth and Helen, Fed. Cas. No. 4,354; Nichols v. Brunswick, Fed. Cas. No. 10,239. Our attention has not been directed to any settled rule of practice in this district, except that adopted by the state courts, which was followed by the Circuit Court in *Nead v. Millersburg Home Water Co.*, 79 Fed. 129; and the practice in the state courts accords with the law as above stated. *Pentecost v. Parks*, 8 Pa. Dist. R. 636; *Cody v. Clelam*, 1 Pa. Co. Ct. R. 8; *Nead v. Millersburg Home Water Co.*, supra.

It is true that members of a corporation who are subpoenaed as witnesses and attend as such in a suit, as well as members of an unincorporated association who are called as witnesses when the association is sued as such, are entitled to witness fees in the state courts; but the claimants here for witness fees are not members of a corporation, nor are they defending as members of an unincorporated association. The pilot boat Philadelphia was attached, and the answer was filed by the president, as part owner of the steam pilot boat Philadelphia, on his own behalf, as well as on behalf of other owners of the said pilot boat, and these witnesses appeared, not directly in the interest of a corporation or unincorporated association, but for themselves to defend each his own interest as owners in the pilot boat, although not by their respective names. The rule, however, excludes them from collecting witness fees as well when they are actually parties in interest as when they appear as nominal parties on the record. The cases establishing the practice in Pennsylvania are collected in *Pepper & Lewis' Digest of Decisions of Pennsylvania Law*, pp. 41, 787.

The exceptions to the taxation of costs by the clerk are overruled.

UNITED STATES v. FOO DUCK.

(District Court, D. Montana. July 11, 1908.)

No. 1,242.

ALIENS—CHINESE EXCLUSION ACT—MINOR SON OF CHINESE MERCHANT.

A son of a Chinese merchant, lawfully domiciled in the United States, who came to this country from China while a minor for the purpose of joining his father, and who during the remainder of his minority labored and studied in the United States, is lawfully entitled to remain, after attaining his majority, and such right is not affected by the fact that he has since worked as a laborer.

[Ed. Note.—Citizenship of the Chinese, see notes to *Gea Fook Sing v. United States*, 1 C. C. A. 212; *Lee Sing Far v. United States*, 85 C. C. A. 332.]

James W. Freeman, U. S. Atty., and J. Miller Smith, Asst. U. S. Atty.

Thomas C. Marshall, for defendant.

HUNT, District Judge. Appeal from an order of deportation made by the United States Commissioner at Missoula, Mont.

The facts, as agreed upon by the United States attorney and counsel representing the defendant, a Chinaman, are substantially as follows: The father of the defendant is a Chinaman, a merchant, in Missoula, Mont., and has been engaged in the mercantile business in that city for over 15 years. The defendant is now over 23 years old. He arrived in the United States in May, 1901, when he was over 16 years old. He has a certificate issued under the treaty between the United States and China, and in apparent conformity with section 6 of the act of Congress approved July 5, 1884 (23 Stat. 116, c. 220 [U. S. Comp. St. 1901, p. 1307]). In this certificate he gave his former and present occupation as student. After the defendant arrived in Missoula, he worked as a cook and waiter at different times for several years. Part of the time he was helping the matron at the University of Montana, which is situated in Missoula, and while in this position, with the aid of the matron, he studied the English language, and learned to speak and read and write the same. He speaks English quite well, wears short hair, dresses as an American, and has evidently studied considerably.

As no question of fraud is in the case, the point for decision is this: Where a minor comes to the United States from China for the purpose of joining his father, who is a merchant lawfully domiciled in the United States, and thereafter, during his minority, such minor labors and studies in the United States, is he entitled to remain in the United States after attaining his majority, or is he liable to deportation? In my opinion such a person is lawfully entitled to remain within the United States. The boy, while a minor, acquired a right of domicile by virtue of his father having such a right; that is, the father's domicile being in this country, as the parent, he had a right to have his minor child enter. *Ex parte Fong Yim* (D. C.) 134 Fed. 938. This right was independent of any provision for certificate or compliance

with other provisions of the law. *U. S. v. Mrs. Gue Lim*, 176 U. S. 459, 20 Sup. Ct. 415, 44 L. Ed. 544. The minor really had no occupation when he entered; hence was not within the purview of section 6, relating to those who must obtain certificates. The reasoning which led to the construction of the statute whereby it was decided that the wife of one who is himself entitled to enter may enter without any certificate is applicable also to the case of a minor child of one so entitled to enter. Both are natural and lawful dependents upon the one who may lawfully have established his domicile in the United States. As the Supreme Court has said:

"In the case of the minor children, the same result must follow as in that of the wife. All the reasons which favor the construction of the statute as exempting the wife from the necessity of procuring a certificate apply with equal force to the case of minor children of a member or members of the admitted classes. They come in by reason of their relationship to the father, and, whether they accompany or follow him, a certificate is not necessary in either case. When the fact is established to the satisfaction of the authorities that the person claiming to enter, either as wife or minor child, is in fact the wife or minor child of one of the members of a class mentioned in the treaty as entitled to enter, then that person is entitled to admission without the certificate."

U. S. v. Chin Sing (D. C.) 153 Fed. 590, is remarkably like the case of this appellant. There the defendant entered the United States in 1898, when he was 14 or 15 years old, and joined his father, and worked as a helper in his father's store. Upon proceedings had under deportation statutes, Judge Wolverton held that the son had the right to enter without first procuring the certificate, as required by section 6 of the exclusion act, and that having come to the country while a minor, and being the son of a resident Chinese merchant, the defendant was lawfully entitled to remain in the United States. The decision of Judge Wolverton was rendered April 8, 1907, thus showing that the minor, who was 14 or 15 years old when he entered the United States in 1898, was 23 or 24 years of age when the court decided that he was lawfully entitled to remain.

The court, however, is asked whether the case before it is not to be distinguished because of the fact that the appellant worked as a laborer from and after the time he attained his majority. The answer is that: Having rightfully entered this country as a minor, and not with intent to become a laborer, he has not forfeited a right to remain by working as a laborer since he was 21. In other words, his coming having been rightful, the fact that, when emancipated, he followed the pursuit of a class of persons who are not entitled to enter, did not operate to deprive him of the right to remain. It is the coming of Chinese laborers into our country that the act is aimed against, and not the expulsion of persons who are here, not having come as laborers, but as children, and who, perchance, have become laborers in America after they have attained legal age.

My judgment is that the defendant has shown a lawful right to be in the United States, and to remain here, without regard to the certificate held by him.

He will be discharged.

UNITED STATES v. GREENE et al.

(Circuit Court, W. D. Virginia. July 20, 1908.)

1. TRUSTS—SUIT TO ENFORCE TRUST EX MALEFICIO—BILL OF INTERVENTION.

In a suit by the United States to establish and enforce a trust ex maleficio in certain property alleged to have been purchased with funds embezzled from the government, a bill of intervention, setting up an adverse claim to the property under an agreement between the defendant and intervener, is insufficient, where it does not deny the allegations of the original bill nor allege that the intervener was ignorant of the facts so alleged.

2. CONTRACTS—LEGALITY—AGREEMENT BY PRINCIPAL IN BAIL BOND TO INDEMNIFY SURETY.

The law will not imply an agreement or obligation on the part of the principal is a bail bond in a criminal case to indemnify his surety, and an express agreement for such indemnity by the principal is illegal and void as against public policy and will not be enforced by the courts.

In Equity. On petition for leave to file bill of intervention.

Marion Erwine, Sp. Asst. Atty. Gen., and Thos. L. Moore, Dist. Atty., for the United States.

J. L. McClure, Aubrey Strode, and Horsley, Kemp & Easley, for intervener.

MCDOWELL, District Judge. Heretofore a bill in equity was filed by the government against Benj. D. Greene, L. F. Kellogg, and the Norfolk & Western Railway Company. Of the nature of the bill it seems at present only necessary to say that it alleges a trust ex maleficio in favor of the government on some 400 shares of the stock of the railway company, standing in the name of Kellogg, which is alleged to have been purchased for Greene with misappropriated funds belonging to the government. The executrix of Jas. D. Leary asks permission to intervene, and alleges, in brief, that the said Leary became the surety of Greene in bail bond given in a criminal cause, on which default was made and on which judgment has been rendered, and that at the time Leary became surety it was understood between him and Greene and Kellogg that the railway stock should be held by Kellogg as a stakeholder and should be used, if occasion arose, to indemnify Leary. The petition of the administratrix of Jas. D. Leary for leave to file a bill of intervention herein is objected to by the government.

The bill of intervention does not deny the allegations in the original bill to the effect that the Norfolk & Western stock was purchased with funds embezzled from the government, nor does it allege that Leary, at the time of the alleged agreement of indemnity, was innocent of knowledge of the facts which are alleged in the original bill and which impress upon the stock a trust in favor of the government. In this failure of allegation the bill of intervention seems to me to be fatally defective. However, as the pleading may be amended in this respect, it will be necessary to go further.

I find myself unable to determine from the bill whether the drafts-

man is setting up an express agreement that the securities were to be used to indemnify Leary, or a tacit and therefore merely a supposed implied agreement. As uncertainties in pleadings are to be construed against the pleader, we must for the present regard the pleading as alleging a tacit, unexpressed intention, which, but for a rule to be mentioned later, would from the acts done and the circumstances create the implied agreement relied upon. I think it is settled, and counsel seem to concede it, that the law will not imply an obligation on the part of the principal in a bail bond in a criminal case to indemnify his surety. See 3 Am. & Eng. Ency. (2d Ed.) 684; Highmore on Bail, p. 204; U. S. v. Simmons (C. C.) 47 Fed. 575; U. S. v. Ryder, 110 U. S. 729, 4 Sup. Ct. 196, 28 L. Ed. 308. And to the extent stated I regard the last case cited as a binding decision. But here again the bill of intervention may be amended. Although verified, the ambiguity of the pleading may be but the imperfect execution of his task by the draftsman. Assuming, then, that the bill of intervention may be so amended as to unequivocally allege an express agreement between Greene and Leary that the securities deposited with Kellogg were to be used to indemnify Leary, let us consider if there would be shown a right on the part of the proposed intervener to any relief.

The reason why there is no implied obligation on the part of a principal in a bail bond in a criminal case to indemnify his surety is that such a contract is against public policy, in that it "gives the public the security of one person only, instead of two." As applied to an express contract by the principal to indemnify his surety (and as distinguished from a contract by a third person to indemnify the surety), it seems to me that the reason for the rule operates quite as strongly to invalidate such express contract as it does to deny the existence of an implied contract. An express contract by the principal in a bail bond, in a criminal case to indemnify his surety, at least as certainly gives the public the security of only one person, instead of two, as would an implied contract to such effect.

Where the contract of indemnity is made by some third person, and not by the principal, the public still has the security of two persons. While in the case of U. S. v. Ryder, *supra*, the fact that the indemnitor was not the principal in the bail bond in the case of *Chippis v. Harfnoll*, 4 B. & S. 414, was not adverted to, this distinction is of importance. See 16 Am. & Eng. Ency. (2d Ed.) 172, where the result of numerous decisions is thus stated:

"In reference to a contract to indemnify a person on account of his becoming bail for a prisoner charged with a criminal offense, the best rule would seem to be that such a contract is illegal as against public policy where it is entered into by the prisoner himself, but valid and enforceable if persons other than the prisoner are the indemnitors."

In 3 Am. & Eng. Ency. (2d Ed.) 684, it is said:

"For obvious reasons of public policy the law will not imply an obligation, nor will it enforce an express agreement, on the part of the principal, to indemnify his bail against the amount of penalty incurred by his default."

Such seems to me to be the necessary conclusion.

In the contention of counsel for the proposing intervener, to the effect that the government cannot rely upon the illegality of the agreement between Greene and Leary, I am unable to see merit. No court will lend its aid to enforce an illegal contract, and here it is the beneficiary under such a contract that moves the court to act. The case of *U. S. v. Ryder*, supra, is here again incidentally in point. In that case on the objection of Ryder, representing creditors of the defaulting principal in the bail bond, the court refused to subrogate the sureties in the bail bond or to afford them any relief.

As the contract between Greene and Leary, however pleaded, cannot be other than illegal and unenforceable, my conclusion is that leave to file the petition of intervention should be denied.

In re COHEN.

(District Court, E. D. New York. May 1, 1908.)

1. PRINCIPAL AND AGENT—RATIFICATION—ACCEPTANCE OF BENEFIT.

Where certain ranges sold under an alleged conditional sale contract were accepted by the buyer and installed in his buildings as contemplated, it was immaterial to the validity of such contract that the seller's offer was accepted by the buyer's alleged agent, whose authority was not proved.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, § 649.]

2. BANKRUPTCY—PREFERENCES.

Where stoves sold to a bankrupt for installation in his buildings, under a conditional contract of sale, were actually delivered, accepted, and used therein, such conditional sale contract, if otherwise valid, was not objectionable as a preference, though made within four months prior to bankruptcy.

3. SALES—CONDITIONAL SALES—VALIDITY.

Where ranges were sold to a bankrupt under a conditional contract of sale, the vendor's property therein before payment of the price as against the bankrupt's trustee was not impaired by the fact that use of the ranges on the buyer's property was inconsistent with the idea of a return to the seller, nor because of the claim that the ranges became a part of the real estate, and were therefore incapable of continued ownership in the vendor.

4. SAME—CONDITIONAL CONTRACT—CONSTRUCTION.

A letter written by the seller of certain steel ranges for installation in the buyer's flat buildings contained below the date line and above the address a statement that the title to all goods delivered should vest in the vendor until fully paid for. The letter offered to furnish a certain number of ranges in question to the bankrupt on certain terms, and, on being received, was accepted by the buyer through his agent, and returned to the seller, by whom it was duly filed, as a conditional sale as required by Laws N. Y. 1904, p. 1696, c. 698. *Held*, that such letter did not contain a fraudulent or secret condition, and was sufficient in form to constitute a valid conditional sale.

Miles Rosenbluth, for Union Stove Works.
Charles J. Belfer, for trustee.

CHATFIELD, District Judge. The petitioner asks for an order giving him leave to foreclose a lien upon, or to bring an action for the recovery of, certain stoves, or that, in the alternative, the trustee be directed to pay in full the balance of the purchase price for said stoves, which were delivered to and set up in a number of houses built by the bankrupt, and which have been used by the occupants of these houses in such a manner that their removal would presumably render the houses uninhabitable, unless others should be installed. The stoves were sold upon a memorandum, accepted by an agent of the owner, and this memorandum is in the following form:

"Established 1834.

Foundries at Peekskill, N. Y.

"The Union Stove Works.

"Manufacturers of Stoves, Ranges, Furnaces, etc., Gas Ranges, Hot Plates, and Heaters in Every Variety.

"70 Beekman & 66-68 Gold St.

"Officers:

"New York, U. S. A., Oct. 28, 1907.

"All estimates given subject to stoppage of our works through strikes, fire breakdowns or other serious accidents and credit is subject to withdrawal if unfavorable contingencies arise before buildings are ready for our goods.

"The title to all goods delivered to vest in the vendor until fully paid for.

"Mr. Max Cohen, 425 Bushwick Ave., Brooklyn, N. Y.—Dear Sir: For and in consideration of the sum of \$15 for each range, we will furnish, deliver and set less the plumbing connection, in your new buildings on Northeast corner of Rockaway and Dumont Aves., Brooklyn, 69 of our No. 70 Astors with water back and couplings. Ranges to be blacked and connected with the fines of the chimneys as we find them and as provided by you. Terms of payment to be 30 days net or 2% for cash in 10 days.

"Yours truly,

The Union Stove Works.

"Max Cohen.

"The above is accepted by Max Danziger. Corrected Dec. 10/07.

"12/3576/"

The creditor caused this written memorandum, as accepted, to be filed in the office of the register of the county of Kings, under the provisions of the laws of New York (chapter 698, p. 1696, Laws 1904), and the record of this agreement was indexed under block 1453 of the land map of the county of Kings in section 5.

It is claimed by the creditor that he has a right to foreclose his alleged lien, under the provisions of section 1757 of the Code of Civil Procedure of New York, and he asserts that this memorandum agreement which he has filed is either a conditional bill of sale or a chattel mortgage. It is admitted by both parties that the sum of \$1,065, with interest, is due, and no apparent question is raised as to the reasonableness of the amount claimed. The attorney for the trustee objects to the making of any order upon this application, upon the ground that the signature by an agent does not prove the execution of the instrument, which was neither acknowledged nor witnessed. It is unnecessary to consider this point, inasmuch as the ranges were received upon the property and used and accepted by the owner, and, if the memorandum is sufficient to give notice to creditors, under the recording act above referred to, the vendor of the ranges should be entitled to his rights thereunder. The trustee also contends that the alleged conditional sale was a preference, inasmuch as it occurred

within the four months prior to the filing of the petition in bankruptcy, but the transaction, being for value, and the goods having been actually delivered, it is difficult to see on what ground the claim of preference is based, if the requirements of the statute as to a chattel mortgage or conditional bill of sale were observed. Neither does the contention of the trustee that the ranges being intended for a use inconsistent with the idea of return (inasmuch as the ranges would be secondhand after heating) seem to be sufficient. Nor are the ranges such property as must necessarily have become a part of the real estate, nor incapable of continued ownership in the vendor.

The important question which is raised by the trustee, and about which there seems to be room for argument, is whether the instrument in question, which has been set forth at length, is in form either a chattel mortgage or a conditional bill of sale, and whether it was made under such circumstances, and is in such form, as to constitute an agreement with the purchaser that the title to the goods did not pass to the purchaser at the time of delivery. In *re Garcewich*, 115 Fed. 87, 53 C. C. A. 510. In the case of *In re Geo. Hassam* (D. C.) 153 Fed. 932, 18 Am. Bankr. R. 745, a pretended conditional sale was held to be secret and a fraudulent attempt to create a lien, inasmuch as the words reserving the title were printed upon the back of the instrument, and the evidence showed that no agreement to that effect was actually entered into. In the case at bar the paper is in form a letter head, in all respects constituting merely a memorandum of sale on credit, except for the clause printed upon the face of the memorandum, to the effect that "the title to all goods delivered to vest in the vendor until fully paid for." This paragraph, while not a part of the proposition addressed to Max Cohen, is included below the date line and is in plain sight upon the instrument. As between the Union Stove Works and Max Cohen, some question might arise, inasmuch as the offer was accepted by one Max Danziger, and no evidence is furnished to indicate who Max Danziger is. The acceptance of a contract by an agent must be ratified by the principals, unless the authority of the agent is shown by some other evidence than that of the statement of the agent himself. If Max Cohen had repudiated the transaction, the Union Stove Works might have had difficulty in sustaining the validity of its contract with him; but, as shown by the affidavits upon this motion, the contract was carried out on the part of the principal, Cohen. The stoves were received, set in the buildings, and used, and Cohen has apparently taken advantage of the contract. This is equivalent to ratification.

As between the Union Stove Works and the creditors of Cohen, the provisions of chapter 698 of the Laws of 1904 of the state of New York must have been complied with before creditors can be deemed to have notice of a conditional bill of sale. If the requirements of chapter 698 are met, there is no reason to consider that either the creditors or the purchaser himself were not apprised of the fact that the sale in question was considered conditional by the Union Stove Works, and that they intended to insist on their rights. Chapter 698 amends the lien law by providing that a conditional sale, with immediate delivery of the chattels sold, shall be void unless filed in com-

pliance with the provisions of that act, and household goods, to be attached or affixed to a building, are included within the provisions of the law. No objection is made that the provisions of the law have not been complied with, and no defect in the method of complying with the requirements of the statutes is pointed out. The criticism of the trustee is directed entirely to the form of the conditional bill of sale itself, and an attempt is made to bring it within the provisions of the Hassam Case above cited. It does not seem to the court that any such fraudulent or secret condition is shown here. The purchaser is not a party raising objection, and, in fact, no objection has been raised on his behalf. When filed, the contract would set forth the reservation of title as plainly as any other statement contained therein, and the very fact of filing is, as has been said before, evidence of the intent of the parties and of the nature of the paper.

In the absence of any testimony indicating deception on the part of the Union Stove Works or lack of knowledge on the part of the purchaser, the conditional bill of sale must be upheld; and, inasmuch as the goods have not been paid for, the vendor is entitled to relief. The present motion was made for leave to foreclose the lien or for a direction to the trustee to pay the balance due upon the property. It is unnecessary to determine which of these reliefs may be had, that can be taken up between the trustee and the creditor, and will be provided for upon the settlement of an order upon this motion.

GULDEN v. CHANCE.

(Circuit Court, E. D. Pennsylvania. July 31, 1906.)

No. 8, October Sessions, 1907.

1. TRADE-MARKS AND TRADE-NAMES—INFRINGEMENT—TEST.

Similarity, and not identity, is the test of infringement of a trade-mark; and it is sufficient to make out infringement if the imitation is such that unwary purchasers are likely to be misled thereby.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, § 64.]

2. SAME—"DON CARLOS" AND "DON CÆSAR."

Under the above rule the word "Don Cæsar," applied to imported Spanish olives packed in glass bottles by defendant, is an infringement of the trade-mark "Don Carlos," previously applied to similar olives similarly packed by complainant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, §§ 68-72.]

In Equity. On motion for preliminary injunction against infringement of the trade-mark "Don Carlos" and unfair competition in trade by reason of simulated labels, etc.

The bill alleged adoption, registration, and use of the words "Don Carlos," as applied to Spanish olives imported and packed by complainant, and also the use of certain distinctive forms of bottles, in which the goods were packed, and labels attached thereto; that the defendant had adopted and used the word "Don Cæsar," as applied to Spanish olives imported and packed by him, and also the same general style of bottles and labels. An injunction was asked

against infringement of the technical trade-mark "Don Carlos," and also against unfair competition in trade by reason of simulated bottles and labels.

T. D. Merwin, for the motion.

Frank P. Prichard and John K. Andre, opposed.

ARCHBALD, District Judge.¹ A trade-mark, to be of any value, must be able to be protected, not only against a palpable imitation, which will rarely be attempted, but against a colorable one as well, which is just as effective for purposes of deception, and which, therefore, invites the ingenuity of those who wish to take advantage of it. Similarity, and not identity, is thus the test, and it is sufficient to make out infringement if the imitation is such that unwary purchasers are likely to be misled thereby. 28 American & Eng. Encycl. Law (2d. Ed.) 410, 411.

In the present instance the complainant, who is a packer and dealer in olives has adopted and registered the words "Don Carlos" as a trade-mark making use of it in connection with a certain brand of olives which he puts up. The defendant, who is in the same business, has adopted the name "Don Cæsar" for the same purpose, and the question is whether the two conflict. It seems to me quite obvious that they do. So closely alike, indeed, are they, that I find myself at times having to think twice in order to keep clearly in mind which belongs to the one party and which to the other. Both names are Spanish, and are applied to a Spanish product, and both have the same prefix "Don," followed by a proper name of two syllables beginning with the same letter. To the confusion so induced the color and style of label also, as well as the general dress of the respective packages, while not enough, perhaps, to make out a charge of unfair competition, unquestionably add. That people who have learned to identify the complainant's olives by the trade-mark "Don Carlos" are likely to be deceived by that of "Don Cæsar" there can be little doubt, and as this is as clear now as it can ever be made, and nothing can apparently do away with it, the complainant is entitled to an injunction at this time, without having to wait until the final hearing.

The motion for a preliminary injunction is therefore granted as to the use of the name "Don Cæsar," but is refused as to the other matters prayed for.

¹ Specially assigned.

SPRAGUE v. PROVIDENT SAVINGS & TRUST CO. et al.

(Circuit Court of Appeals, Sixth Circuit. June 17, 1908.)

No. 1,785.

1. EQUITY—PLEADING—SUFFICIENCY OF ANSWER—WAIVER BY FAILURE TO EXCEPT.

A complainant in equity in a federal court who joins issue upon the answer, and goes to hearing without excepting thereto, is not entitled to thereafter move for decree because of its insufficiency.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 635.]

2. MECHANICS' LIENS—WAIVER OF RIGHT IN CONTRACT.

A provision of a building contract by which the contractor expressly waived the right to a mechanic's lien as against the holders of bonds issued by the owner and secured by mortgage on the property held effective, and not abrogated by subsequent dealings between the parties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mechanics' Liens, §§ 381, 382.]

Appeal from the Circuit Court of the United States for the Southern District of Ohio.

Proceedings by intervention in suit brought by the Provident Savings & Trust Company to foreclose a mortgage upon the Harrison Building in Columbus, Ohio. The case is here on the appeal of Sprague, receiver of Ellis & Co., intervener, from an order made subsequent to the decree of foreclosure and sale, denying to appellant a mechanic's lien under the contract of Ellis & Co. for the construction of the Harrison Building, and adjudging liens in favor of interveners Esswein, Winston, Powell, and the Electric Supply & Construction Company, under their subcontracts with Ellis & Co.

The essential facts are these: On November 14, 1901, one Blackburn, who held a permanent lease (upon the payment of ground rentals) of the lot on which the Harrison Building was later erected, contracted with Ellis & Co. for the erection by the latter of the building in question for the sum of \$300,000, covering both labor and materials, the building to be finished by April 1, 1903, payments upon the contract price to be made monthly on architects' certificates to the extent of 90 per cent. of the proportion of work done and 50 per cent. of materials on the ground, the final 10 per cent. to be retained until after 30 days from the final completion of the building, final approval of the architects, and acceptance by the owner. Express provision was made for transfer by Blackburn of his rights in the real estate under the building contract to the contemplated corporation, and that upon such transfer the corporation should be substituted in Blackburn's place. At the same time a side contract was made between Blackburn and Ellis & Co., for the payment by the latter to the former of \$60,000 in monthly payments of \$5,000 each (later modified by substituting a proportionate amount of each estimate as paid), as so-called rebates. This arrangement was made for the stated purpose of meeting ground rents, taxes, discounts, and commissions on sales of bonds, and interest upon bonds accruing before the completion of the building, together with architects' fees, so that the building when completed would represent a net investment of \$300,000. By another arrangement Ellis & Co. were also to pay the commission of one Moling for obtaining the ground lease, the amount of this compensation being stated generally in the record as \$5,000, although what apparently is the same item is stated in the written agreement between Moling and Harrison as \$4,400. Ellis & Co. were thus to receive net for the building about \$235,000. The defendant Harrison later acquired the rights of Moling and Blackburn, the latter receiving a share of the prospective net profits of the Harrison Building Company, and Ellis & Co. were notified by Harrison of the assignments in question; no objection being made thereto. The Harrison Building Company was organized April 10, 1902 (Harrison taking practically all its stock), and soon afterwards

received the assignment of the rights of Harrison and Blackburn under the original building contract. The construction of the building was begun a few days before the formation of the Harrison Building Company, and as a result of an arrangement made on the day of the formation of that company the time for completing the construction was extended until December 1, 1903. The mortgage under foreclosure (\$300,000) was made by the building company March 5, 1903, and on June 6, 1903, \$115,000 of the mortgage bonds were issued to Harrison on account of his advancements of \$110,000 and upwards, made before that time in connection with the construction of the building under the contract with Ellis & Co. The company had also made a temporary loan at the bank of about \$23,000. On July 27, 1903, when the building was partially completed, there had been paid to Ellis & Co., under the construction contract, about \$128,000, and that firm had repaid, under its rebate contract, \$23,649.24. On that date a contract was made between the Harrison Building Company and Ellis & Co. reciting that the building company was contemplating borrowing money to be used in the further construction of the building, and that the amount borrowed on the bonds might be insufficient to pay for the entire completion of the building, and containing an express agreement on the part of Ellis & Co. to complete the work in accordance with the terms of their contract for \$140,000 in addition to what had already been paid (with like provision for payments of architects' estimates as in the original contract), and "to turn over said building fully completed to said Harrison Building Company, its successors or assigns, as provided in said contract, hereby waiving all rights as contractors, or otherwise, to any lien upon said building as against bonds issued by said building company or the mortgage securing the same," and that such stipulation should operate in favor of any person or corporation loaning money on the security of the bonds.

In the same connection an agreement was made between Ellis & Co. and Knauss & Gamble, real estate agents and officers of the Harrison Building Company, reciting the agreement of July 27, 1903, before referred to, and providing that the rebates mentioned should be paid by Ellis & Co. to Knauss & Gamble from time to time, and that the fund so made should be deposited in the Manufacturers' & Merchants' Bank (called the "M. & M. Bank"), and should be used to pay Ellis & Co.'s estimates on the building at such times and in such manner as they might elect, with the express provision that the signing by Ellis & Co. of the agreement of July 27, 1903, should not release the responsibility of the principals or their successors on the original contract with Ellis & Co. for the erection of the building. The agreement of July 27, 1903, contained a reference to this proposed arrangement with Knauss & Gamble as securing "W. H. Ellis & Co. in the payment of the balance of the money due on their said contract for said building in addition to the amount of \$140,000 stipulated as above." In connection with the making of these contracts, an arrangement was made between the building company and Knauss by which the building company issued \$175,000 more of mortgage bonds, which, together with the \$115,000 of bonds previously issued to Harrison, were deposited with the Columbus Trust & Savings Bank as collateral to a note of \$190,000 executed by Knauss, the proceeds of which were to be used in taking up the temporary loan of \$23,000 before referred to, paying the discount upon the note and the services of the trust company and providing the \$140,000 for payment to Ellis & Co., the balance to be used for construction expenses, ground rents, and taxes. Up to March 7, 1904, there had been paid to Ellis & Co. out of this \$140,000 fund in the Columbus Savings Bank & Trust Company \$120,182.40, leaving in that fund and in that bank \$19,817.60. A controversy having arisen over the construction of the building, Ellis & Co. filed a mechanic's lien, claiming the \$300,000 provided by the contract plus \$8,000 for alleged extras, and giving credit for payments to the extent of \$244,204.85. As a result of this action a suit was begun by the building company against Ellis & Co. in the state court, under which Ellis & Co. were temporarily restrained from proceeding with the erection of the building. April 9, 1904, a stipulation was filed in the suit in the state court providing for an immediate specification by the architects of the particulars wherein the building failed of completion according to the contract, for an immediate completion of the building by Ellis & Co. according to the specifications and

contract, and for making payments to the subcontractors, to the extent of the previously unexpended contract price plus such allowance as should be made by the architects for extras; and providing that neither the right of Ellis & Co. to claim additional compensation, nor the right of the building company to claim that the work and materials claimed as extras, were required by the contract were waived, and that the pending suit, as well as the rights of each party under the contract, including such status as the Ellis & Co. lien might have, should be unaffected by the arrangement referred to. A few days later the architects made a specification of the details in which the building failed of completion according to the contract, estimating that \$10,890 was required for such completion, and on May 25, 1904, gave a more detailed statement specifying numerous particulars in which the building was incomplete. September 9, 1904, Ellis & Co. filed a second claim of lien, demanding \$37,293.01 for extras in addition to the contract price, and giving credit for payments amounting to \$243,254.85. On January 17, 1905, the \$290,000 of bonds held by the bank as collateral to the Knauss loan for \$190,000 were bought by Harrison for \$190,714.45. This was done to prevent a sacrifice of the \$115,000 of bonds owned by Harrison, as well as the \$175,000 pledged with it under the Knauss agreement. The foreclosure suit was begun January 6, 1906. Subsequently Sprague, receiver of Ellis & Co., intervened by cross-bill under leave of the court, and later the subcontractors, Esswein, Winston, Powell, and the Electric Supply & Construction Company were permitted to intervene. On May 16, 1906, a decree of mortgage foreclosure was made (the amount due being \$326,153.02), and sale of the premises was ordered free of liens, the fund arising from the mortgage sale to be substituted for the mortgaged premises, all questions of priority being reserved for further hearing.

The premises were sold to Harrison under the decree for \$150,000, the sale was confirmed, satisfaction of the mortgage ordered, and he was permitted to retain \$50,000 of the purchase price for application upon the bonds (payment of the remaining \$100,000 to the marshal being directed), and hearing was had upon the question of priority of liens. The trial judge filed an opinion, under which decree of distribution was made. The court held the lien of Ellis & Co. invalid, upon the ground that, when the claim of lien was filed, the building had not been completed, nor had it been approved by the architects or accepted by the owner; and upon the further ground that, as to the claimed extra work, none was done in accordance with the requirements of the contract, in that there was no written agreement between the parties authorizing the extra work or payment therefor, or any evidence to show that the owner by any act or conduct on his part waived or is estopped from asserting a right to the strict performance of the contract in respect to extras. The court also found that the building was never completed, and that the value of the extra work was, at most, but a few hundred dollars.

It was further held that the liens of the four subcontractors in question were valid and unaffected by the failure of the principal contractors to complete their contract; those of Esswein (\$5,640.63) and the Electric Supply & Construction Company (\$511.95) being held to antedate the mortgage bonds, and thus to be payable in full out of the proceeds of the mortgaged premises, and those of Winston (\$3,784.04) and of Powell (\$10,157.50) to be subsequent to the mortgage and payable ratably to the extent of \$12,184.17, as part of the rebate fund deposited in the M. & M. Bank; which, to the extent stated, the court held had been misappropriated by Ellis & Co. to the detriment of the subcontractors, and without their consent. The balance of the \$150,000 remaining above the payment of costs, receiver's expenses, fees, etc., was required to be paid to Harrison (as the holder of \$290,000 of the bonds), less \$10,000 and the interest thereon reserved for further order, on account of a conflict of ownership over the remaining \$10,000 of bonds.

The only appeal taken is that on behalf of the receiver of Ellis & Co. Upon this appeal, no question is made as to the decree in the case of Winston, and as to the other three subcontractors no question is made as to the performance and completion of their work, and as to their right to compensation therefor; the contention being that they are not entitled to liens unless Ellis & Co. are so entitled.

C. Southworth and H. L. Rockel, for appellant.
J. J. Lentz and J. E. Bruce, for appellees.

Before LURTON and RICHARDS, Circuit Judges, and KNAPPEN, District Judge.

KNAPPEN, District Judge (after stating the facts as above). A preliminary question is presented by the contention of appellant that the trial court erred in refusing to permit him to file a motion and affidavits for a decree in his favor against the Harrison Building Company upon the pleadings.

The proposition is based upon this situation: The answer of the Harrison Building Company to the cross-bill of appellant contained several admissions, grouped in eight separately numbered paragraphs. The ninth paragraph states that:

"This defendant denies each and every allegation and averment contained in said cross-bill of James M. Sprague, receiver of W. H. Ellis & Co., not herein expressly admitted."

The appellant filed replication to this answer, and went to hearing upon pleadings and proofs. The record indicates that, after the entry of final decree against appellant, the latter moved for a decree of judgment against the Harrison Building Company upon the pleadings, and that the court refused to permit the motion and affidavits to be filed. Regardless of the fact that the motion seems to have been made after final decree, the action of the court was proper. If appellant regarded the answer as insufficient, he should have excepted to it upon that ground. Having replied to it, and having gone to hearing, it is too late to raise the question of the technical insufficiency of the answer, as that it was too general. 1 Bates on Federal Equity Procedure, § 350, and following; General Equity Rule 61. It is true that by joining issue upon the answer its legal sufficiency as a defense is no longer conclusively admitted, but the facts stated and determined avail the defendant "as far as in law and equity they ought to avail him." General Equity Rule 33; *Green v. Bogue*, 158 U. S. 478, 500, 15 Sup. Ct. 975, 39 L. Ed. 1061; *Butler Bros. Shoe Co. v. U. S. Rubber Co.*, 156 Fed. 1, 5, 84 C. C. A. 167. But an exception to the answer for insufficiency raises not the question of the insufficiency of the facts stated in the answer in point of law, as a defense to the action, but only the question as to whether sufficient discovery has been made by the defendant, or the averments fully answered, or questions relating to scandal or impertinence (*Pennsylvania Co. v. Bay* [C. C.] 138 Fed. 203, 206), and general equity rule 61 expressly provides that, if no exception for insufficiency be made to the answer within the time provided by that rule, "the answer shall be deemed and taken to be sufficient."

At the outset we are confronted with the important question of the effect of the waiver of the mechanic's lien contained in the agreement of July 27, 1903. The language of the waiver is clear and explicit. It declares that the contractors waive "all rights as contractors or otherwise to any liens upon said building as against the bonds issued

by said building company or the mortgage securing the same." It is not contended that this contract did not create a waiver of the right to a mechanic's lien, nor could such contention well be made. As was said by Mr. Justice Miller in *Grant v. Strong*, 18 Wall., 624, 21 L. Ed. 859:

"The question whether a lien is obtained, or is displaced when it once attaches, is largely a matter of intention to be inferred from the acts of the parties and all the surrounding circumstances."

See, also, *McMurray v. Brown*, 91 U. S. 257, 23 L. Ed. 321, and cases there cited; *Central Trust Co. v. Richmond, N. I. & B. R. R. Co.*, 68 Fed. 90, 15 C. C. A. 273, 41 L. R. A. 458.

Appellant's proposition is, however, that this waiver was conditioned upon the application to the contractors' claims of the special rebate fund provided to be deposited in the M. & M. Bank; that in violation of this condition, and without the consent or acquiescence of Ellis & Co., Harrison caused to be drawn from the rebate fund in the M. & M. Bank the amount represented by building estimate No. 15, viz., \$17,104.17, less \$5,000 deducted for rebates, and later caused the voucher to be cashed from the \$140,000 fund in the Columbus Savings Bank & Trust Company; and that the result of this misappropriation of the special security set aside for the payment of appellant's demands is an abrogation of the waiver of the lien and restores appellant to all rights of lien existing in the absence of such waiver.

It may be conceded that such misappropriation, if established, would abrogate the waiver in whole or in part. *Chicago & Alton R. R. Co. v. Union Rolling Mill Company*, 109 U. S. 702, 3 Sup. Ct. 594, 27 L. Ed. 1081; *Van Stone v. Stillwell & Bierce Manufacturing Company*, 142 U. S. 128, 12 Sup. Ct. 181, 35 L. Ed. 961; *Central Trust Company v. Richmond, N. I. & B. R. R. Co.*, 68 Fed. 90, 15 C. C. A. 273, 41 L. R. A. 458; *McMurray v. Brown*, 91 U. S. 257, 23 L. Ed. 321. But whether entirely, or merely to the extent of such misappropriation, is immaterial, in the view we take of the case. The burden of proof is clearly upon appellant to establish the fact of the alleged misappropriation, as against the rights of Ellis & Co. The trial judge did not pass upon the question as concerning the rights of Ellis & Co., but did hold that there was a misappropriation of at least \$12,104.17 by the building company, as against the subcontractors, upon the ground that Harrison had received secret rebates from Ellis & Co., to the extent of \$23,649.24, to the prejudice of the subcontractors, and that the building company got the benefit of these rebates to the extent of \$12,104.17, thus depleting the sum available for the benefit of the subcontractors.

An examination of the record fails to satisfy us that there was a misappropriation of which Ellis & Co. can complain. The testimony of Kennedy, a member of the firm of Ellis & Co., is to the effect that the voucher for \$17,104.17, which is the one in question, was receipted for "on the \$300,000 contract"; that it was in the same form as those paid from the \$140,000 fund; that on its presentation to Knauss & Gamble the latter "gave their own individual check on the M. & M.

Bank" for that amount, less \$5,000—this deduction being not on account of the rebates which made up the fund of \$60,000, but on account of the commission for negotiating the ground rent lease. This check was apparently given February 2, 1904. He testified that Knauss & Gamble agreed "to hold the voucher as against Ellis & Co.," and not collect it from the Columbus Savings Bank & Trust Company, later testifying that "they [Knauss & Gamble] understood the circumstances, but they wanted to draw out of that fund," meaning, as we understand, the fund in the Columbus Savings Bank & Trust Company. Knauss denies any knowledge or recollection of an arrangement that the voucher should not be drawn from the \$140,000 fund in the same way that other like vouchers were drawn. Gamble did not testify. The check on the M. & M. Bank was not produced. It does not appear whether or not Knauss & Gamble had more than one account at the M. & M. Bank. The check may have been drawn from the rebate fund, but Kennedy's testimony, that the check given by Knauss & Gamble was "their own individual check on the M. & M. Bank," does not satisfy us that the check in question was drawn against the rebate fund. Taken altogether, it appears to us quite as consistent with the construction that there was not enough in the rebate fund to pay the voucher, that it was accordingly paid from Knauss & Gamble's individual account, and that what Kennedy wanted was that Knauss & Gamble should hold the voucher until there should be enough in the rebate fund to pay it. It may be that it was drawn against the rebate fund, and that a double payment was made to the extent of \$12,104.17, and that a misappropriation of that amount was effected without the consent of Ellis & Co. We can only say that we are not satisfied from the testimony that appellant has sustained the burden of proving that there was such double payment or such misappropriation.

It is further contended that the waiver was abrogated by an alteration of the contract subsequent to the agreement of July 27, 1903, so that the proposal embodied in that contract was not complied with. We cannot assent to the proposition that the building contract contemplated by the agreement of July 27, 1903, is proven to have been so altered as to abrogate the express waiver of lien as against the bondholders. The original contract apparently contemplated extras by forbidding compensation for the same, "except that written agreement therefor be first signed and the said extra charges agreed to in writing by the said party of the first part, or his successors or assigns, and agreed to by said second party's bondsmen." The agreement of July 27, 1903, contains nothing to the contrary. On the other hand, it evidently contemplated that extras would be required beyond the specifications of the original contract, for it recited that "the amount borrowed on said bonds may be insufficient to pay for the entire completion of said building." Inasmuch as at least \$100,000 appears to have been paid before July 27, 1903, the \$140,000 deposited in the Columbus Savings Bank & Trust Company would have been sufficient to pay the remainder of the original net contract price of \$240,000, and Kennedy's testimony seems to treat the \$140,000

fund as applicable "to the \$300,000 contract." Unless, therefore, extras were contemplated, there was no apparent need of providing an additional fund out of the rebates. But, regardless of this consideration, we are unable to see how there could have been any alteration of the contract without the consent of Ellis & Co. If they consented to such alteration, clearly they cannot predicate an abrogation of the waiver upon an alteration so assented to. If there was no assent by them, there could have been no alteration binding upon them, and so no abrogation.

The consideration that the lien of the principal contractors has failed of establishment by reason of their express waiver thereof does not necessarily affect the status of the liens of the subcontractors. Conceding, for the purposes of this opinion, at least, that under the present Ohio statutes (Rev. St. Ohio 1906, §§ 3184-3195) the subcontractors' lien cannot, except under circumstances not here material, take precedence of the lien of the principal contractor, and notwithstanding the fact that the personal liability of Ellis & Co. to the subcontractors is made by the contracts to depend upon the making of payments to the former by the owner, as held by this court in *Re Ellis*, 143 Fed. 103, 74 C. C. A. 297, there is no inconsistency, under the circumstances here presented, between the awarding of a lien to the subcontractors and the denial of a lien to the principal contractor. It is sufficient to say that it is not denied that the subcontractors have fully completed their contracts and are equitably entitled to compensation therefor; that neither the owner nor the bondholders are here complaining of the awarding of liens to the subcontractors; and, if Ellis & Co. are to be denied a lien because they waived it, they cannot well complain that their subcontractors have been substituted in their place to the extent stated.

It being determined that no lien in favor of Ellis & Co. exists, the questions of accounting need not be settled here. The decree of the court below is affirmed, upon the ground that the waiver of Ellis & Co. was effectual as to the mortgage bondholders, but without prejudice to any and all suits now pending or which may hereafter be brought between the appellant or Ellis & Co. and the Harrison Building Company and William P. Harrison, either or both, with respect to liability under the contracts in question; and without prejudice to the rights of the defendants, Winston and Powell, to maintain suit for whatever amount of their respective claims may not have been satisfied under the decree in this cause.

NOTE.—The following is the opinion of Thompson, District Judge:

THOMPSON, District Judge. This suit was brought by the Provident Savings Bank & Trust Company against the Harrison Building Company to foreclose a mortgage upon certain real estate in the city of Columbus, Ohio, consisting of a leasehold for 99 years, renewable forever, upon which there is a 12-story office building. They were the only parties to the suit. Afterwards Sprague, receiver of W. H. Ellis & Co., a partnership, which as contractor erected the office building, and certain subcontractors, claiming to have mechanics' liens upon said building, were permitted to intervene and set up their liens, and others claiming to have rights and interests in the property were also permitted to intervene and set up their claims. Some of the interveners

have not only filed intervening petitions, but also cross-bills covering the same matters, presumably being in doubt as to the form and style of the pleading required.

Intervention is "the admission, by leave of the court, of a person not an original party to pending legal proceedings by which such person becomes a party thereto for the protection of some right or interest alleged by him to be affected by such proceedings." *Bouvier's Law Dictionary*, 1114. A cross-bill is a mere auxillary suit, and must touch the matters in question in the original bill. If it concerns matter different from the original bill, it is not a cross-bill. *Cross v. De Valle*, 1 Wall. 1, 17 L. Ed. 515; *Rubber Co. v. Goodyear*, 9 Wall. 807, 19 L. Ed. 587. Here the interveners by their cross-bills do not touch the matters in question in the original bill, but only seek the protection and enforcement of the liens which they set up. They do not question the right of the complainant to foreclose its mortgage and bring the property to sale, but intervene to set up their own liens and have them protected and their priorities recognized. Original defendants or defendants brought into the suit as proper, necessary or indispensable parties may file cross-bills, but those who are not necessary or indispensable parties, who by leave of the court are permitted to come in for the protection of their rights and interests in the subject of the litigation, would best describe themselves as intervening petitioners, presenting their claims by intervening petitions. Here the subcontractors were not necessary or indispensable parties, and, had they not come in, their liens would not have been discharged by the sale of the property in the foreclosure suit by the complainant, but would continue against the property in the hands of the purchaser. *Esswein and Winston*, by leave of the court, filed intervening petitions, and without the leave of the court also filed cross-bills, and *Powell and the Electric Supply & Construction Company* filed cross-bills. The cross-bills of *Esswein and Winston* will be stricken from the files and the cross-bills of *Powell and the Electric Supply & Construction Company* will be treated as intervening petitions.

The "Second Defense" of the answer of the Harrison Building Company to the cross-bill of *James M. Sprague*, receiver of *W. H. Ellis & Co.*, sets up the pendency in the court of common pleas of Franklin county, Ohio, of a suit by *W. H. Ellis & Co.* against the Harrison Building Company and others, in which it is alleged that the petitioner states the same identical cause of action as is contained in the said cross-bill of *James M. Sprague*, receiver herein; that the Harrison Building Company, by cross-petition in said cause, asks judgment against *W. H. Ellis & Co.* for \$60,000, and that *W. H. Ellis & Co.*, against the objection of the Harrison Building Company, on May 10, 1906, dismissed said suit without prejudice to its right to bring a new action, and then alleges that 18 persons, partnerships, and corporations named, have some interest in the property, and prays that all proceedings in this court be stayed pending the proceedings in the state court, and that the 18 persons, partnerships, and corporations named be made parties to this suit, and that process issue against them. To this "Second Defense" a demurrer has been interposed by *W. H. Knauss and John T. Gamble and Knauss & Gamble*, two of the persons and one of the partnerships named, upon the ground, among other things, of multifariousness. It is entitled the "Joint and Several Demurrer of *W. H. Knauss and John T. Gamble and Knauss & Gamble, Partners*, to the Answer and Cross-Bill of the Harrison Building Company," but the text shows that it was directed against the so-called "Second Defense." The character of the pleading, however, would justify the court in acting upon its own initiative. This pleading does not show that the persons, partnerships, and corporations named are necessary or indispensable parties to the pending controversy, and, as it was filed after the sale and the confirmation of the sale of the property, it is difficult to comprehend what interest the Harrison Building Company has in bringing them before the court. Any liens or interests they may have upon or in the property have not been impaired or destroyed by the sale, and the purchaser, *W. P. Harrison*, who took the property subject thereto, has not asked that they be brought in. Nor can this court arbitrarily stay the proceedings in this suit to await the proceedings in the state court in the action by the Harrison Building Company against

W. H. Ellis & Co., presumably to recover damages for a breach of the contract for the construction of the building in question. The demurrer, therefore, will be sustained to the so-called "Second Defense," and the costs incurred in serving process upon said persons, partnerships, and corporations and all costs incident thereto, will be charged against the Harrison Building Company.

February 9, 1905, the Harrison Building Company made an assignment of its property for the benefit of its creditors, which was filed in the probate court of Franklin county, Ohio, to be administered, and on February 14, 1905, W. P. Harrison brought suit in the court of common pleas of Franklin county, Ohio, against Alexis Cope, the assignee, to set aside the assignment, which was done upon the execution of a bond in the sum of \$150,000, conditioned to pay the debts of the Harrison Building Company, including costs of administration in the probate court, and also including attorney fees. For the reasons stated in memorandum opinion of November 1, 1906, the demurrers of plaintiff to the cross-petitions of Cope and Sheets will be sustained.

The pleading entitled, "Amended and Supplemental Answer and Cross-Bill of the Harrison Building Company to the Cross-Bill of James M. Sprague, Receiver of W. H. Ellis & Company," was filed out of rules and without leave of the court, and was not brought to the attention of the court at the final hearing of the case, nor was evidence offered in support of it, and the matters therein set up are irrelevant to the matters in controversy and the motion of Sprague, receiver, to strike it from the files will be sustained.

Rulings of the Court Upon Admission of Evidence.

The objections to the admission of evidence numbered in pencil in the stenographer's report of the testimony 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23, 24, 26, 27, 28, 29, 30, 31, and 32, are overruled and those numbered 21, 21½, 25, and 33 are sustained.

The Claim of the Contractor.

November 14, 1901, W. H. Ellis & Co. contracted to erect and construct a 12-story office building for Joseph E. Blackburn "or for his successors or assigns in interest," in strict and careful accordance with plans and specifications to be prepared by the architect, and to furnish all material of every kind and description necessary therefore, and for which Blackburn or his successors or assigns were to pay W. H. Ellis & Co. the total sum of \$300,000 in monthly installments, upon the certificate of the architect of the work done and materials furnished during the preceding month, the final installment to be \$30,000, but not to be paid "until after thirty days from the final completion of the building, final approval of the architect and acceptance by the owner." March 18, 1902, Joseph E. Blackburn assigned his interest in the contract and property to W. P. Harrison, who on July 2, 1902, assigned the same to the Harrison Building Company, a corporation organized April 10, 1902, for that purpose.

Installments were paid from time to time as the work progressed, until a controversy arose as to whether the building had been completed in accordance with the terms of the contract, and thereupon, on April 9, 1904, in a suit pending in the court of common pleas of Franklin county, Ohio, in which the Harrison Building Company was plaintiff and W. H. Ellis & Co. and others were defendants, a written stipulation was signed and filed by the parties, by which it was agreed that Samuel Hannaford & Sons, architects, in charge of the construction of the building should forthwith, in writing, specify wherein they claimed that the building had not been completed in accordance with the terms of the contract, and that a copy of such specifications should be delivered to W. H. Ellis & Co. at as early a date as possible, and that within three days succeeding the delivery of such copy W. H. Ellis & Co. should advise the Harrison Building Company in writing of their objections, if any they might have, to the claim made by such architects, and W. H. Ellis & Co., irrespective of their disagreement, if any they had with the claims of such architects, should as speedily as practicable complete the build-

ing in accordance with the specifications and contract, not waiving, however, any right they might have to compensation for extra work, and the Harrison Building Company not waiving its rights to claim and assert that such work and materials were required to be done and furnished by the contractor. This stipulation was filed subsequent to the filing by W. H. Ellis & Co. of the affidavit for a mechanic's lien. The architects thereupon, in April, made an examination of the building and made a report, which was objected to by W. H. Ellis & Co. as being too general in its terms, and afterwards, on the 20th and 21st days of May, 1904, made a further investigation, and on the 25th of that month made a specific report, taking up the building, room by room and item by item, which was delivered to W. H. Ellis & Co., and which, or a copy thereof, was put in evidence and shows hundreds of items required by the contract which was then unfinished.

(1) Did the contract of July 27, 1903, supersede the original contract? Was the right of the contractor to a mechanic's lien restored by a violation of the contract of July 27, 1903, by the owner? The original contract was not superseded by the contract of July 27, 1903, but only modified as to the consideration; the latter contract providing that W. H. Ellis & Co. "will complete the work on said building in accordance with the terms thereof for the sum of \$140,000, in addition to sums already paid. Said sum to be paid on estimates to be made by the architect during the progress of said work as provided in said contract for said building; and to turn over said building fully completed to said Harrison Building Company, its successors or assigns, as provided in said contract. * * * In addition to the consideration above named for the making of the aforesaid stipulations, a further stipulation has been made, and which is hereby acknowledged, whereby W. H. Knauss and J. T. Gamble have for the Harrison Building Company secured or agreed to secure W. H. Ellis & Company in the payment of the balance of the money due on their contract for said building in addition to the amount of \$140,000.00 stipulated as above." Was there a violation of the contract of July 27, 1903, by the owner? The rebates of \$5,000 monthly (see the two agreements of W. H. Ellis & Co. and Joseph E. Blackburn, of November 14, 1901, and agreement of W. H. Ellis & Co. and Knauss & Gamble, of August 4, 1903) were to be deposited in the M. & M. Bank, and, when sufficient to pay an estimate, Knauss & Gamble were to give their check therefor on the M. & M. Bank, and with reference to the payment of Estimate 15, for \$17,104.17, Kennedy, upon examination in chief, testified as follows:

"Mr. Gamble was present when I delivered the voucher to him. There was an agreement whereby a certain amount of money was to be deposited in the M. & M. Bank, and, when that money had accumulated to a sufficient amount to take care of his architect's estimate, that they were to give us their check on the M. & M. Bank, and, when this voucher was presented, I demanded that check, and the percentage which was to go to the owner on their original contract reduced the amount of this estimate to a trifle over \$12,000—I can't recollect just the exact amount—and when this estimate was signed, receipted for by me, Knauss & Gamble gave their own individual check on the M. & M. Bank, and they agreed to hold this voucher as against Ellis & Co., to not collect it from the Columbus Savings Bank & Trust Company."

And upon cross-examination he testified as follows:

"Q. You spoke about a balance, I think about \$5,000, that you didn't get, being something that was to go to them on the contract, that was a rebate that they were to receive on the Ellis & Co. contract?"

"A. That was a rebate they were to receive on the original contract."

Mr. Huling's testimony as to what Gamble said about the \$17,104.17 voucher being delivered to Knauss & Gamble to cover advances theretofore made is mere hearsay and cannot be considered. Gamble was not called to testify, and Knauss' recollection of the transaction was very indistinct.

It is not questioned but that Kennedy received the \$12,104.17 as contemplated and provided for by the said agreements of W. H. Ellis & Co. and Joseph E. Blackburn and W. H. Ellis & Co. and Knauss & Gamble, nor can it be questioned that Knauss or the Harrison Building Company received the \$17,104.17 out of the \$140,000 set apart for W. H. Ellis & Co. It follows that the

Harrison Building Company wrongfully appropriated at least \$12,104.17 of the moneys deposited in the Columbus Savings Bank & Trust Company.

But in the view which the court takes of the case it is not necessary to determine whether the wrongful appropriation by the Harrison Building Company of the \$12,104.17 would release the waiver and restore to the contractor the right to a mechanic's lien.

(2) Did the contractor do extra work, and, if so, was it done in accordance with the requirements of the contract? The evidence bearing upon this point is found in the testimony of the witnesses Hannaford and Kennedy, and the account attached to the affidavit for a mechanic's lien filed by W. H. Ellis & Co. September 9, 1904. The weight of the evidence shows that the only extra work done was in making some changes in the partitions on the tenth floor, reducing the number of rooms provided for in the drawings under which the building was constructed. If this work is covered in the account by the items set forth under the head "Remodeling Tenth Floor," the cost thereof would be \$45.31, and, if it covers the first seven pages of the account, less the first seven items of the first page, the two items of the fifth page for work on the second and twelfth floors, and the last five items on the sixth page for work done on the elevator shaft, the cost would amount to \$873.71. The following items of the account do not represent work and labor done and material furnished for the construction of the building under the contract, and do not furnish the subject-matter of a mechanic's lien, namely: Fuel, water, and labor furnishing heat for tenants, \$1000; damage to boiler since court issued injunction, \$500; additional elevator pump, if required, and supplying one passenger with safe-lifting device, \$1,500; mail chute, if ordered, \$1,500; expense on account of injunction suit, \$1,000; 15 per cent. profit for maintaining business, office rent, stenographers, liability insurance, bond, incidental, and traveling expenses, legal services, etc., \$1,797.35; difference in cost of building between original drawings and specifications and the detail plans and specifications from which the building was constructed, \$20,000; 10 per cent. profit, \$3,377.97—making a total of \$30,675.30.

But if extra work was done, little or much, it was not done in accordance with the requirements of the contract, which provides "that no deviation shall be made in the matter of compensation herein and no charges made or claim presented for extras or for any other matters claimed to be outside of the contract, plans and specifications, excepting that written agreement therefor be first signed and the said extra charges agreed to in writing by the said party of the first part, or his successors or assigns, and agreed to by the said second party's bondsmen." There was no written agreement between the parties authorizing the extra work or payment therefor, nor is there any evidence to show that the owner by any act or conduct on his or its part waived or is estopped from asserting the right to a strict performance of the contract in respect to extra work.

(3) Was the building completed, finally approved by the architect, and accepted by the owner, as required by the contract? The contract provides that "the final ten (10) per cent. of said purchase price, to wit, thirty thousand (\$30,000.00) dollars, shall not be paid until after thirty days from the final completion of the building, final approval by the architect and acceptance by the said party of the first part."

Sprague, the receiver of W. H. Ellis & Co., claims that the building was completed May 19, 1904, but the report of the architect shows conclusively that it was not then completed. The evidence shows that the intervening subcontractors completed their work at the times following, namely: The Toledo Wire & Iron Works Company between the 10th and 15th of August, 1904; Samuel A. Esswein on June 21, 1904; the Electric Supply & Construction Company on August 17, 1904; and Thomas H. Winston on September 22, 1904. And the architect, Hannaford, testifies positively that the building never was completed and that the work never received his final approval, nor was it accepted by the owner.

Kennedy, in his cross-examination and in chief, testified positively that the building was completed within three weeks after the architect made his report on May 25th, which would fix June 16, 1904, as the time of completion,

but, as stated, the subcontractors did not finish their work until the latter part of June, and in August and September, and Hannaford testified that the work never was completed.

The mechanic's lien, therefore, claimed by the receiver of W. H. Ellis & Co. cannot be enforced.

The Claims of the Subcontractors.

Under the mechanic's lien law of Ohio in force pending the construction of the building, subcontractors might acquire liens for labor performed and material furnished, not only upon the moneys due to the contractor from the owner, but also upon the building, and the subcontractors here have filed intervening petitions and set up such liens. Subcontractors Samuel A. Esswein, the Electric Supply & Construction Company, and Frank Powell, doing business under the name of the Toledo Wire & Iron Works Company, in compliance with the requirements of section 3184 and 3195 of the Revised Statutes of 1906 of Ohio, as amended April 18, 1902, obtained liens for labor and material not only upon the fund deposited with the Columbus Savings Bank & Trust Company, under contract of July 27, 1903, but also upon the building and the leasehold upon which it stands; and Subcontractor Thomas H. Winston, by compliance with the requirements of sections 3193, 3198, and 3201 of the Revised Statutes of 1908 of Ohio, as re-enacted April, 20, 1904, and approved by the Governor April 27, 1904, also obtained a lien for labor performed and material furnished upon said fund and upon said building and leasehold, and these liens are not affected by the failure of W. H. Ellis & Co. to complete their contract. Notice being given, these liens attached to the unpaid installments covered by the estimates of the architect of May 31, 1904, and June 16, 1904, the first being for \$10,220.80 and the second for \$20,011.09, payment of which to W. H. Ellis & Co. was withheld by the Harrison Building Company, as admitted by its counsel, because of such notice, and they also attached to the building and the leasehold upon the filing of a sworn copy with the county recorder of the statement or affidavit required by the statutes referred to. See Boisot on Mechanics' Liens, §§ 84, 85, and the cases there cited.

The liens of Esswein and the Electric Supply & Construction Company have priority over the mortgage of the complainant, the Provident Savings Bank & Trust Company. The lien of the mortgage became effective on June 6, 1903, when the bonds were issued to W. P. Harrison. *Reynolds v. Manhattan*, 83 Fed. 593, 599, 27 C. C. A. 620. But the liens of Esswein and the Electric Supply & Construction Company "date back from the date of the furnishing of the first item of labor." Section 3185, Rev. St. Ohio 1906; 95 Ohio Laws, p. 210. The first item of labor was furnished by Esswein June 20, 1902, and by the Electric Supply & Construction Company April 25, 1903. The liens of Powell and Winston, however, do not antedate the issue of the bonds, but the Harrison Building Company wrongfully appropriated at least \$12,104.17 of the fund deposited with the Columbus Savings Bank & Trust Company, which it now holds as a trustee ex maleficio, for the beneficiaries of that fund, whose equity therein is superior to the claim of W. P. Harrison, who is not only the holder of the bonds, but since March 18, 1902, has been the beneficial owner of the building and leasehold, and who personally received secret rebates upon each voucher paid by him to W. H. Ellis & Co. upon the architect's estimates from July 29, 1902, to May 25, 1903, to the amount of \$23,649.24.

Blackburn and W. H. Ellis & Co. for their mutual profit devised a scheme for the erection of the building set forth in the two written contracts between them of November 14, 1901. They were not capitalists, and the scheme contemplated the transfer of Blackburn's interest to a corporation to be organized, or to some person able to finance it, and through Moling they found Harrison, to whom the contracts were assigned. By an agreement between Harrison and Moling, in consideration of Moling's services in procuring the transfer of Blackburn's interest in the two contracts of November 14, 1901, and other contracts, and of his undertaking to sell all the bonds of a company to be afterwards organized as the Harrison Building Company, Harrison agreed to turn over to Moling one-third of all the net profits or assets of said

company, whether it should be in stocks, bonds, moneys, real estate, or other securities, and Moling thereupon transferred to Blackburn a one-half interest in said net profits, and in this manner Blackburn was paid for his interest in the two contracts of November 14, 1901. This transaction demonstrated that in Harrison Blackburn and W. H. Ellis & Co., through Moling, had found an able financier, for, as a result of the transaction, Blackburn got one-half of one-third of the prospective net profits of the Harrison Building Company, Moling got from W. H. Ellis & Co. \$5,000 in money, and Harrison got a fund of \$60,000, to be received by him in rebates upon each voucher paid by him to W. H. Ellis & Co. Afterwards Harrison on behalf of the company borrowed \$190,000 from the Columbus Savings Bank & Trust Company, upon the pledge of the bonds to the amount of \$115,000, issued to him for moneys advanced for the construction of the building, and treasury bonds to the amount of \$175,000. Of this loan \$140,000 was deposited with the Columbus Savings Bank & Trust Company, to be paid to W. H. Ellis & Co. for the completion of the building, upon the terms and conditions set forth in the written agreement of July 27, 1903. When the loan matured, to prevent a sacrifice of the collateral (his own bonds and the treasury bonds), Harrison bought it in for \$190,714.45, and, upon the sale of the property, under the mortgage, Harrison, through his attorney Fritter, bought it in for \$150,000, and upon application to this court had it conveyed by the United States marshal to the Harrison Company, a new corporation organized for that purpose. From the beginning he practically owned and controlled the property under cover of a corporate organization, and, if necessary for the payment of the claims of the subcontractors in full, resort might be had to his interest in the proceeds of the sale to the extent of the rebates received by him to the prejudice and in fraud of the rights of the subcontractors.

It is not questioned that the work of the subcontractors was completed as set forth in their intervening petitions, nor that of the fund set apart for the completion of the building there remains on deposit in the Columbus Savings Bank & Trust Company \$19,817.60, but, as that fund is not subject to the control of this court, it will direct that the proceeds of the sale of the property, after the payment of costs, be applied first to the payment of the claims of Samuel A. Esswein and the Electric Supply & Construction Company in full and their costs; second, to the payment of the claims of Thomas H. Winston and Frank Powell, and their costs, not exceeding, however, the sum of \$12,104.17; the remainder of said proceeds to be distributed as the court shall hereafter order.

Question has been made by counsel for the Harrison Building Company as to whether Winston filed with the owner notice of his claim, as required by section 3193, and counsel for Winston advises the court that at the hearing he offered to call Judge Sater to prove that he had served such notice, as the attorney of Winston, and that opposing counsel then accepted the statement of counsel for Winston that such notice had been duly given. If, however, counsel for the Harrison Building Company still insist that such notice was not given, the court will permit Judge Sater to testify as to what the fact is, and will hear any evidence which may be offered by the Harrison Building Company upon that point.

MILLER & LUX, Inc., et al. v. CALIFORNIA PASTORAL & AGRICULTURAL CO., Limited, et al.*

(Circuit Court of Appeals, Ninth Circuit. June 8, 1908.)

No. 1,508.

WATERS AND WATER COURSES—CONTRACT BETWEEN APPROPRIATORS OF WATER FROM STREAM—CONSTRUCTION.

A contract and supplemental contract between parties severally taking water from the San Joaquin river by means of canals construed, and the rights of the respective parties thereunder determined.

Gilbert, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the Southern District of California.

W. B. Treadwell and Frank H. Short, for appellants.

Charles Page, Edward J. McCutchen, and Chas. W. Willard, for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. The true construction of a written contract is the question for determination in this case. It was entered into August 17, 1898, between the San Joaquin & Kings River Canal & Irrigation Company, a corporation, as party of the first part, the California Pastoral & Agricultural Company, a corporation as party of the second part, and Miller & Lux, a corporation, as party of the third part.

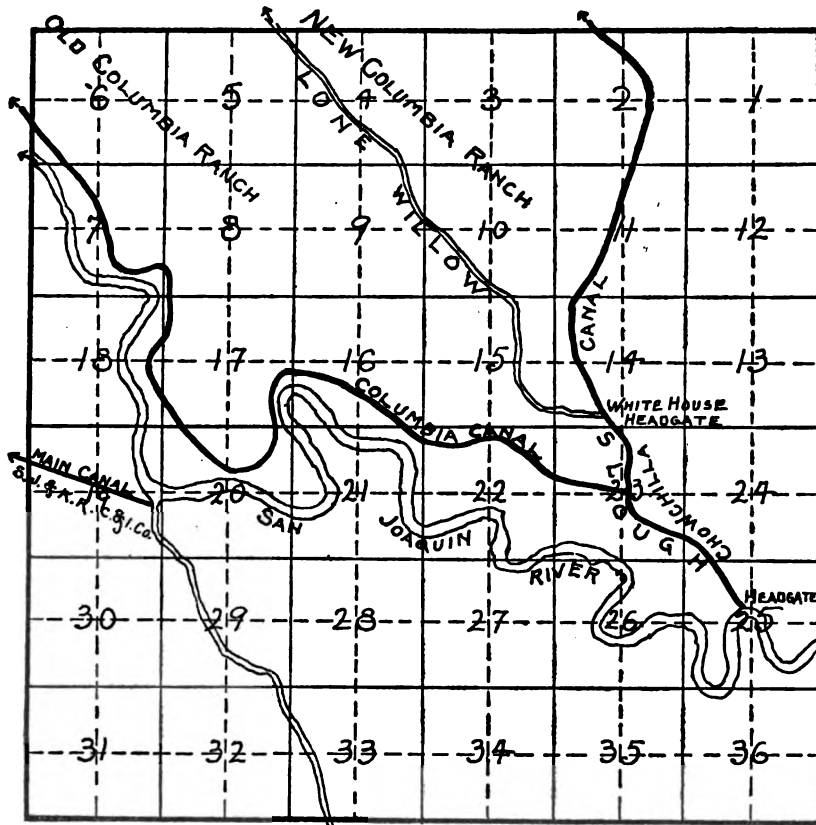
Inasmuch as this contract refers to and makes a part of it a previous contract of date August 11, 1871, between William S. Chapman, party of the first part thereto, and Henry Miller and Charles Lux, parties of the second part thereto, the provisions of that previous contract enter into and bear upon the true meaning of that governing the parties here, who are: (1) The successors in interest of William S. Chapman, were complainants in the court below and are appellees here, and, for convenience, are referred to by counsel and in this opinion, as the pastoral company; (2) the successors in interest of Henry Miller and Charles Lux, defendants and cross-complainants in the court below and appellants here, and, for convenience, referred to as Miller & Lux; and (3) the San Joaquin & Kings River Canal & Irrigation Company, defendant and cross-complainant in the court below and appellant here, and referred to by counsel, and by us, as the canal company.

Certain waters of the San Joaquin river constitute the subject-matter of the suit, and, to the end that a better understanding of the controversy may be had, we here insert a diagram found in one of the briefs for the appellants, which the record shows to be a correct representation of the premises with one exception, which is this: The slough marked on the diagram "Lone Willow Slough" extends, as a matter of fact, to its connection with the river at the point marked upon the diagram "Headgate," so that the indication upon the diagram

*Rehearing denied October 26, 1908.

that the artificial Chowchilla Canal extends from the point marked thereon "White House Headgate" to the point on the river marked "Headgate" is erroneous. The diagram is as follows:

T. 13 S. R. 15 E.



The contract of August 11, 1871, omitting such parts as are not here pertinent, is as follows:

"This agreement, made and entered into this 11th day of August, A. D. 1871, by and between William S. Chapman, party of the first part, and Henry Miller and Charles Lux, parties of the second part, all of the city and county of San Francisco, witnesseth:

"That said party of the first part, for and in consideration of the sum of one dollar to him in hand paid by the said parties of the second part, the receipt of which is hereby acknowledged before the signing and delivery of these presents, and the further consideration of the mutual promises herein contained and set forth to be done and performed by the parties hereto, does hereby covenant and agree to and with the said parties of the second part, and the said parties of the second part do hereby covenant and agree to and with said party of the first part, that they will jointly dig and construct a canal for irrigation through lands of said parties of the second part in the county of Fresno, and state of California, the said canal to commence at

a point where a slough now makes out from the north side of the San Joaquin river, near the center of the dividing line between sections twenty-four (24) and twenty-five (25) in township thirteen (13) south, range fifteen (15) east, from the Mount Diablo base and meridian, and thence running in a northerly direction to the north line of the most southern tier of sections in township twelve (12) south, range fifteen (15) east, from said base and meridian, which said canal is to be twenty-five (25) feet wide, and shall be so constructed as to carry one and one-half (1½) feet of water in depth, and it is further agreed that the slough above mentioned may be used as a part of said canal as far as shall be deemed advisable. * * * And it being further understood and agreed that said parties of the second part shall at their own expense construct and put in all side gates and other works which may be required for taking out water from the said canal within the distance above specified.

"And it is further understood and agreed that said parties of the second part and their assigns shall have the right at all times to draw from said canal, without charge, by side gates and ditches, and to use and dispose of one half of the water flowing therein, and said party of the first part and his assigns are to have the right at all times, also, without charge, to take at the northerly end of said canal, and to use and dispose of the remaining half of such water, and to carry the same further on by another canal or other canals, to be used as he may see fit, and further to enter upon and go on the land of said parties of the second part, with men and teams, over which said canal may pass, for the purpose of repairing the said canal, at any time, doing as little damage as is possible thereby. * * *

"And it is further covenanted and agreed that no work of any kind shall be done in the construction of said canal or anything connected therewith, which shall in any way injure the works of the San Joaquin & Kings River Canal Company.

"And it is further covenanted and agreed that should said parties of the second part find it necessary, in order to irrigate their lands or any portion thereof, to put a lock and dam or locks and dams in said canal, that they shall have the right to do so, not impairing the rights of said parties of the first part in so doing, nor impeding the flow of the water to be carried by said ditch, to which he is entitled, and, further, that a bridge shall be built over said canal, on the lands of the parties of the second part, at a point to be designated by them, at the joint expense of the parties hereto, each party paying one-half of said expense, and shall be kept in repair likewise at their joint expense.

"And it is further agreed that the said parties of the second part shall not be liable in damages to said party of the first part for any injury which shall be done to the banks of said canal by the cattle of said parties of the second part.

"In witness whereof the parties hereto have hereunto set their hands and seals the day and year first above written.

W. S. Chapman. [Seal.]
"Miller & Lux. [Seal.]"

Indorsed on the foregoing agreement of August 11, 1871, is the following:

"Know all men by these presents: That the parties of the first and second part respectively to the within agreement have jointly completed the canal provided therein to be built, and have jointly extended the same, from the terminus originally proposed, to the south line of township eleven (11) south, range fifteen (15) east from the Mount Diablo base and meridian; that a full and complete settlement and adjustment has been had between said parties of the first and second part of the amount contributed by each to the expense of constructing said canal; that each has now paid his share of the expense of such construction; and that the said canal, with its gates, sluices, embankments, and all the privileges and appurtenances thereto belonging or in any wise appertaining, is now owned in common by them from its commencement to said township line—that is to say, one undivided half by said party of the first part, and one undivided half by said parties of the second part. The expense of keeping in repair the canal so owned in common shall be equally borne, one-half by the said party of the first part, and one-half by said party of the sec-

ond part. Said party of the first part is to be at liberty to take out from said canal for use upon any land owned by him any portion of his half of the water in said canal at any point therein, not to interfere with any rights of said parties of the second part.

"In testimony whereof said parties of the first and second part have hereunto set their hands and seals this sixteenth day of January, A. D. 1872.

"W. S. Chapman. [Seal.]

"Miller & Lux. [Seal.]

"By Henry Miller."

Since the earlier contract is expressly made a part of the later one, it is manifest that the two must be read and considered together, and that in order to ascertain the true meaning of the parties we must first get a clear understanding of the first, and then bear in mind the purpose of the second.

Looking, then, at the agreement of August 11, 1871, we find therein an express recognition by all parties thereto (Chapman and Miller & Lux) of whatever rights the canal company had. Those rights were in the contract of August 11, 1871, wholly undefined; but, such as they were, they were recognized and acknowledged by Chapman and Miller & Lux in and by this clause in their agreement:

"And it is further covenanted and agreed that no work of any kind shall be done in the construction of said canal [the canal provided for by the agreement of August 11, 1871] or anything connected therewith, which shall in any way injure the works of the San Joaquin & Kings River Canal Company."

Having thus acknowledged the paramount, although indefinite and uncertain, rights of the canal company, Chapman and Miller & Lux proceeded, in and by the instrument of August 11, 1871, to agree to jointly dig and construct through the lands of Miller & Lux a canal for irrigation, from the point where the Lone Willow Slough makes out from the San Joaquin river and near the center of the dividing line between sections 24 and 25 (indicated on the diagram), and thence running in a northerly direction to the north line of the most southern tier of sections in township 12 south, range 15 east, from the Mount Diablo base and meridian; the canal to be 25 feet wide and to be so constructed as to carry a depth of $1\frac{1}{2}$ feet of water. The agreement further expressly provided for the use of the slough as a part of the canal as far as should be deemed advisable by the respective parties thereto, and the case shows that they did deem it advisable to use and adopt the slough as a part of the canal from the point where it leaves the river down to the point marked "White House Headgate," where the artificial part of the canal constructed by Chapman, on the one part, and Miller & Lux, on the other part, at their joint and equal cost, commences. The agreement of August 11, 1871, contains nothing whatever to indicate the quantity of water the respective parties contemplated diverting and appropriating thereby from the river. Indeed, in that respect, the provisions are about as uncertain and indefinite as that in respect to the acknowledgment of the paramount rights of the San Joaquin & Kings River Canal Company. But the agreement of August 11, 1871, does expressly provide that Miller & Lux shall have the right to construct and put in at their own expense all side gates and other works they may require for taking out water from the joint canal at any place between

the point where the slough makes out from the river, to the north line of the most southerly tier of sections in township 12 south, range 15 east, Mount Diablo base and meridian, and that by means of such side gates Miller & Lux, and their assigns, should have the right to draw from such joint canal, without charge, and use and dispose of, one half of the water flowing therein, and that Chapman, and his assigns, should have the right, also without charge, to take out at the northerly end of said joint canal, and to use and dispose of, the remaining half of such water, "and to carry the same further on by another canal or other canals, to be used as he may see fit, and, further, to enter upon and go on the land of said parties of the second part, with men and teams, over which said canal may pass, for the purpose of repairing the said canal, at any time, doing as little damage as is possible thereby."

These provisions of the contract of August 11, 1871, are too plain to admit of controversy concerning them. They show, among other things, that Miller & Lux, and their assigns, were entitled thereby to tap the joint canal, by side gates put in at their own expense, at any place between the point where the slough made out from the river, and the north line of the most southern tier of sections in township 12 south, range 15 east, of the base and meridian mentioned, and to take from the canal, for their use and disposal, one half of the water flowing therein, whatever the quantity should be, with the right on the part of Chapman, and his assigns, to take at the north end of the canal, the remaining half of such water, and use and dispose of the same, with the additional right in Chapman, and his assigns, to extend such use by the construction of other canals in the lands of Miller & Lux.

Since the sole purpose of appropriating and diverting water for irrigation is the beneficial use of it upon land, it is manifest that convenient places for such diversion are of great, and often (depending upon the location of the land upon which the water is to be used) of controlling, importance. The places designated in the agreement of 1871 for the taking, by the respective parties thereto and their respective assigns, from the joint canal, of their respective moities of the water flowing therein, were therefore of the gist of the agreement.

The case shows that, in time, disputes arose concerning the waters in question, which resulted in the agreement of August 17, 1898, which latter agreement recites not, as we understand, what "must be taken to be the construction which had been placed on the contract of 1871 by the parties thereto," but, on the contrary, expressly recites that "differences have arisen between the parties hereto as to the rights of the said parties of the first (San Joaquin & Kings River Canal & Irrigation Company), second (The Pastoral Company), and third (Miller & Lux) parts hereto, to take water from the said San Joaquin river, and also as to the amount of water they are each entitled to take and receive from the said river, and as to their priorities in such water," and that it is entered into "for the purpose of settling and adjusting said differences as between the parties hereto." This latter agreement further expressly recites that "Miller & Lux

are the owners of, and entitled to take and receive all the water now flowing or that may hereafter flow in the said slough through which said Chowchilla Canal now takes and receives its water, after the full amount of water which said Chowchilla Canal is entitled to receive through such slough is supplied to and received by and into its said canal, at the Headgate and Weir hereinafter referred to," and that "the party of the first part hereto, the San Joaquin & Kings River Canal & Irrigation Company, is the owner of canals which are taking water from the said San Joaquin river, and are entitled to take and receive water from said river into said canals." After making these express recitals, the parties to the contract of August 17, 1898, proceeded to provide and agree, among other things:

"(1) That said party of the first part has the prior right to divert from the San Joaquin river, at all times, sufficient water so that its canal shall have and receive seven hundred and seventy-five (775) cubic feet of water per second, measured at a point at its main canal immediately above the head of the branch of said canal which is known as the Poso Canal, and where said main canal passes through the northwest quarter (N. W. $\frac{1}{4}$) of section thirty-three (33), township twelve (12) south of range fourteen (14) east, such measurement to be made by means of a gauge placed in said canal or by means of other proper measuring device. But it is understood and agreed that in the event said party of the first part shall at any time take and divert any of such seven hundred and seventy-five (775) feet of water to which said party of the first part has the first and prior right into its new canal, which is constructed so that it can take water from the main canal of the said party of the first part hereto, at a point above said point of measurement, then and in that event the water so taken into said new canal shall be measured, and said party of the first part shall in such case receive at the point of measurement hereinabove specified seven hundred and seventy-five feet of water per second, less the amount so diverted and taken into said new canal; that is to say, the amount of water so diverted and taken into such new canal shall be deducted from the seven hundred and seventy-five (775) feet of water to which said party of the first part has, under the terms of this agreement, the first and prior right.

"(2) That whenever the canal of said party of the first part is supplied with seven hundred and seventy-five (775) cubic feet of water per second at the point of measurement hereinbefore referred to, then, so long as that quantity is so supplied thereto, the parties of the second and third parts, as the owners of said Chowchilla Canal above referred to, shall have the right jointly to divert from said San Joaquin river, through said slough, sufficient water so that said Chowchilla Canal shall have and receive into its said canal, at the present Headgate or Weir in said canal and in the slough hereinabove referred to where it passes through the southwest quarter (S. W. $\frac{1}{4}$) of section fourteen (14), township thirteen (13) south of range fifteen (15) east, one hundred and twenty (120) cubic feet of water per second, provided there is sufficient water flowing in said San Joaquin river to supply the said party of the first part hereto its full seven hundred and seventy-five (775) cubic feet of water, and also supply or furnish said Chowchilla Canal the maximum amount of water it is entitled to take and receive through said slough and through said gate, to wit, one hundred and twenty (120) cubic feet of water per second. In the event that there be not sufficient water flowing in said San Joaquin river to supply to said party of the first part its full seven hundred and seventy-five (775) cubic feet of water, and supply to the said Chowchilla Canal one hundred and twenty (120) cubic feet of water, then said Chowchilla Canal shall be entitled to take and receive from said river and from said slough and through said gate only the amount of water flowing in said river after the full seven hundred and seventy-five (775) cubic feet of water per second is supplied to said party of the first part at the point of measurement hereinbefore specified.

"(3) After the amount of water which the said party of the second part shall be entitled to take and receive into its said canal at its said Headgate or Weir is received by it, the balance of the water running in said slough above the

said Headgate, if any, shall belong to the said party of the third part hereto. But it is understood that this agreement neither fixes nor limits any rights of Miller & Lux, the party of the third part hereto, to the water flowing in said San Joaquin river, after the diversion therefrom of said quantities of seven hundred and seventy-five (775) feet and one hundred and twenty (120 feet here-in provided for.

"(4) When the water in said San Joaquin river is at such low stage that said party of the second part is not, under this agreement, entitled to receive into its said canal sufficient water out of said one hundred and twenty (120) feet to supply the party of the second part in said canal with stock water, then and in that event the said party of the second part shall be entitled to receive from the water flowing in the said San Joaquin river, and belonging to the said party of the first part hereto, sufficient water for such stock purposes, provided there is sufficient water flowing in said San Joaquin river and in the canals of the said party of the first part to supply all of the parties having a prior right to demand and receive water from the canals of the said party of the first part, the San Joaquin & Kings River Canal & Irrigation Company, and to also supply such stock water to the party of the second part, such stock water so furnished to said party of the second part hereto by said party of the first part, to be turned into the canal of said party of the second part by the superintendent of the party of the first part, and to be paid for at the rates established for water sold by said party of the first part.

"(5) The agreement of said April 11, 1871, hereinbefore referred to, and to which this is supplemental, shall remain in full force and effect, except in so far as modified by this supplemental agreement; provided that the water at any time flowing in said Chowchilla Canal shall be equally divided between the parties of the second and third parts by actual measurement made at the point where said party of the third part is, at that time, diverting water from said canal. If the said party of the third part desires to divert water at more than one point on said canal at the same time, then such measurement shall be made at each of such points, so that said party of the third part shall receive at the second or any subsequent point only such proportion of the water then flowing at such point as, when added to the proportion of the water diverted by it at prior points, shall equal one-half."

It will be at once seen that there is much repetition and confusion in the supplemental contract of August 17, 1898, but we think it not difficult to discover therefrom the real meaning and intent of the respective parties thereto. First and foremost is the fact that the agreement of August 17, 1898, is supplemental to that of August 11, 1871, and that the latter, it is therein expressly declared, "shall remain in full force and effect, except in so far as modified by this supplemental agreement; provided that the water at any time flowing in said Chowchilla Canal shall be equally divided between the parties of the second and third parts by actual measurement made at the point where said party of the third part is, at that time, diverting water from said canal. If the said party of the third part desires to divert water at more than one point on said canal at the same time, then such measurement shall be made at each of such points, so that said party of the third part shall receive at the second or any subsequent point only such proportion of the water then flowing at such point as, when added to the proportion of the water diverted by it at prior points, shall equal one-half."

Next, it is to be observed that all parties to the supplemental agreement expressly declare, in more than one place, that the canal company has the prior right to 775 cubic feet per second of the water of the river, after which the pastoral company and Miller & Lux are

jointly entitled to take, when there is so much left in the river, 120 cubic feet of the water through and by means of their jointly constructed and owned Chowchilla Canal. In two places in the supplemental agreement, recognition is made of rights of Miller & Lux in and to such water as may flow in the river, and in the slough, after the 775 cubic feet have been taken by the canal company, and the 120 cubic feet by the pastoral company and Miller & Lux jointly. In respect to such excess of water flowing in the river, the provision is:

"But it is understood that this agreement neither fixes nor limits any rights of Miller & Lux, the party of the third part hereto, to the water flowing in said San Joaquin river, after the diversion therefrom of said quantities of seven hundred and seventy-five (775) feet and one hundred and twenty (120) feet herein provided for."

And in respect to such excess flowing in the slough, the provision is:

"After the amount of water which the said party of the second part shall be entitled to take and receive into its said canal at its said Headgate or Weir is received by it, the balance of the water running in said slough above the said Headgate, if any, shall belong to the said party of the third part hereto."

We do not overlook the conclusion reached by the learned judge of the court below that the words "the said party of the second part," of the last-quoted clause of the agreement, were inserted by clerical mistake for the words "the Chowchilla Canal." We cannot so regard them. The words, as they appear in the agreement, are in accord with what we conceive to be the true meaning and intent of the contract, taking it by its four corners. Precisely the same words, "the said party of the second part," were inserted in clause 4 of the agreement to secure to the pastoral company rights to water for its stock in the event of a shortage of water.

It is not contended that there is any express provision in the supplemental agreement taking away the express and valuable right the contract of 1871 conferred on Miller & Lux to take their just proportion of the waters in question from the Chowchilla Canal at any place or places they should desire, between the point where the slough makes out from the river to the north line of the southern tier of sections hereinbefore mentioned, and not only do we fail to discover from the language employed by the parties any indication of any such intent on their part, but we are unable to see how the denial of that right to Miller & Lux would result in any substantial benefit to the pastoral company, for surely no one will claim that Miller & Lux have not the right to take their half of the 120 cubic feet, or of whatever part of the water of the river may be left after the prior right of the San Joaquin & Kings River Canal Company is satisfied, from the Chowchilla Canal immediately after the water passes the White House Headgate and enters the artificial part of that canal. In what way the pastoral company can be any more injured by the taking by Miller & Lux of their proportion of the water immediately before it passes that gate it is difficult to see. However that may be, we are of the opinion, for the reasons stated, that reading the two agreements together, as they must be read and considered, Miller & Lux are entitled to take, at their own expense, their proportion of

the waters in question from the Chowchilla Canal at any place or places they may desire, between the point where the Lone Willow Slough makes out from the river to the north line of the most southern tier of sections in township 12 south, range 15 east, of the Mount Diablo base and meridian.

The case is remanded to the court below, with directions to modify the decree in accordance with the views above expressed; the appellant to recover the costs of this appeal, the costs of the trial in the court below, and those hereafter to be incurred in that court to be apportioned as the court below may deem equitable.

GILBERT, Circuit Judge (dissenting). In my opinion the appeal presents a plain case for affirmance of the decree of the court below. I am unable to find in the contract upon which the rights of the parties depend any ground whatever for the construction which is placed thereon by the majority of this court. To begin with the contract of 1871: That agreement provides for the construction of a canal, and stipulates that the slough may be used as a part of such canal so far as shall be deemed advisable. It further stipulates that Miller & Lux "shall have the right at all times to draw from said canal, without charge, by side gates and ditches, and to use and dispose of one half of the water flowing therein," and that Chapman, the party of the first part, is to have the right at all times, without charge, "to take at the northerly end of said canal, and to use and dispose of the remaining half of such water." Now, if there is any ambiguity in that agreement, it is as to the intention of the parties in the use of the word "canal," as it is found in that portion thereof just quoted. Did they mean the artificial portion of the canal, or did they intend to include under the term "canal" that portion of the slough which it had been agreed might be used as a part of the canal?

Whatever ambiguity there may have been in that provision of the contract, it was dispelled by the terms of the agreement of August 17, 1898. That agreement recites that the pastoral company, the party of the second part therein, has acquired the interest of Chapman, and recites what must be taken to be the construction which had been placed on the contract of 1871 by the parties thereto. It recites that Miller & Lux "are the owners of and entitled to take and receive of the water now flowing or that may hereafter flow in the said slough through which said Chowchilla Canal now takes and receives its water, after the full amount of water which said Chowchilla Canal is entitled to receive through such slough is supplied to and received by and into its said canal at the Headgate and Weir hereinafter referred to." What was the full amount of water which the canal was entitled to receive through the slough after which Miller & Lux should have the right so to divert water from the slough?

That question is answered by paragraph 2 of the contract, which provides that, after satisfaction of the right of the canal company to 775 cubic feet of water per second, the pastoral company and Miller & Lux shall have the right jointly to divert through the slough and into the canal by the White House Headgate 120 cubic feet of water

per second. Paragraph 3 proceeds to define the rights of the pastoral company and Miller & Lux as between themselves. It provides that:

"After the amount of water which the said party of the second part shall be entitled to take and receive into its said canal at its said Headgate or Weir is received by it, the balance of the water running in said slough above the said Headgate, if any, shall belong to the said party of the third part hereto."

The amount of water which the pastoral company, the party of the second part, was so entitled to "take and receive" into its canal at the White House Headgate was 120 cubic feet of water per second. This does not mean that it had the right to the use of that amount of water, but that it was entitled to the inflow of that quantity of the water into the canal. I think that the term "party of the second part," as used in paragraph 3, was used advisedly. It is used again in the same sense in paragraph 3, where it is provided that:

"When the water in the San Joaquin river is at such low stage that said party of the second part is not under this agreement entitled to receive into its said canal sufficient water out of said 120 feet to supply the party of the second part in said canal with stock water," etc.

The intention was, and it is clearly expressed, to concede to Miller & Lux the right to use and divert the surplus water in the slough, provided that such use should not interfere with the flow of 120 cubic feet per second into the canal. The right of the pastoral company to have 120 cubic feet flow into the canal, although it had the right to use only one-half thereof, was evidently considered a substantial right. The contract must have been made with reference to known conditions, and the construction of its terms is not to be affected by the consideration that Miller & Lux might have diverted its one-half of the water immediately after it had passed the White House Headgate.

Further evidence that the understanding of the parties was as above indicated is afforded by paragraph 5, which adopts the contract of April 11, 1871, with the proviso:

"That the water at any time flowing in said Chowchilla Canal shall be equally divided between the parties of the second and third parts by actual measurement made at the point where said party of the third part is at that time diverting water from said canal."

Obviously, the canal here referred to is the artificial portion of it below the White House Headgate, for by article 3 there is no provision for equal division of waters taken from the slough. On the contrary, it is therein stipulated that all water running in the slough over and above the 120 cubic feet per second, which is to enter the canal, shall belong to Miller & Lux.

If there were doubt about the meaning of the contract, we should find aid in ascertaining it from the construction which the parties placed thereon immediately after its execution. The evidence shows that, although Miller & Lux requested of the pastoral company the right to divide the water before it entered the White House Headgate, the right was denied, and that Miller & Lux never asserted such right under the terms of the contract until within a year prior to the commencement of the suit; but I agree with the court below that

"the contract is so clear and unambiguous in phraseology that it neither requires nor admits of any extraneous aids in its construction other than the physical conditions to which it relates."

THE J. R. LANGDON.

(Circuit Court of Appeals, Sixth Circuit. June 15, 1908.)

Nos. 1,753-1,760.

1. MARITIME LIENS—ENFORCEMENT—SUITS IN PERSONAM.

Vessel property, like other personal property of shipowners, may be reached and subjected to the liabilities of the owners in a personal suit against them, but in such case only the interest of the owners, as such, may be subjected to sale, and persons holding maritime liens on the vessels cannot be compelled to submit their claims to the court in such suit; its only effect being to delay the enforcement of their liens during the time the vessels are in the actual custody of the court.

2. JUDGMENT—QUESTIONS CONCLUDED—RIGHTS OF INTERVENER.

Libelants, who had furnished coal to steamers owned by a corporation, intervened in a creditor's suit against the corporation in which the court by its receiver had taken possession of the vessels, and set up their claim to a maritime and statutory lien and asked its enforcement. The court ordered the vessels sold, requiring the purchaser to assume and pay any lien which it might thereafter establish. After the sale the right of libelants to a lien was tried and decided, adversely to them. *Held* that, having voluntarily submitted it to that court, such question was res judicata as between libelants and the purchaser, and that libelants could not thereafter maintain a suit in rem in admiralty against the vessels to enforce a lien thereon for their claim.

3. SAME—RES ADJUDICATA.

When a fact or question is distinctly put in issue as a ground of recovery, and is directly determined by a court having jurisdiction to make such determination, that fact, right, or question cannot be again disputed in a subsequent suit between the same parties or their privies.

Appeals from the District Court of the United States for the Northern District of Ohio.

For opinion below, see 145 Fed. 64.

Harvey D. Goulder, for appellants.

Roger M. Lee, for appellees.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge. These suits are proceedings in rem against the eight steamers named in the caption. The cause of action is for fuel supplied to each of them by appellants during the season of 1898. All of the vessels were then owned by the Ogdensburg Transit Company, a Michigan corporation, and the coal was supplied to them at the ports of Cleveland, in Ohio, and Sandwich, in the Dominion of Canada. At the close of the season that company executed its promissory note for the aggregate sum due. Each libel is like every other except in name and amount. Each avers that the coal was supplied

on the master's order, at a foreign port and upon the credit of the particular vessel supplied. The respondents are the Rutland Transit Company, who acquired title through a mortgage foreclosure suit and a general creditor's bill in the Circuit Court of the Eastern District of Massachusetts. The facts in each case are the same, and all the suits were heard upon one record.

Two defenses are made: First, that the appellants asserted the identical claims now set up as maritime liens in the creditor's suit referred to, and that the defense of no lien was made and sustained and their intervention dismissed for that reason; second, that the coal supplied was furnished under a contract with the Ogdenburg Transit Company, and not upon the credit of the vessels as averred. The defense of *res adjudicata* was sustained in the court below, and the libels dismissed without consideration of the question of a lien upon its merits. In the view we take of the case we shall only consider this defense of former adjudication. That appellants did intervene in the creditor's suit referred to and the issue of lien or no lien was presented and decided adversely to them is not controverted. Among other things, in answer to this plea they say: That they did not voluntarily intervene in that case. That the vessels were then in the actual possession of the Circuit Court and being operated by its receiver. That they could not enforce their liens through the admiralty court while the steamers were thus held, and they were in danger of displacement through later maritime contracts and torts fastening liens upon the vessels while being operated by the court's receiver. That their intervention was for the limited purpose of obtaining insurance against displacement through contracts and torts of the receiver. Next they say, that, however their intervention be construed, the Circuit Court had no jurisdiction to determine the question of the existence or non-existence of a maritime lien for coal supplied, and that its determination that no lien existed was absolutely void for want of jurisdiction over the subject-matter.

It is a misapprehension of the intervention of the libelants in the Circuit Court case to characterize it either as a nonvoluntary appearance or one for the narrow purpose of obtaining benefit of insurance against subsequent maritime liens, contractual or tortious. Appellants were not brought in as parties to that suit. They voluntarily intervened by petition and set up their claims as both statutory and general liens in identically the same terms they now assert the same claims. After stating the facts, they said:

"Your petitioners say that by the general maritime law they are entitled to and have a lien enforceable in a court of admiralty upon each of said steamers, their engines, boilers, boats, tackle, etc., for the full amount of each of said claims. * * * And by virtue of said liens, under the general maritime law and under the statute of Ohio, your petitioners' said liens against said steamers respectively are entitled to payment and satisfaction from said steamers and from the use thereof in preference to any and all claims against said defendant, or its property, excepting maritime liens of equal or higher rank."

The petition then stated that there was danger of the displacement of their liens through later liens of the same character or through mari-

time torts, resulting from the navigation of the vessels under the court's orders. Upon the ground that they had a maritime lien, the petition concluded by praying the court to direct the receiver to pay their claims "as preferred liens against said steamers, or that an order may be entered requiring said receiver to pay to your petitioners the earnings of said steamers over and above the cost of operation until said several liens have been satisfied in full, and that said receiver may in that event be also required to insure said steamers in some good and responsible insurance companies against the perils to which said property is being subjected by such use, with loss payable to your petitioners and other holders of maritime liens as their interest may appear, and for such other and further orders as may accord with justice and petitioners' rights under the circumstances."

This petition was filed September 9, 1899. The receiver answered at once and admitted the liability as a debt of the transit company, but denied that the petitioners were entitled to any lien, maritime or statutory, asserting that the coal had been supplied under a written contract with the owners and upon their credit only. An answer was also filed by the trustees under a mortgage to secure bonds denying any precedence of the claims of the libelants over their vessel mortgage. September 20, 1899, a decree was entered foreclosing the vessel mortgage and directing a sale of the eight steamers here involved and that the proceeds of the sale should be applied as follows: First, to costs of the cause, receiver's services, fees of solicitors, etc., then to the mortgage debt and the surplus, if any, to such purposes as the court should direct. By express direction of the court the purchaser, in addition to the amount of his bid, was required to pay "all maritime or statutory liens upon the said steamboats or any of them which this court shall hereafter allow and order to be paid."

Under this decree the vessels belonging to the Ogdenburg Company were sold at public sale for \$300,000. As the mortgage foreclosed was to secure bonds aggregating \$600,000, it will be seen that there was no surplus for any purpose. On December 18, 1899, the sale was confirmed upon the express condition that the court should have power to retake and resell, if the purchasers should fail to pay off, in addition to their bid, any maritime lien which the court might adjudge to exist against the vessels so sold.

Immediately following this confirmation, and upon the same day, an order was made referring this intervening petition to a special master to take proof and report "whether or not a maritime or other lien exists against the steamers lately belonging to the Ogdenburg Transit Company. * * *" The master reported in favor of the lien claimed, but upon exception the Circuit Court ruled against the lien, finding that the fuel had been supplied under a contract with the owning corporation and upon its credit. Upon appeal to the Circuit Court of Appeals, this decree was affirmed. *Cuddy et al. v. Clement et al.*, 113 Fed. 454, 51 C. C. A. 288. More than a year after this affirmance these libels were filed. Thus, while it was true that the possession of the vessels by the Circuit Court operated to delay the filing of any libel in the District Court until the hand of the Circuit Court should be raised and the ves-

sels delivered to the purchaser under the decree of sale, that hindrance was removed on December 18, 1899, when the sale was confirmed. From that moment a court of admiralty was at liberty to determine and enforce any maritime liens which might exist, for the effect of the sale under the creditor's bill was only to pass the right, title, and interest of the owners to the purchasers, subject to any maritime lien which might exist. The libelants might at that time have dismissed their petition and instituted a proceeding in rem such as they did after the failure of their experiment in the Circuit Court; but as they had a decree under which the purchaser was obligated, in addition to his bid, to assume and pay off any such maritime lien as they had asserted, they chose to have their claim of lien referred to a master and finally adjudicated by the Circuit Court, being thus assured of payment in case they were found to have such a lien. It is of no avail to say now that they only sought to obtain insurance which would protect them against loss of the vessels while they were delayed in enforcing their claims by a suit in rem or from a displacement of their liens by the creation of other liens of the same or higher character while the vessels were being operated by the receiver. That aspect of the petition was purely secondary, for their prayer was that their claims should be recognized as maritime or statutory liens and paid by the receiver as preferred over the mortgage and all other claims except claims of like character.

We come then to the question as to whether the voluntary submission of the question as to whether they had a maritime lien to the adjudication of the Circuit Court concludes them from now asserting such a lien in the face of the decree of that court that they had no such lien. The jurisdiction of the Circuit Court of the United States for the purpose of winding up the affairs of the Ogdenburg Transit Company and enforcing a mortgage upon the ships of the fleet owned by that company was indisputable. So long as that court retained possession, that possession and jurisdiction was exclusive of every other court. Even the warrant of a court of admiralty could not properly dispossess the officers of the Circuit Court, and a proceeding in rem is not conceivable without seizure of the res. *The Royal Saxon*, 1 Wall. Jr. 311, Fed. Cas. 13,803; *Moran v. Sturges*, 154 U. S. 257, 277, 283, 14 Sup. Ct. 1019, 38 L. Ed. 981; *Taylor et al. v. Carryl*, 20 How. 583, 601, 15 L. Ed. 1028. Neither is it disputable that the original jurisdiction conferred upon the District Court to enforce maritime liens by a proceeding in rem is exclusive of all other courts, federal and state. Such a remedy is unknown at the common law, and common-law remedies are not applicable or appropriate to enforce such maritime liens. The provision of the jurisdictional statute saving common-law remedies does not include any in rem proceeding. Vessel property, like other personal property of ship owners, can be reached and subjected to the liabilities of the owners in a proceeding by which the owners are personally sued; but in such case only the interest of the owners as such may be subjected to sale. *The Moses Taylor*, 4 Wall. 411, 18 L. Ed. 397; *The Hine v. Trevor*, 4 Wall. 555, 568, 18 L. Ed. 451; *The Belfast*, 7 Wall. 624, 644, 19 L. Ed. 266; *Moran v. Sturges*, 154 U. S. 256, 276, 14 Sup. Ct. 1019, 38 L. Ed. 981. The proceeding in the Circuit Court to wind

up the Ogdensburg Transit Company, as well as the mortgage foreclosure consolidated or incorporated with the general creditor's suit, was not a proceeding in rem, but a proceeding based upon the liability of the Ogdensburg Company for debts created upon its personal credit. Persons holding maritime liens could not have been compelled to submit their claims to the determination of that court, and the only effect of its proceeding, with actual possession of vessels subject to such liens, would be to delay their enforcement while such custody continued. Under the general maritime law such liens confer the right to proceed in rem to subject the vessel itself irrespective of the presence of owners to satisfaction of the lien, and a sale made in such a proceeding carries the title against all the world. Unless therefore the appellants are barred by their voluntary submission of the question of lien or no lien to the Circuit Court and the judgment of that court against such lien, the proceedings in the Circuit Court will not have the effect of displacing their liens, and they are now at liberty to ask their enforcement in this proceeding in rem. *Moran v. Sturges*, 154 U. S. 256, 282, 283, 14 Sup. Ct. 1019, 38 L. Ed. 981. and cases cited.

But it is said that, inasmuch as the Circuit Court could not have maintained an in rem proceeding for the determination and enforcement of a maritime lien, the determination that the appellants had no such lien was only incidentally or collaterally involved, and therefore not a bar to the reconsideration of the same question between the same parties, or their privies, when presented in a direct proceeding for the determination and enforcement of the lien there claimed and denied. They cite: *Cavanaugh v. Buehler*, 120 Pa. 441, 14 Atl. 391; *Marvin v. Dutcher*, 26 Minn. 391, 4 N. W. 685; *The Duchess of Kingston's Case*, 2 Smith's Leading Cases, 573 et seq.; *Van Fleet's Former Adjudication*, 28, 29. These cases are not much in point for the general principles of res adjudicata are well settled. The trouble in applying these principles comes from the difficulty of determining when a fact, or right, or question once decided between the same parties was only collaterally or incidentally involved so as not to be conclusive when again presented between the same parties in another controversy.

It is not enough to say that the Circuit Court had no jurisdiction to have maintained an in rem proceeding to determine and enforce a maritime lien. That court had jurisdiction for certain purposes over the property of the Ogdensburg Transit Company, including the very steamers which the libelants now wish to subject to the satisfaction of their claims. Personal liability of the owner is not inconsistent with a maritime lien. In this very case the libelants accepted a promissory note of the Ogdensburg Transit Company for the aggregate sum of their several claims now asserted. To save any question of waiver of the lien they provided that "when paid should be in full for fuel supplied the Ogdensburg Transit Company during season of 1898." *The St. Lawrence*, 1 Black 522, 17 L. Ed. 180. A remedy in personam as well as a remedy in rem existed. That the remedy in personam might be pursued in either the Circuit Court or in a state court is clear. In respect to remedies in personam the jurisdiction of the Circuit, Dis-

trict, and state courts may be said to be concurrent. The Belfast, 7 Wall. 625, 644, 645, 19 L. Ed. 266. Thus in that case it is said:

"Proceedings in a suit at common law on a contract of affreightment are precisely the same as in suits on contracts not regarded as maritime, wholly irrespective of the fact that the injured party might have sought redress in the admiralty. When properly brought, the suit is against the owners of the vessel, and in states where there are attachment laws the plaintiff may attach any property not exempted from execution, belonging to the defendants.

"Liability of the owners of the vessel under the contract being the foundation of the suit, nothing can finally be held under the attachment except the interest of the owners in the vessel, because the vessel is held under the attachment as the property of the defendants, and not as the offending thing, as in the case of a proceeding in rem to enforce a maritime lien. Attachment in such suits may be of the property of nonresidents or of defendants absent from the state, as in suits on contracts not maritime, and the same rules apply in respect to the service of process and notice to the defendants."

Whether a suit in personam implies necessarily a waiver of any maritime lien existing for the same claim we need not consider. The Supreme Court, in *The Kalorama*, 10 Wall. 204, 218, 19 L. Ed. 941, waived the question. That a judgment in personam would not be a bar to a subsequent suit in rem was held by Benedict, J., in *The Brothers Apap* (D. C.) 34 Fed. 352, and by Townsend, J., in *The Cerro Gordo* (D. C.) 54 Fed. 391. To the same effect are the cases of *The Bengal*, Swabey, 468; *The John & Mary*, Swabey, 471; *Murphy v. Granger*, 32 Mich. 358; and *Toby v. Brown*, 11 Ark. 308. For this purpose appellants might go into the Circuit Court and assert their claims as ordinary debts. That they might obtain a preference over ordinary debts out of the fund in court they asserted that for their security they had a maritime lien. The Circuit Court without exercising any of the exclusive jurisdiction of a court of admiralty might very well say, as it did: "Very well, if you have such a lien, you shall be paid before other creditors out of the proceeds of sale, and we will require the purchaser, in addition to his bid, to assume and pay off any such lien, if one you have." If the sale had produced a fund large enough to discharge every class and rank of liability, is there any reason for saying that if one holding a maritime lien on account of supplies might not voluntarily intervene and ask that his lien be determined and paid? Can there be any doubt but that such a claimant would be as much concluded by an adjudication that he had no lien as he would be by a finding that his claim had been paid or was fraudulent? The Circuit Court did have jurisdiction to determine the claims of any one who voluntarily came in for the purpose of asserting any right to be paid out of the fund arising from the sale of those vessels. That a maritime lienor could not have been brought in may be conceded. He had the right to wait and pursue his remedy against the vessels in the hands of the purchaser from the Circuit Court; but if he elects to assert his claim to the fund which the Circuit Court had the undoubted right to distribute, and the determination of his right to be paid out of that fund in preference to the general creditors of the owners necessarily required the determination of the question as to whether he had a maritime lien, such determination operates as *res adjudicata* in respect

to the same matter when presented between the same parties, or their privies, in a subsequent proceeding in rem to assert and enforce the same claim of maritime lien. The question upon which the right of the appellants to receive full payment out of the fund in the Circuit Court is the same question upon which his right to enforce his lien here is based. The defendants in the Circuit Court denied the existence of a state of facts necessary to create a lien. The defendants here are in privity with the defendants there, for they trace title to that proceeding and took title subject to any maritime lien which the appellants might establish in that case. When a fact or question is distinctly put in issue as a ground for recovery and is directly determined by a court having jurisdiction to make such determination, that fact, right, or question cannot be again disputed in a subsequent suit between the same parties or their privies. *Hopkins v. Lee*, 6 Wheat. 109, 113, 5 L. Ed. 218; *Smith et al. v. Kernochen*, 7 How. 198, 216, 12 L. Ed. 666; *Southern Pac. Ry. Co. v. United States*, 168 U. S. 48, 18 Sup. Ct. 18, 42 L. Ed. 355; *Estill County v. Embry*, 112 Fed. 882, 50 C. C. A. 573; *Brown D. J.*, in *The Tubal Cain* (D. C.) 9 Fed. 834, held that a judgment in a state court in a suit by the owners of the *Tubal Cain* for damages of a breach of a contract, in not furnishing cargo as agreed, was a bar to a subsequent libel in admiralty by the charterers for not waiting longer or going elsewhere for a cargo as desired. He said:

"The claims of each party in the two actions is based solely upon an alleged entire breach of the charter party by the other and an entire failure in its performance. * * * The issues therefore in both actions are substantially the same. The issue has been tried upon its merits in the action in the state court, and a judgment recorded in favor of the respondents. * * * Its operation is not as a former judgment recovered upon the same cause of action, for the cause of action is not the same, but as an estoppel of record by an adjudication of the same identical matter once heard and determined between the parties."

In *The City of Lincoln*, 25 Fed. 843, the libel was for damages to the cargo by the breaking down of a pier through the negligence of the wharfinger. One defense was a former adjudication by a judgment in the Circuit Court in an action by the wharfinger against the owners of the vessel to recover damages for breaking down the pier. The owners counterclaimed for damages due for detention and loss to cargo. The jury found both parties guilty and that neither could recover. Brown, Judge, after stating the facts, said:

"It thus appears that both the parties, who are the respondents in the present case, voluntarily submitted their claims to a court of common law; each claiming their entire damages against the other. The wharfingers, by their complaint, and the owners of the steamer, by the counterclaims in their answer, having thus voluntarily appealed to a common-law forum, and had their day in court upon this question, I think that the determination then made, that there was mutual fault, should be held binding upon them, in any other action where the same question arises as between themselves. In cases turning upon questions of navigation, indeed, the verdict in a common-law court has been held not to be binding in a court of admiralty, on account of the superior means for determining such questions supposed to belong to admiralty tribunals. *The Ann & Mary*, 2 Wm. Rob. 189. But in other classes of cases, I apprehended a prior determination and judgment in a court of common law are binding as between the same parties in admiralty, whether pleaded or given in evidence as respects the same material facts

again in litigation. *Goodrich v. The City*, 5 Wall. 566, 18 L. Ed. 511; *Taylor v. Royal Saxon*, 1 Wall. Jr. 333, Fed. Cas. No. 13,803; *The Tubal Cain* (D. C.) 9 Fed. 834, 838, and note. Undoubtedly, the verdict and judgment in the former action between the present respondents is no adjudication or bar, as respects the libelants in this case, who were not parties to that suit. The present action, however, concerns the same subject-matter, and the very question once determined as between these codefendants now arises again as between themselves. The analogy of the rule in equity would seem to be applicable, which makes a former decree determining the rights of codefendants binding in a subsequent action between them on the same subject-matter. It is immaterial, it is said, how the parties are arranged, whether upon the same side or upon opposite sides in the cause, so long as their rights are directly in litigation, and each has the opportunity of asserting his claim and his defense, and to cross-examine the witnesses. *Farquharison v. Seton*, 5 Russ. 45, 62; *Daniell*, Chancery Pr. *1010, *1013; *Nevill v. Johnson*, 2 Vern. 447."

Goodrich v. City of Chicago, 5 Wall. 566, 18 L. Ed. 511, was a libel in the District Court against the city of Chicago in personam to recover damages to libellant as owner of the steamer Huron for injuries sustained from the vessel running against a sunken wreck in the Chicago river. The action was based upon the supposed duty of the city to keep the river clear, and that it had been negligent in this regard. One of the defenses was a judgment of a state court upon a general demurrer to a declaration in an action at law by the libellant against the respondent for the same cause of action. The judgment of the state court was held to be a bar upon the principle of *res adjudicata*.

The judgment of the court below must be affirmed upon the defense of estoppel. This renders any consideration of the question of lien or no lien altogether unnecessary.

NORFOLK & W. RY. CO. V. BECKETT.

(Circuit Court of Appeals, Fourth Circuit. July 27, 1908.)

No. 795.

1. MASTER AND SERVANT—INJURY TO SERVANT—UNSAFE PLACE TO WORK.

It is negligence and a breach of its duty to its employes for a railroad company to build a standpipe so close to its track as to endanger employes on passing trains when engaged in the performance of their duties, and such employes do not assume the risk from such structure merely because they know of its existence and general location.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 84, Master and Servant, § 662.]

2. SAME—LIABILITY OF MASTER—ASSUMED RISK.

Plaintiff, who was conductor of a freight train on defendant's road, while the engine of his train was taking water at a station in the night, went in to send in reports in the course of his duty. When he came out the train was moving, and he started to climb upon a car by the side ladder provided for that purpose, when he was struck by a spout or standpipe, knocked from the car, and seriously injured. There was no caboose on the train, and plaintiff was required to be on top of the cars to act as a brakeman. He was not well acquainted with the road at that point, and, while he knew there was a standpipe and its general location, he did not know that it was so near the track as to be dangerous to a person in his position. *Held*, that defendant was negligent in so placing

it, and that plaintiff did not assume the risk therefrom, nor was he chargeable with contributory negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 662, 707.

Assumption of risk incident to employment, see note to *Chesapeake & O. R. Co. v. Hennessey*, 38 C. C. A. 314.]

3. SAME—DUTY OF CARE ON PART OF SERVANT.

It being the duty of a master in the first instance to furnish a servant with a reasonably safe place wherein to work, the servant has the right to assume that such duty has been performed, and is not required to exercise reasonable care to discover dangers, but is chargeable with knowledge only of such defects as are plainly observable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 710-714.]

In Error to the Circuit Court of the United States for the Southern District of West Virginia, at Bluefield.

A. W. Reynolds (Joseph I. Doran and Theodore W. Reath, on the briefs), for plaintiff in error.

Harold A. Ritz and Joseph M. Sanders (Sanders & Crockett, on the brief), for defendant in error.

Before PRITCHARD, Circuit Judge, and WADDILL and BOYD, District Judges.

PRITCHARD, Circuit Judge. This is an action brought for the recovery of damages on account of personal injuries sustained by the plaintiff below, James H. Beckett, resulting in the loss of a leg while employed by the defendant below, the Norfolk & Western Railway Company, as a freight conductor. The case was tried at October term, 1907, of the Circuit Court of the United States for the Southern District of West Virginia, at Bluefield, and a verdict was rendered in favor of the plaintiff below for the sum of \$10,000. The defendant in error had been running over that part of the road where he was injured but a short time. The facts, substantially, are:

"On the 14th day of November, 1902, he (Beckett) was called to go to Bluefield, and was started out with a train of about 45 cars, 5 of which he set off and left at Vivian. When he reached Vivian, he received an order to run an hour late, on account of having been detained in setting off the cars there. Running on the order which he had received, he reached Morgan, a short distance east of Vivian, and, when the train stopped for the engine to take water, he went into the office at Morgan to send a message to the superintendent, informing him as to the cause of the delay, and while he was laying out, and also to send a message to Coaldale, concerning a car which he was to get on his way to Bluefield, all of which he was required by the company to do, and which it was his duty to do. He gave the messages to the operators, and the train started while he was at the office, and he came out and caught the train and was climbing up on the side of a box car, on a ladder, placed on the side of the car for the purpose of getting upon the car, and while so climbing up the car, and when he had gotten nearly to the top of the car, a portion of his body projecting above the top, he was struck by a water column or standpipe, standing by the side of the track about 30 or 40 yards east of the station, and was knocked between the cars, fell to the ground, and the cars ran over him and cut off his left leg, between the ankle and the knee; thence he was taken to the hospital at Bluefield and his leg was reamputated."

The first question to be determined is:

"Was it negligence of the master to erect and maintain the water column or standpipe which struck the defendant in error at the point at which it is erected and maintained?"

It is a well-settled principle of law that it is the duty of the master to furnish the servant with a reasonably safe place in which to work, and the servant may assume when he enters upon his employment that the master has performed the duty thus enjoined upon him.

It appears from the evidence that the standpipe which occasioned the injury in this instance was set so near the track that it was impossible for a person occupying the position that the plaintiff did on that occasion to pass it without injury. While the evidence shows that trains of which the defendant in error was in charge had frequently taken water at Morgan, it does not appear that the defendant in error had ever attempted to board a freight train at that point prior to the time of his injury, or that his attention had ever been called to the fact that the standpipe was too close to the track to permit one to pass safely on the side of the box car. However, it is insisted by the plaintiff in error:

"That there was no negligence in placing the standpipe in the position it occupied at the time the defendant in error was injured; that it was the duty of the defendant in error to have acquainted himself with the dangers incident to this standpipe; that under the circumstances proved in the case it was gross negligence on the part of the defendant in error to attempt to ascend the car upon a side ladder while the train was in motion and when he knew that he was approaching this standpipe; that the defendant in error had no right to assume that the standpipe was at a sufficient distance to permit him to pass in safety in the position which he occupied; that there was no necessity that he should have thus exposed himself to danger in the discharge of his duties; that he knew that the position he occupied was a dangerous one; that he was liable to come in contact with objects along the side of the road; and that he assumed all of the dangers incident to the dangerous manner in which he chose to get on board of his train."

This contention might be true as to obstructions placed so near the track as to be dangerous without the knowledge or consent of the master and when he had had no opportunity to acquaint himself with the situation.

In the case of *Choctaw, Oklahoma & Gulf Railroad Co. v. McDade*, 191 U. S. 67, 24 Sup. Ct. 25 (48 L. Ed. 96), the court, in discussing this phase of the question, among other things, said:

"It is the duty of a railroad company to use due care to provide a reasonably safe place and safe appliances for the use of workmen in its employ."

Ordinarily, the conductor of a freight train is provided with a caboose in which to ride whilst the train is in motion; but it should be borne in mind that the train on this occasion did not have a caboose, and that, among other duties, the conductor was at intervals required to perform those of a brakeman. Therefore, when we come to consider the question as to whether the conductor was in the discharge of his duties at the time he was injured, we are reminded that the top of the car was the only place provided by the master whereon he could ride, and, even had this not been the case, the fact alone

that he was required to act as brakeman would necessitate his presence on the top of the car while the train was in motion.

On this occasion the train had stopped at Morgan in order to take on coal and water, and it appears that the defendant in error had gone to the dispatcher's office to report to the superintendent, thus performing a duty required of him by the rules of the company, and while in the performance of such duty the train started to leave the station, and the conductor immediately proceeded to board his train by climbing the side ladder, the only means provided by which he could reach the position he was required to occupy while the train was in motion. When the train started he was confronted with a situation which involved the performance of a plain duty. The duty thus imposed was imperative, and there was no alternative. To say that it was not his duty to accompany the train which had been placed under his control by the master, would be unjust, and under these circumstances it cannot be insisted that the defendant was acting contrary to the orders of the company or doing anything inconsistent with the faithful performance of his duty. If the conductor had on this occasion refused to board his train as it pulled out, and thus permitted the same to proceed on its way, it would have been tantamount to an abandonment of the trust reposed in him as the captain of the train and a flat refusal to perform his duty as required in that respect. It therefore seems clear to us, under all the circumstances, that the conductor was engaged in the performance of his duty in attempting to go upon the top of the car by climbing the ladder which had been provided by the master for that express purpose, and this is especially true in view of the fact that no other means were provided by which he could have reached any portion of the train wherein he was required to perform the duties incident to the relation which he sustained to the master.

That the plaintiff had seen the standpipe in question and knew its location is not disputed, but there is not a scintilla of evidence to show that he ever saw a box car pass it so as to be able to observe the space between it and the car, nor was there any evidence to show that he had ever passed it while on a box car, or that he had ever seen any one attempt to climb the ladder at a time when the car was passing this particular point. In other words, he had knowledge of the existence of the standpipe and its relative position to cars while passing it in a general way, but there is nothing to show that he had any knowledge as to the increased hazard resulting from the close proximity of the standpipe to the center of the track.

In the case of *Texas & Pacific Ry. Co. v. Swearingen*, 196 U. S. 51, 25 Sup. Ct. 164, 49 L. Ed. 382, in discussing this phase of the question, among other things, it is said:

"Knowledge of the increased hazard resulting from the dangerous proximity of the scale box to the north rail of track No. 2 could not be imputed to the plaintiff simply because he was aware of the existence and general location of the scale box."

As we have already said, the master owes to the servant the absolute duty of furnishing a reasonably safe place wherein to work,

and the servant when entering upon employment may assume that a reasonably safe place has been furnished for that purpose. In the case just quoted it is held that the knowledge of an attendant danger in a case like the one at bar cannot be imputed to the plaintiff simply because he knew of the location of such attendant danger. To establish a different rule would be to abrogate the rule which requires the master to furnish the servant a reasonably safe place wherein to work, and, while it is the rule that one seeking employment assumes the risk incident thereto, the rule is predicated upon the principle that in the first instance the master will, by exercising that care and caution which devolve upon a prudent person, provide a reasonably safe place wherein the servant is to work, and in doing so it is undoubtedly the duty of the master to provide against erecting or maintaining any kind of fixtures which must of necessity result in injury to the servant in the performance of the duties incident to his employment, and which he is liable, under emergencies like the one on this occasion, to be called upon to perform, and while the servant (once the master performs his duty) assumes those risks that are common and incident to his employment in a particular line, yet this does not mean that he assumes risks which are incident to the negligence of the master in the first instance. In other words, if the master has complied with the rule as to the degree of diligence imposed upon him, then the servant assumes the risk incident to his employment; but here there was a failure on the part of the master to furnish a reasonably safe place wherein the servant was called upon to work by placing the standpipe at such a distance from the center of the track as to permit the servant under such circumstances to board a moving train in safety in such emergency.

In the case of *Riley v. W. Va. Cent. & P. R. Co.*, 27 W. Va. 145, the court said:

"It is the duty of a railroad company not only to furnish a reasonably well-constructed and safe railway and track for the use of its employes, but it must also exercise continued supervision over the same and keep them in good and safe repair and condition."

In that case the plaintiff, while acting as a brakeman in the employ of the defendant on a train consisting of an engine and tender, was struck by a stump standing along the railroad and near the track. The stump originally stood some distance from the track, but, being in loose loamy soil, had by a slide produced by heavy rains slipped so near the track as to render it dangerous for one occupying the position the brakeman did on that occasion to attempt to pass the point where it was located.

Among other things, it is insisted by the plaintiff in error that, if the conductor on this occasion had stepped round the end of the car on the sill, he could have avoided the accident. This is a degree of diligence which we do not think he was called upon to exercise under the peculiar circumstances by which he was surrounded on that occasion. When he came out of the dispatcher's office the train was in motion, the night was dark, and, in order to perform the duties incident to his employment, he was required to act promptly, and under

these circumstances to hold that he was guilty of contributory negligence in that he neglected to anticipate a danger of which he had no actual knowledge, by stepping round to a point where he was not required to go in order to reach the place where he was to perform the duties incident to his employment, would be unreasonable and without precedent. The ladder which the defendant in error was ascending was placed upon the side of the car to be used by him for the purpose of ascending the car when leaving the station, and at other times when he was required to board the car. Then to require him to do this and erect and maintain at the very place or near the place where this duty was to be performed a standpipe so near the railroad as to endanger his person in the performance of this duty we think was negligence, in that it was a failure to provide a safe place for him to work, because the work which he was then performing was required to be done then and there, and in this instance the car was in motion, he had no time or opportunity to take a survey of the surroundings to see what dangers were near, and this adds strength to the position that, being in a situation of that sort, it devolved more imperatively upon the railroad company to provide for his safety.

We now come to consider the various assignments of error. The first assignment is as to the action of the court in giving the instructions offered on behalf of the plaintiff below. The first instruction submitted to the jury involves the question whether at the time the plaintiff received the injury he was engaged in his duties as conductor and in doing so exercised ordinary care, and the jury was told that they should find for the plaintiff, unless they should also find that the plaintiff knew the standpipe was in such position as to be unsafe, or that he knew the position of the standpipe, and that from its position it was plainly observable to be unsafe. It is insisted by the plaintiff in error that this instruction under the evidence was improper, inasmuch as the evidence showed that he negligently assumed a position of known danger, and that therefore this instruction should not have been submitted to the jury. We fail to find anything in the record from which it can be inferred that the plaintiff knew of the dangerous proximity of the standpipe. From the evidence it is shown that he only had a general knowledge as to the location of the standpipe, and there is nothing in the record which shows that from the location of the standpipe it was plainly observable to be unsafe. In other words, in order to bring this case within the class of cases wherein it is held that the servant assumes the risk incident to his employment, it must appear that the danger was plainly observable, and in this instance, inasmuch as there is want of proof to sustain the contention of the plaintiff in error, we are inclined to the opinion that the court did not err in submitting the instruction complained of in the first assignment of error.

In the case of Choctaw, O. & G. R. Co. v. McDade, *supra*, it is said:

"The question of assumption of risk is quite apart from that of contributory negligence. The servant has the right to assume that the master has used due diligence to provide suitable appliances in the operation of his business, and he does not assume the risk of the employer's negligence in performing such duties. The employé is not obliged to pass judgment upon the employer's methods of transacting his business, but may assume that reasonable care will be used in furnishing the appliances necessary for its operation. This

rule is subject to the exception that where a defect is known to the employé, or is so patent as to be readily observed by him, he cannot continue to use the defective apparatus in the face of the knowledge and without objection, without assuming the hazard incident to such a situation. In other words, if he knows of a defect, or it is so plainly observable that he may be presumed to know of it, and continues in the master's employ without objection, he is taken to have made his election to continue in the employ of the master, notwithstanding the defect, and, in such case, cannot recover."

We have carefully considered instruction No. 2 given for the plaintiff below, and we are of opinion that the contention of the plaintiff in error is without merit. This instruction practically embodies the statement of the law as contained in the case of Choctaw, O. & G. R. Co. v. McDade, supra.

As to instruction No. 3, which is to the effect that the plaintiff below had the right to assume that the defendant had exercised reasonable care in the preparation of the place wherein he was to work, and that he was not required to exercise reasonable care to acquaint himself with the condition thereof, but that under the circumstances he assumed the peril and extra hazard not incident to his employment only for defects known or plainly observable by him, we think is correct.

In the McDade Case, cited, the court below charged the jury that the plaintiff could not recover if he knew of the position of the water-spout, or by the exercise of ordinary care on his part ought to have known of it. The Supreme Court, in discussing this phase of the question, says:

"The charge of the court upon the assumption of risk was more favorable to the plaintiff in error than the law required, as it exonerated the railroad company from fault if in the exercise of ordinary care McDade might have discovered the danger. Upon this question, the true test is not in the exercise of care to discover dangers, but whether the defect is known or plainly observable by the employé."

In other words, it being the duty of the master in the first instance to furnish the servant a reasonably safe place wherein to work, the servant is not required to exercise reasonable care to discover dangers; but he is chargeable with knowledge of any and all defects that are plainly observable, and he assumes all risks incident thereto.

We do not think it necessary to consider seriatim the remaining assignments of error, inasmuch as we have discussed generally the propositions involved therein and are of opinion that the rulings of the court below on the various propositions were correct.

This case was tried with great care and ability by the learned judge below, and all controverted questions of fact were submitted to the jury, and we think the findings of the jury were justified by the testimony, and that there was no error in the principles of law enunciated by the court.

The decision of the court below is affirmed.

Affirmed.

HARMON v. SPRAGUE et al.

SPRAGUE et al. v. CORNER.

(Circuit Court of Appeals, Sixth Circuit. July 23, 1906.)

Nos. 1780, 1781.

1. INSOLVENCY—PREFERRED CLAIMS.

C., prior to the failure of a firm of brokers, ordered them to purchase certain stock for delivery. The purchase was made through another concern by the latter advancing the purchase price, in accordance with the usual custom, and charging the amount to the brokers' general account, retaining the stock in pledge. C. thereupon paid the brokers the amount due and requested that the certificates be transferred to him, but this was not done until the firm suspended, without having notified the purchasing brokers to transfer the stock to C., whereupon it was sold as a part of the pledge for the brokers' general account. *Held*, that such stock belonged to C., that the sale was wrongful, and that C. was therefore entitled to a preferred claim for the value thereof, against a balance remaining to the credit of the brokers on the sale.

2. SAME.

D. & Co., a firm of brokers, was ordered by H. to sell for him 20 shares of preferred Q. stock and to purchase 25 shares of G. Trust Co.'s stock. G. & Co. sold the Q. stock on the Chicago Exchange, realizing \$2,057.50, in addition to commissions therefor, through another firm of brokers. The 25 shares of G. stock was purchased with commissions for \$7,556.25, through another firm of brokers on the Cleveland Stock Exchange, and, both transactions being reported to H., he delivered to D. & Co. a certificate for the 20 shares of Q. stock and \$98.75, which, with the proceeds of the Q. stock, he directed to be applied to the purchase of the G. stock, leaving a balance due D. & Co. of \$5,400, which a trust company had agreed to pay to D. & Co. on delivery of the stock. On the sale of Q. stock, D. & Co. were credited with the selling price and charged with the stock, the charge being balanced by the delivery of the certificate, leaving D. & Co. credited on the books of their correspondent with \$2,057.50. The trust company's stock, however, was never delivered, and on D. & Co.'s failure the sale was canceled by their correspondent without loss, resulting in net credit to H. on D. & Co.'s books of \$2,056.25. *Held*, that the purchase of the G. stock had never been consummated, and H. was therefore a mere creditor of D. & Co. at the time of their failure and was therefore not entitled to a preferred claim on the surplus arising from the sale of other pledged collateral belonging to D. & Co.

Severens, Circuit Judge, dissenting in part.

Appeals from the Circuit Court of the United States for the Northern District of Ohio.

C. F. Taplin and J. E. Morley, for W. F. Sprague and others.

F. L. Taft, for Frank S. Harmon.

T. H. Hogsett, for Horace B. Corner.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. On and prior to January 9, 1906, Finley, Barrel & Co. was a firm engaged in business as stockbrokers, in Chicago. At the same time, Denison, Prior & Co. were similarly engaged in Cleveland. The former firm was one of the correspondents of the latter, which bought and sold stocks for customers through it, carrying the same, where a direct purchase was not made, upon mar-

gins. On January 9, 1906, Denison, Prior & Co. failed, owing Finley, Barrel & Co., \$146,913.68. To secure this, Finley, Barrel & Co. held 2,599 shares of the common stock of the American Ship Building Company, 1,885 shares of the preferred stock of the United Boxboard & Paper Company, 70 shares of the common stock of the United Boxboard & Paper Company, 50 shares of the common stock of the Quaker Oats Company, which securities, with the exception of 75 shares of the Boxboard preferred stock, which was delivered free, were on January 10, 1900, sold out, producing altogether \$174,814.43. After paying the debt for which these stocks were pledged, Denison, Prior & Co. were left with a credit balance of \$26,211.69, which was turned over to the receiver.

The contest is with respect to the distribution of this amount. Among the claimants were Horace B. Corner and Frank S. Harmon. Neither of these was a margin trader, doing business with Denison, Prior & Co., on a speculative account for the purchase and sale of stocks. Corner gave a straight order to Denison, Prior & Co. to purchase for him 50 shares of Quaker Oats common. This purchase was at once effected through Finley, Barrel & Co.; the latter advancing, in accordance with the usual custom, the purchase price, and charging the same to Denison, Prior & Co.'s general account, retaining the stock in pledge. On November 27, 1906, Denison, Prior & Co. presented to Corner a bill for the purchase price of the stock including commission, and stated that the stock had been purchased for it in Chicago. Corner paid the bill and instructed Denison, Prior & Co. to have the certificate transferred for him. This they agreed to do and receipted the bill. A few days thereafter, not having received the certificate, Corner asked Denison, Prior & Co. about the matter, and they informed him that the certificate had not been received, but that they would deliver it in a few days, as soon as it was received from the transfer office. Nothing was done by Corner until the time of the suspension of the firm of Denison, Prior & Co., and the certificate was not delivered to him. Denison, Prior & Co. had never notified Finley, Barrel & Co. to transfer the stock for Corner.

The claim of Frank S. Harmon grew out of the following facts: On January 4, 1906, he ordered Denison, Prior & Co. to sell for him 20 shares of the preferred stock of the Quaker Oats Company, and at the same time ordered the firm to purchase for him 25 shares of the Guardian Savings & Trust Company stock. That day the firm executed these orders in the following manner: By selling 20 shares of Quaker Oats preferred stock on the Chicago Stock Exchange, for \$103 per share, realizing, after deducting commissions, \$2,057.50. This sale was made through Finley, Barrel & Co. The purchase of 25 shares of Guardian Savings & Trust Company stock was made at \$302 per share, which, with the commission added, made \$7,556.25. This purchase was made on the Cleveland Stock Exchange from the firm of Wright, McLoud & Baker. Both these transactions were reported to Harmon, and on January 5, 1906, he delivered to Denison, Prior & Co. a certificate for 20 shares of Quaker Oats preferred, and at the same time paid them \$98.75, which, with the proceeds of the sale of the Quaker Oats stock, he directed to be applied on the purchase price of the

Guardian Savings & Trust stock, thus leaving a balance due Denison, Prior & Co. of \$5,400, and it was then agreed that Denison, Prior & Co. should deliver the shares of the Guardian Savings & Trust Company stock to the Citizens' Savings Trust Company, with which company Harmon had an arrangement whereby the bank was paid the balance of \$5,400, on the delivery of said Guardian Savings & Trust Company stock. Upon the sale of the Quaker Oats stock, on January 4, Finley, Barrel & Co. credited Denison, Prior & Co.'s account with the selling price thereof, and charged their account with the stock so sold. Denison, Prior & Co. transmitted the certificate of Quaker Oats preferred stock delivered to it by Harmon to Finley, Barrel & Co., which firm on receipt of the certificate on January 9, credited Denison, Prior & Co.'s account with the stock so received, making the net credit on account of the transaction \$2,057.50. On the 9th of January, the books of Denison, Prior & Co. showed Harmon to be owing said firm the sum of \$5,400, and that the firm were carrying for his account 25 shares of the Guardian Savings & Trust Company stock; that Denison, Prior & Co. did not pay Wright, McLoud & Baker any part of the purchase price of the 25 shares of the Guardian Savings & Trust Company stock; that at the suspension of Denison, Prior & Co., on January 10, 1906, said shares of stock were still in the possession of Wright, McLoud & Baker, and were held by that firm subject to the rules of the Cleveland Stock Exchange, which provide that, on the suspension of a member of the exchange, the sale shall be closed out, and any deficiency resulting therefrom shall be a lien on the seat of the firm so becoming insolvent. Instead of closing out the sale, the same was canceled, and no loss resulted to Denison, Prior & Co., and no charge was made against the seat of the firm on the Cleveland Stock Exchange. In closing out Harmon's account, Denison, Prior & Co. credited him with the sum of \$7,556.25, leaving Harmon as a net credit, \$2,156.25.

The master found with respect to these claims that neither Corner nor Harmon was entitled to any preference over the other creditors. The court below sustained this holding as to Harmon, but took the view that Corner's claim stood by itself, that he had made a straight out purchase of the 50 shares of Quaker Oats stock, the stock was bought and identified, that Denison, Prior & Co. made out a bill for its price with commission, and that Corner paid this and was entitled to the certificate. The stock therefore became and was his, and its sale as collateral pledged, under the general agreement to secure Finley, Barrel & Co.'s account, was wrongful. Accordingly, the court took the view that Corner was entitled to receive out of the fund the entire proceeds of the sale of 50 shares of Quaker Oats stock which belonged to him. With respect to the claim of Harmon, the court took the same view the master did, that he was not entitled to participate in the fund.

We agree with the view taken by the court below of the Corner claim. It seems to be simply a case of following and identifying the proceeds of a sale of stock which belonged to Corner and should have been delivered to him instead of being sold. The rule in following and identifying trust funds is defined in the recent case of Board of Commissioners of Crawford Co. v. Strawn, 157 Fed. 49, 84 C. C. A. 553.

That states the law of this court upon the subject. The law regulating brokers and customers, and governing the relations which result from the purchase and sale of stocks, either directly or on margin, is discussed by the Supreme Court of the United States, speaking by Mr. Justice Day, in the recent cases of *Richardson v. Shaw*, 209 U. S. 365, 28 Sup. Ct. 512, 52 L. Ed. 835, and *Thomas v. Taggart*, 209 U. S. 385, 28 Sup. Ct. 519, 52 L. Ed. 845. It is unnecessary to go into any extended discussion or consideration of the present case which has no features distinguishing it from others of a like character. The stock was bought on the order of the Cleveland brokers, by the Chicago firm, for Corner, and was paid for by him; the bill being sent him by the Cleveland firm. When this was done, the stock belonged to Corner, and the certificate should have been sent him; but the Cleveland firm failed to do so, and, as a result, the stock was sold upon their failure, as collateral to satisfy the account of the Chicago brokers against them. We think this was done wrongfully. Corner owed neither the Cleveland firm nor the Chicago brokers anything, and consequently the proceeds of Corner's stock, which went into the fund at the sale, should go to him.

As to the claim of Harmon, who was so unfortunate as to have the proceeds of the Quaker Oats stock, sold by the Chicago firm, go to the credit of the Cleveland brokers just about the time they became insolvent, the Cleveland brokers had received Harmon's order to sell the Quaker Oats stock and then purchase 25 shares of the Guardian Savings & Trust Company stock. They, accordingly, gave the necessary instructions to carry out these orders; but the program was never completed. The Chicago correspondent sold the Quaker Oats stock and credited the account of the Cleveland brokers with its proceeds. The Cleveland brokers meantime had given instructions to a Cleveland firm dealing on the Cleveland Exchange to purchase the 25 shares of the Guardian Savings & Trust Company stock, and the arrangement was made that upon receiving the proceeds of the Quaker Oats stock, with a small additional sum, a Cleveland bank would advance \$5,400 on the 25 shares of the Guardian Savings & Trust Company stock. This, however, was not done, because of the failure of Denison, Prior & Co. The proceeds of the sale of the Quaker Oats stock, \$2,057.50, with the amount paid them by Harmon, \$98.75, making altogether \$2,156.25, standing on the books of Denison, Prior & Co. to the credit of Harmon, not being available for the purchase of the 25 shares of the Guardian Savings & Trust Company stock, the sale of the latter was canceled, and no loss resulted to Denison, Prior & Co. During the interim, the proceeds of the sale of the Quaker Oats stock were held by Denison, Prior & Co. as a credit for that amount, and stood there at Harmon's risk. The firm did what it could to carry out the instructions given by Harmon, but before it could do so the failure came, and that put Harmon in the condition of any other creditor; the purchase of the 25 shares of the Guardian Savings & Trust Company stock not having been consummated.

The fund for distribution here arose from sale of stocks owned by original purchasers, and they only are entitled to share in the surplus

remaining after satisfaction of the debt for which they had been pledged by Denison, Prior & Co. None of the shares so included in the pledge belonged to Harmon. He has failed therefore to show any right to be paid out of or share in the fund in the receiver's hands.

Decree affirmed.

SEVERENS, Circuit Judge, dissents as to disallowance of the Harmon claim.

THE SIMON DUMOIS.

(Circuit Court of Appeals, Fourth Circuit. July 22, 1906.)

No. 732.

COLLISION—STEAMERS MEETING IN FOG.

Evidence considered, and *held* not to establish the fault of a steamer outward bound from Baltimore for a collision with a meeting steamer in a fog as she was passing under the stern of an anchored schooner; it being shown that she was navigated with great care, at slow speed, and was outside of the dredged channel, on the anchorage grounds on her own side of the channel.

Appeal from the District Court of the United States for the District of Maryland.

Francis S. Laws, and Arthur D. Foster (Foster & Foster, and John F. Lewis, on the brief), for appellant.

Frederick M. Brown (Butler, Notman & Mynderse, on the brief), for appellee.

Before GOFF and PRITCHARD, Circuit Judges, and BOYD, District Judge.

BOYD, District Judge. This is an appeal from a decree in admiralty rendered by the District Court for the District of Maryland, at Baltimore. The appellant, the Di Giorgio Importing & Steamship Company, filed a libel against the steamship Simon Dumois, the appellee, to subject the latter to the payment of the value of a cargo of bananas, laden on the steamship Iberia, alleged to have been destroyed as the result of a collision between the two said steamships near Ft. McHenry, in the harbor of Baltimore, on the 7th of March, 1904, which said collision is alleged to have been caused solely by the fault of the Simon Dumois. The Iberia was bound for Baltimore, fully laden with the cargo aforesaid, and the Simon Dumois was outward bound, in ballast. The allegations of the libellant are:

"The steamship Iberia with a perishable cargo of bananas, left the quarantine station about 7 o'clock on the morning of the collision, bound for Baltimore. The weather was foggy at starting, but the pilot was able to pick up the buoys which mark the northeastern boundary of the channel, and proceeding at a speed of about two knots an hour, and blowing fog signals at regular intervals, he continued along the line of these buoys, near enough to distinguish the numbers on some of them, until those on the bridge sighted the topmast of a four-masted schooner lying at anchor on the southwesterly side of the channel and partially across it. No change was made in the course of the Iberia until she reached a point about 700 feet from the stern of the

schooner, when a fog whistle was heard coming from the vicinity of the schooner and on the port bow of the Iberia. The Iberia answered with a fog signal and ported her wheel, and almost immediately thereafter a steamer (which subsequently proved to be the Dumois) loomed up, coming around the stern of the schooner, and headed directly across the channel and the Iberia's course. The wheel of the Iberia was at once put hard aport, the engines were reversed, and signals given. Within a space of time estimated from a half a minute to a minute, the Dumois, continuing her course across the channel, struck the Iberia on her port side, just forward of amidships, and sunk her. The Iberia, at the instance of the collision, was stopped, or practically so. After the collision the Iberia drifted with the tide in the direction of Ft. McHenry, where she finally took bottom some four hours later. The Dumois left the harbor of Baltimore outbound about 7:15 a. m. on the same morning. The weather was hazy and rainy, and the pilot laid her course 'on the southernmost edge' of the channel until he had passed opposite Ft. McHenry, when he ported his wheel about two points and deviated from his course about 100 feet in order to pass under the stern of an inbound schooner. After clearing the schooner the wheel was starboarded, and the vessel again brought upon her channel course and steadied, when a four-masted schooner at anchor was observed about a mile ahead, lying over the southern edge of the channel. The vessel was under full speed at this time, but shortly thereafter a heavy fog bank was seen ahead, which completely enveloped the schooner. The steamer continued until within about 100 feet of the fog banks, when she reduced her speed to slow, and blew fog whistles. This course was held for 10 or 12 minutes, until the schooner was seen in the fog about 150 feet away, and almost ahead, when, in order to avoid the schooner, the engines were stopped and the wheel hard astarboarded, to pass under her stern. This altered the course of the steamer from parallel with the channel to almost directly across it. After clearing the schooner orders were given to port the wheel and go slow ahead, but before either could be executed a fog whistle was heard from the Iberia. The engines were ordered reversed, but before any of these orders could be carried out the Dumois' headway had carried her across the channel and brought her into collision with the port side of the Iberia with sufficient force to crush in her side. At the time of the collision the Iberia was cargo laden and drew 19 feet of water, while the Dumois was light and drew but 14 feet 6 inches of water."

The libellant further insisted that the collision occurred on the north-easterly side of the ship's channel and somewhat astern of the anchored schooner before referred to, and that the disaster was due to the fact that the Dumois, in her efforts to avoid striking the schooner, had turned and was steering diagonally across the channel and into the path of the incoming Iberia, so that, whilst the Iberia was proceeding in her due course, the Dumois, by this misdirection of her course, was the sole cause of the collision. On the other hand, the appellee, in the answer, insists that the Simon Dumois, at the time of the collision, was navigating well on the outward bound one-half of the channel, and probably, if not on the anchorage ground, adjoining that side of the channel; that all reasonable skill, care, and prudence was used by the navigators in laying and maintaining a proper course; and that when the collision of the two vessels was imminent, and as soon as the danger was discovered, all proper signals were given by the navigators of the Dumois, and every means within their control was used to prevent the collision; but that it took place, and was due not to the fault of the Dumois, but to surrounding conditions, over which her navigators had no control.

Testimony was introduced both by the libellant and by the respondent relative to the facts and circumstances attending the navigation of

the two ships and the collision which occurred. Of course, there is, as generally in cases of this character, much contradictory testimony, which, however, was considered, as we readily gather, by the trial judge, whose duty it was, under the rules of evidence, to reconcile, if possible, conflicting testimony, but, if the testimony is so absolutely contradictory as to be incapable of reconciliation, then to accept such of it as he believes and disregard such as he does not. In this situation the trial judge found the following facts:

"The collision occurred, I think, well within 100 feet of the stern of the schooner, as is established by the strong probative facts and testimony. It seems to me that the proof leaves no doubt that the Dumois was not in the channel at all, but at the time of the collision was within the water of the dredged-out anchorage ground to the south of the channel. There is ample proof that the Dumois was navigating with great care. All her officers were on deck, her first officer having been stationed on the bow as a lookout, and her master was with the pilot on the bridge. Her speed when the fog set in was slow, and when the schooner was seen, her engines were stopped. When the collision occurred, her engines were making full speed astern. I can find no particular in which it can be justly said that the Dumois was in fault. As the Iberia is not represented in this litigation, I forbear to comment upon her navigation. * * * From a patient consideration of all the testimony, my conclusion is that none of the faults charged against the Dumois have been sustained."

After a careful reading and consideration of the testimony, we find no sufficient ground upon which to disturb these conclusions, and the decree of the District Court of Maryland is therefore affirmed.

Affirmed.

NOTE.—The following is the opinion of MORRIS, District Judge:

MORRIS, District Judge. This suit grows out of a collision which occurred just outside the inner harbor of the port of Baltimore on the morning of March 7, 1904, in a dense fog. The colliding vessels were two small Norwegian fruit steamers, the Iberia, about 500 tons, and the Simon Dumois, about 428 tons net register. The Iberia, having made a voyage from Cuba, was entering the port with a cargo of bananas belonging to the libellant. The Simon Dumois was without cargo, and had just left the port bound out to sea. The collision occurred in the dredged channel or anchorage ground, something over a mile below the entrance to the inner harbor at Ft. McHenry.

The Iberia had remained at the quarantine dock the night before, and a little after 7 o'clock in the morning, with a licensed pilot in charge, she got under way to come to her dock in the harbor. There was a dense fog, and her pilot testifies that she came slowly, blowing fog signals. The pilot says he was running the channel course N. W. by N. and observing as he passed them the channel buoys, indicating the northern side of the channel. He sighted a four-masted schooner at anchor, seeing the tops of her masts above the fog, and, when close to the schooner, he heard a fog whistle on his port bow. He ordered his helm to port, and discovered a steamer (the Simon Dumois) coming out from under the stern of the four-masted schooner about, as he states, 700 feet off. He then ordered his helm hard aport and his engines full speed astern, but in a few (560) moments the Dumois ran into the Iberia, striking her on the port side about amidship, making such a hole in her that she gradually settled, and, drifting with the wind in the direction of Ft. McHenry, finally sank, and her cargo of bananas was a total loss.

The case stated in the answer filed on behalf of the Simon Dumois is: That she had left the port of Baltimore on the same morning at 7:30 a. m., at which place the atmosphere, although misty, was good for seeing. That she passed outside Ft. McHenry in the channel, and was proceeding on a course S. E. by S. parallel with this course and to the southward of the center of

the channel, when a thick fog was encountered. That she then slowed her speed and blew fog signals, and was about to anchor and had stopped her engines for that purpose, when a four-masted schooner was observed nearly ahead showing her starboard side with her bow pointing away from the channel to the south and west. The Dumois' course was then shaped to pass under the schooner's stern. The order had been given slow ahead, when the Iberia was seen approaching through the dense fog. The Dumois' engines were reversed, but notwithstanding the two steamers collided, and the bow of the Dumois punched a hole in the port side of the Iberia a little forward amidship.

This libel was filed by the owner of the cargo of the Iberia, charging the Dumois with the loss of the Iberia's cargo and alleging that the Dumois was in fault in the following particulars, viz.:

- (1) In failing to maintain the proper course for outbound vessels on the right-half side of the channel.
- (2) In failing to blow proper fog signals.
- (3) In going too fast under the circumstances and failing to slow down.
- (4) In failing to stop and reverse.
- (5) In failing to have a sufficient lookout.

The owner of the cargo in instituting this suit was under the embarrassment of having no help from those navigating either of the ships. They were both Norwegian vessels, and were both insured by the same underwriters. Shortly after the collision there was an official inquiry held by the Norwegian consul at Baltimore, the finding of which was that the collision was caused by unavoidable accident. The Iberia having sunk, her crew were soon returned to Norway, and what their testimony might be could not be ascertained.

The faults alleged against the Dumois now relied upon by the libellant after the testimony has all been presented and after the libellant's proctors have been able to carefully consider it, are:

- (1) Attempting to navigate down the channel when a vessel could not be seen more than half a ship's length off and when those in charge of the Dumois knew that the schooner was lying in the channel, and should have known that an attempt to pass her might carry the Dumois so far into the channel as to obstruct inbound vessels.
- (2) In standing too close to the anchored schooner before changing the Dumois' course in order to pass under the schooner's stern.
- (3) In directing the course of the Dumois across the channel in her effort to avoid the schooner.
- (4) In not keeping to the side of the channel which lay to her starboard.

As to the course of the Dumois with regard to the channel, there are circumstances and testimony which fix that with more than usual certainty. The four-masted schooner was fast to the ground. She had been there for two days for the reason that the pin holding the forward part of her center board had broken, and the center board had dropped down below her keel some 12 to 16 feet. She drew 19 feet, and the additional draft of the center board would make her draw 30 to 35 feet. In consequence of this, while being towed into an anchorage, she fetched up against the mud bank at the anchorage ground. That fixes her position on the southwesterly edge of the dredged anchorage ground adjoining and parallel with the channel proper. The dredged anchorage ground is 400 feet in width, and the width of the channel is 600 feet. It seems to be conclusively proved that the Dumois before she starboarded her helm to pass, under the stern of the schooner was on a course well to the southwest of the southwestern edge of the channel, which was the edge on her starboard side. The mate of the schooner was on the deck on watch, and ringing the schooner's bell on account of the fog. He was watching the two approaching steamers, and had nothing else to do but to observe them, and was interested in doing so because they were both coming towards his vessel. He testifies that the Dumois was approaching on his starboard bow and the Iberia on his port beam. They both continued he states until about 150 feet off, when both headed more to the north and eastward in order to pass his stern; that the Dumois passed about 30 feet from the schooner's stern, and then they collided, as he testifies,

about 100 feet from the schooner's stern. This is the testimony of a witness who from a stationary vessel saw the collision. It seems to me it fixes with certainty that the place of collision was well to the southwestward of the center line of the channel, and that the Dumois deflected from her course along the southwestern edge of the channel only so far as was absolutely required to pass under the stern of the schooner, which was aground outside of that edge on the edge of the dredged anchorage ground. The schooner's stern did not project at right angles towards the channel, but she was lying at an angle at about 40 degrees to it, with her stern pointing nearly north and her bow nearly south, the course of the channel being N. W. by N. and S. E. by S. In his testimony the schooner's mate also states that, when approaching the schooner, both steamers were going at a moderate speed, the Iberia with a little more speed than the Dumois, and that both were blowing fog signals. He testifies that he heard the bells to reverse on the Dumois before she had reached the schooner's stern. He observed an officer and a couple of sailors on the bow of the Dumois working with her anchor. This testimony, confirmed as it is by witnesses from the Dumois, establishes, not only that the collision took place near the western edge of the channel, but also that the Dumois passed the schooner's stern at a distance of less than 50 feet, the mate says 25 feet, certainly as close as it was reasonably safe to go. The testimony of the captain of the schooner who came on deck just at the moment of the collision gives as his observation that both steamers were going very slowly.

The licensed Maryland pilot who was navigating the Iberia testifies that the Iberia was close to the buoys on the eastern edge of the channel, but it is impossible to reconcile this location with established facts, and, when first examined (about 10 months closer to the collision in point of time), he stated that "the collision occurred about 100 feet astern of the schooner which vessel was lying on the south side of the channel." He testifies that, when he and the master of the Iberia, about 7 o'clock on the morning of the collision, observed the dense fog which prevailed at the quarantine ground, he expressed to the master his opinion that it was not prudent to start with the fog so thick, but that the anxiety of the master to get to port prevailed upon him to try it. He testifies that when he first heard the fog signal of the Dumois, he put his helm to port and continued his speed of slow ahead until the Dumois came in sight coming out from underneath the schooner's stern, and he then gave the order hard astern and full speed astern.

Gray, the licensed Maryland pilot in charge of the Dumois, testifies that at 7:30 a. m., when he got the Dumois under way to take her from the dock in the harbor, there was no fog, that it was raining, but one could see a mile or two; that he passed out by Ft. McHenry keeping to the southerly edge of the channel, and he saw about a mile off a four-masted schooner at anchor, and he straightened on his course with the four-masted schooner a little on his starboard bow, intending to pass the schooner about 100 feet astern of her; that just then there appeared between the Dumois and the schooner a heavy fog bank and the Dumois engines were slowed and she blew fog signals; that the Dumois very soon entered the fog bank, and the pilot concluded to anchor and gave orders to get the anchor ready. Just as he had about concluded to let go the anchor and had stopped the Dumois engines, he saw in the fog the four-masted schooner only about 150 feet away, and thought it would be too close to her to anchor at that place, and concluded to pass around under the schooner's stern and anchor on the other side of her. He then starboarded his wheel, and got the schooner about two points on his starboard bow, but had nearly lost his headway. He was about to order his engines slow ahead when he saw the Iberia about two points on his starboard bow and about two lengths away, apparently going with some speed. He immediately signaled the engine room full speed astern, and blew reversing signals, but the vessels came together, the Dumois bow striking the Iberia a light blow amidship.

Olsen, the man at the wheel on the Dumois, testifies that, when the Dumois reached the schooner, the schooner was directly ahead, and that to clear her the pilot ordered the helm hard astarboard, and the Dumois had just cleared the schooner's stern when the Iberia was struck; that before they struck he received an order to port his wheel; that the Dumois engines had stopped

before the Iberia was seen, and when she was seen the order was full speed astern. He testifies that the Iberia had considerable headway as he could see foam under her bow.

Lindbow, the first officer of the Dumois, who was on the bow, testifies that the second mate and two seamen were also on the bow getting the anchor ready, but that he was exclusively engaged in acting as lookout; that he saw the Iberia coming with such speed that there was foam under the bow.

Johannassen, one of the seamen who was on the bow ready to let go the anchor, testifies that he heard the first officer (acting as lookout) report the Iberia on the Dumois' starboard bow, and that she was coming fast as he could tell by the waves under her bow.

Christiansen, the chief engineer of the Dumois, testifies that the Dumois went out of the harbor at slow speed, then three or four minutes at full speed, and that then he heard the fog signals of the Dumois and received an order to go slow and went slow four or five minutes, and then received order to stop the engines, and that the engines were stopped five or six minutes; that then he received an order to go slow ahead, but had only made two or three revolutions when he received the order full speed astern, and had made eight or ten revolutions full speed astern when the vessels struck.

Capt. Nieuwejaar, the master of the Dumois, who was with the pilot on the bridge, testifies that, when he could first see the schooner after she was hidden by the fog, she was about half a ship's length from the Dumois' stern; that she was on his starboard bow, but he could see part of her starboard side as well as the whole of her port side; that at the moment of the collision the Dumois was so near to the schooner that he could have talked to persons on board of her, not being over 30 to 40 feet away; that, as soon as the Dumois cleared the schooner's stern, her wheel was ordered to port, in order to direct the course of the Dumois to her proposed anchorage, but the Dumois was nearly stopped and without steerageway, and the order had not taken effect when he saw the Iberia right upon them and the order was given to put the Dumois engines full speed astern and reverse signals were twice blown before the collision; that the only fault he attributed to the Iberia was that she had too much speed.

From a patient consideration of all the testimony, my conclusion is that none of the faults charged against the Dumois have been sustained.

After the testimony was all produced in court and the case had been fully presented and argued by proctors on both sides, the learned and zealous proctors for the libellant obtained leave to file a brief, and in their most carefully prepared brief and as the result of all the testimony they formulated the four several faults of which they contend that the Dumois was guilty.

First. That she attempted to navigate down the channel in a fog so dense that a vessel could not be seen more than half a length ahead, and when they knew that the four-masted schooner was lying partly across the channel and that the attempt to pass her might carry the Dumois beyond the middle of the channel to the obstruction of the incoming vessels. With respect to the charge of fault in navigating in so dense a fog, it is to be borne in mind that, when the Dumois left the harbor to proceed to sea, there was no fog, and that the fog bank came up the river from the southward after the Dumois entered the channel below Ft. McHenry, and that she almost immediately stopped her engines and prepared to anchor and would have anchored before the collision, except that the four-masted schooner which was grounded on the edge of the anchorage ground made it seem reasonably prudent and necessary to get past her before anchoring. The Dumois was intending to anchor as soon as she reasonably could after the fog came on and was guilty of no fault under all the circumstances, being out of the fairway, in seeking a safe place in which to cast anchor.

The second fault charged is "in standing too close to the anchored schooner before changing her course in order to pass under the schooner's stern." It was proper for the Dumois to keep away from the center of the channel as much as possible, and to do this it was proper to pass close under the schooner's stern which to some extent extended out northerly from the southern bank of the dredged quarantine anchorage adjoining the southern edge of the channel. I can see no grounds whatever for the contention that keep-

ing as close as possible under the stern of the schooner and as far away as possible from the center of the channel was not proper navigation for the *Dumois*.

The third fault charged is that the *Dumois* directed her course across the channel in her effort to avoid the schooner. I think the manifest preponderance of testimony does not support this charge. I do not think the *Dumois* ever was to the north of the center of the channel or near to it. I do not think the proof establishes that the *Dumois* by starboarding her helm changed her course more than two points from S. E. by S. the course of the channel, in order to pass under the schooner's stern, and that was at a time when she hardly had sufficient speed for steering way and the order to port was immediately given as soon as the schooner was cleared, but the order full speed astern came so quickly after it that the order to port did not have any effect.

The fourth fault charged is that the *Dumois* violated the rule requiring steam vessels in narrow channels when it is safe and practicable to keep to that side of the fairway or midchannel which lies on the starboard side of such vessel. The preponderance of proof does not support this charge. The channel at the place of collision is 600 feet wide. Adjoining this to the south and west is the dredged anchorage which is 400 feet wide, making the whole width of the deep water 1,000 feet. The schooner was aground by reason of the dropping down of the center board on the southerly and westerly edge of the anchorage ground. The collision occurred, I think, well within 100 feet of the stern of the schooner as is established by the strong probative facts and testimony. It seems to me that the proof leaves no doubt that the *Dumois* was not in the channel at all, but at the time of the collision was within the water of the dredged out anchorage ground to the south of the channel.

There is ample proof that the *Dumois* was navigated with great care. All her officers were on deck, her first officer having been stationed on the bow as a lookout and her master was with the pilot on the bridge. Her speed when the fog set in was slow, and when the schooner was seen her engines were stopped. When the collision occurred, her engines were backing full speed astern.

I can find no particular in which it can be justly said that the *Dumois* was in fault. As the *Iberia* is not represented in this litigation, I forbear from comment upon her navigation.

I will sign a decree dismissing the libel.

PRIDMORE v. PUFFER MFG. CO. et al.

(Circuit Court of Appeals, Fourth Circuit. July 28, 1908.)

No. 804.

1. BANKRUPTCY—PROPERTY PASSING TO TRUSTEE—PASSING OF TITLE TO PROPERTY PURCHASED BY BANKRUPT.

A bankrupt corporation had contracted with petitioners for the purchase of machinery to be paid for in cash, in one case on delivery and in the others when it should be installed by the sellers. In each case the machinery was shipped, and had reached the station of destination, and was in possession of the railroad company, when the bankrupt became insolvent and a receiver was appointed, who removed the machinery; but it had not been unpacked when the trustee in bankruptcy was appointed. *Held*, that the title had not passed from petitioners and did not vest in the trustee, and that each was entitled to reclaim its property. .

2. SALES—CONDITIONAL SALES UNDER SOUTH CAROLINA STATUTE.

Civ. Code S. C. 1902, § 2450, requiring contracts of conditional sale, where title is reserved in the seller, to be recorded, has no application to a sale of machinery to be paid for in cash when delivered, or when installed by the seller.

Petition for Revision of Proceedings of the District Court of the United States for the District of South Carolina, at Charleston, in Bankruptcy.

W. S. Hall, Jr., for petitioner.

J. C. Otts, for respondents.

Before PRITCHARD, Circuit Judge, and BOYD and DAYTON, District Judges.

PRITCHARD, Circuit Judge. The bankrupt, Lipscomb Silicia Springs Company, agreed to purchase on September 6, 1906, from the Liquid Carbonic Company, Chicago, Ill., one carbonator and fixtures at an agreed price of \$435, payable in cash when installed by the vendor. The carbonator and machinery were shipped in the months of November and December, and before the goods arrived and could be erected the bankrupt was placed in the hands of a receiver by the state court of South Carolina. At that time the machinery was taken in hand by the receiver appointed by the state court, and had not been unboxed or placed in position by the vendor. This machinery was shipped to Gaffney, S. C., and was in the depot of the Southern Railway, when the Lipscomb Silicia Springs Company went into the hands of a receiver in December, 1906, and was hauled from the depot to the springs by the receiver some time in December. It is now in the hands of the trustee, and unboxed, and title is still in the vendor.

On the 18th day of October, 1906, the International Harvester Company of America agreed to sell the Lipscomb Silicia Springs Company one three horse power gasoline engine for the sum of \$170 cash when the engine was installed. At the time the Lipscomb Silicia Springs Company was placed in the hands of a receiver this engine had been hauled from the depot down to the springs, but had not been unpacked or erected. In this case the vendors were to erect the machinery, and after it was tested, if found to be satisfactory, the Lipscomb Silicia Springs Company were to pay cash the price agreed upon.

On October 18, 1906, the Lipscomb Silicia Springs Company agreed to purchase one carbonator and fixtures from the Puffer Manufacturing Company, at an agreed price of \$300, cash on receipt of the goods. This property was at the depot when a receiver was appointed and had not been delivered to the bankrupt. This machinery is now in the possession of the trustee and has never been unpacked. After the Lipscomb Silicia Springs Company had been placed in the hands of a receiver, a petition for involuntary bankruptcy was filed by creditors against the corporation, and Lipscomb Silicia Springs Company was duly adjudged a bankrupt.

The trustee took charge of all of the property, which had been gathered together by the receiver; but before the trustee was appointed the vendors in each case had notified the receiver that they claimed the property in dispute, as testified to by E. F. Lipscomb, who was appointed receiver by the state court. It also appears from the evidence that after the machinery was ordered and shipped to Gaffney, S. C., the Lipscomb Silicia Springs Company was placed in the hands

of a receiver before either of the vendors had an opportunity to come to Gaffney and erect the machinery according to the agreement to purchase, and it was never accepted by the Lipscomb Silicia Springs Company.

Thereafter each of the petitioners filed their petition in the court of bankruptcy, asking that the property in dispute be delivered to them. The trustee in bankruptcy duly filed his return, and contended that the property in dispute was in the hands of a receiver when he was appointed trustee in bankruptcy, and that the same was held by him in trust for the benefit of the creditors of the bankrupt. A hearing was had before the referee in bankruptcy, G. W. Speer, Esq., who held that the title to the property was vested in the trustee in bankruptcy for the benefit of intervening subsequent creditors, inasmuch as there was no record of the contracts reserving the title in the vendors until the purchase money was paid. The claimants petitioned the United States District Court to superintend and revise the decision of the referee, upon the ground that the title to the machinery in dispute had not left the vendors and had not passed to the vendee, because under the agreement to purchase it was the duty of the vendors to place the machinery in position, to erect it, and, after it was approved by the vendee, the Lipscomb Silicia Springs Company, bankrupt, it was to be paid for in cash, taking the position that there was no intention to make a contract of a conditional sale, no chattel mortgage was executed or intended to be executed, and that the vendors could not collect for the machinery until the same was placed in position, erected, and approved by the purchaser.

The learned district judge held that there was some question as to the delivery of the machinery in dispute, but under his view of the case it was governed by the case of York Manufacturing Co. v. Cas-sell, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782, and Hewit v. Berlin Machine Works, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986, holding that the trustee in bankruptcy could not take any higher title to the property in dispute than that held by the bankrupt; and as against the vendors no recording of any chattel mortgages, if there had been chattel mortgages, was necessary as between the vendor and the vendee. From this decision the trustee in bankruptcy petitioned this court to superintend and revise the decision of the court below upon the ground that the learned judge erred in not holding that the contracts in question were of a character such as are required to be recorded under section 2456, vol. 1, Code of Laws of South Carolina, in not holding that whether the title to the property passed to the bankrupt or not, did not affect the right of subsequent creditors of the bankrupt, who had no notice of the secret agreement between the claimants and the bankrupt, whose rights as subsequent creditors are superior to those of the claimant.

The sole question presented is as to whether the property mentioned in the petition passed to the bankrupt company. The determination of this point settles the question at issue in this controversy. It is well settled that the trustee can only take such title as is vested in the bankrupt at the time the bankruptcy proceedings are instituted. In the

case of *York Manufacturing Co. v. Cassell*, 201 U. S. 352, 26 Sup. Ct. 484, 50 L. Ed. 782, Mr. Justice Peckham said:

"Under the present bankrupt act the trustee takes the property of the bankrupt, in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all the equities impressed upon it in the hands of the bankrupt."

The subject-matter of this controversy was heard before the district judge on a petition to review the report of the referee, which denied the petitioners the restoration to them of certain machinery and other property in the possession of the trustee of the bankrupt company. The learned judge who heard the petition reversed the decision of the referee and remanded the case, with instructions to deliver the property to the petitioners. In disposing of the case, the court said:

"As to the two petitioners first named, it seems to me doubtful that the title to the property mentioned in the petition ever passed to the bankrupt company. The machinery, etc., was sold by the first named for cash, to be paid for when installed under the superintendence of the petitioners. It had not been unpacked or erected, and by the express terms of the contract the title remained in the petitioners. And the case of the *International Harvester Company* is substantially of the same character. As to the claim of the *Puffer Manufacturing Company*, the testimony before me is very slight. According to my understanding of it, this company agreed to sell to the bankrupt corporation one Faithful carbonator, No. 3, for \$300 cash, to be paid for on receipt of the goods. The goods were shipped, and arrived at Gaffney, and were in the warehouse of the railroad when insolvency supervened. Apart, however, from these considerations, I am of opinion that the case is controlled by *Hewit v. Berlin Machine Works*, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986, and *York Manufacturing Company v. Cassell*, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782. It has been strongly urged by counsel for the trustee that *Chesapeake Shoe Company v. Seldner*, 122 Fed. 593, 58 C. C. A. 261, decided by the Circuit Court of Appeals of this Circuit, is directly in point. The facts in that case are different, and so is the statute of Virginia. That case, which was decided in May, 1903, was cited in the argument of counsel before the Supreme Court in the *Hewit Case*; and, if the opinion therein is at variance with the later decision of the Supreme Court of the United States, the latter, of course, is controlling."

It is manifest from the foregoing that the property in question never passed to the bankrupt company and that the title remained in the vendor. Under these circumstances we are of opinion that the petitioners were entitled to the property, and that the ruling of the court below to that effect was eminently proper. Notwithstanding that the court expressed some doubt as to whether the title to the property claimed by the *Liquid Carbonic Company*, of Illinois, and the *International Harvester Company of America*, of Wisconsin, passed to the bankrupt company, we are of opinion, after a careful investigation of the evidence as well as the pleadings herein, that the title never passed to the bankrupt company.

We have carefully considered the contention of counsel representing the trustee, in which it is insisted that the statute of South Carolina (Civ. Code, § 2456), which relates to secret liens, applies, and are of opinion that under the circumstances in this case the decisions relied upon to sustain such contention do not apply to the case at bar, and that this case is governed by the rule laid down by the Supreme Court of the United States in the case of *York Mfg. Co. v. Cassell*,

201 U. S. 352, 26 Sup. Ct. 481, 50 L. Ed. 782, and *Hewitt v. Berlin Machine Works*, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986.

For the reasons hereinbefore stated, the judgment of the district court is affirmed.

Affirmed.

CHESSE et al. v. GRANT.

(Circuit Court of Appeals, Fourth Circuit. July 30, 1908.)

No. 799.

1. TRIAL—ADMISSION OF EVIDENCE.

Where a paper is offered in evidence to the jury, and a general objection is made to its being read, which is overruled, an appellate court will not hold such ruling to be error if the paper could properly be read as evidence for any purpose.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 226.]

2. EJECTMENT—EVIDENCE.

In an action of ejectment, the record in a prior suit against the defendant to condemn right of way for a road over the property in controversy is admissible in evidence to prove possession under claim of title by defendant, where such fact is pertinent to the issues, although plaintiff was not a party to such suit.

3. SAME—INSTRUCTIONS.

Instructions given in an action of ejectment considered, and, construed together, held to correctly state the law applicable to the case.

In Error to the Circuit Court of the United States for the Northern District of West Virginia, at Clarksburg.

John Bassel and George M. Hoffheimer, for plaintiffs in error.

John W. Davis (Davis & Davis and Roy E. Guy, on the briefs), for defendant in error.

Before PRITCHARD, Circuit Judge, and WADDILL and BOYD, District Judges.

PRITCHARD, Circuit Judge. This is an action of ejectment instituted in the Circuit Court of the United States for the Northern District of West Virginia, at Clarksburg, by the plaintiffs in error, together with their late brother, Walter Chess, now deceased, against the defendant in error, Edward M. Grant, for the recovery of a tract of land lying on Cheat river, in Monongalia county, W. Va., in the possession of the defendant in error.

The declaration demands a tract of 273 acres described by the metes and bounds of what is known as the "Ramsey & Shaw Patent," as to all of which, except a tract of 10 acres, more or less, defendant in error disclaimed, and as to said 10 acres he pleaded not guilty. There was a jury trial, resulting in a verdict for the defendant in error on which the court below rendered judgment after overruling the motion of plaintiffs in error to set aside the verdict and grant a new trial.

We have examined the record in this case with great care, both as to the assignments of error relating to the instructions given by the court as requested by the defendant in error, as well as the one relating to the admissibility of certain testimony offered by the defendant

in error below. We are unable to discover any new or novel question from an examination of the record. This being a suit in ejectment, the main question is as to the location of the land claimed by the plaintiffs in error which necessarily involves the true location of certain lines described in the conveyances offered in evidence by the plaintiffs below.

As to the assignment of error which relates to the admissibility of certain court records in a proceeding wherein an order was entered by the county court of Monongalia county, on the 9th day of September, 1898, establishing a road across the land in controversy, this order was introduced in connection with the direct examination of the defendant's witness William Bayles. This order shows that the land proposed to be taken belonged to the witness Bayles, and the plaintiffs in error objected to the introduction of the same upon the ground that it was inadmissible, in that it constituted an adjudication of another court in a proceeding to which the plaintiffs in error were not parties. In referring to this matter, counsel for plaintiffs in error insist that:

"In the case at bar the order of the county court could not but have impressed the jury as a recognition, if not an express adjudication by a tribunal of the community in which the land is situated that William Bayles, defendant in error's grantor, was the owner of the land, and that the plaintiffs in error had no right thereto."

The stenographer's report is silent as to the discussion which occurred at the time this order was offered as evidence, but it is insisted by counsel for the defendant in error that the court at the time of its introduction expressly stated to the jury that the order had and could have no effect as an adjudication of the rights of the parties in the controversy which they were called upon to determine. This contention is denied by the plaintiffs in error, and we are necessarily restricted to the record as to what transpired in the court below.

The defendant in error insists that this order was properly admitted as testimony, and assigns three distinct grounds to support such contention, as follows:

"(a) To prove an act of ownership on the part of William Bayles:

"William Bayles was the grantor of the defendant and the owner of all that part of the James Moore survey bounded by the lines here in dispute. He testified that he and his grantors had always claimed to the river, and that his southern boundary line had always run from the white oak at B to the point of rocks at C, and that he had resided on this tract of land over 65 years, claiming it all under the color of title evidenced by his deed. Many acts of ownership on his part were shown, which it is not necessary at this stage to recapitulate. Not the least distinct of these acts was the transaction shown by this order when, asserting himself to be the owner of the land, he made formal waiver of any objection to the making of this road and accepted a sum certain for compensation for the building of the fence around the same. The northwest side of this road forms the boundary line of the land sold to the defendant Grant, and when it was established, with the possible exception of a very few feet at the junction of the road and river southeast of the point C shown on the map, every foot of the road was built on land which William Bayles had owned and occupied for over 65 years. Certainly this was an important and material fact to be proven.

"(b) To negative an act of ownership on the part of the plaintiffs in error:

"In the examination of the plaintiffs' witness Marshall Dunn, he was asked by counsel this question:

"Q. Do you recollect of any wire fence or barrier being placed there on or about that time by any one representing the company for the purpose of keeping Grant out? A. No, sir; but I do know of wire being sent there to build a fence and being carried off in the night some time.

"Q. The wire was destroyed? A. Yes, sir.

"Q. Who sent it there? A. Keffer.

"Q. Who was he? A. Manager or superintendent of the iron company."

"The purpose of these questions, of course, was to create in the minds of the jury the impression that the plaintiffs in error, or their grantors, had distinctly asserted their title in hostility to the defendant Grant.

"On the cross-examination of the witness Marshall Dunn, it was disclosed that at or about the time of the establishment of this road, a man named Voight undertook to operate a ferry across Cheat river from its terminus in competition with the ferry lower down the river operated by the plaintiffs in error. This same incident was referred to in the examination in chief of the defendant's witness William Bayles:

"Q. I will get you to state what was the first time that Keffer to your knowledge claimed any ownership over that property for the Chess Company? A. We was building the road there the first time I remember.

"Q. Do you recall in what year that road was built? A. Must be '90 to '91, or '2, along there.

"Q. Did the Chess Company or their agents at the time that road was being built attempt to block it? A. Dawson put out notices.

"Q. On the road? A. Yes, sir.

"Q. Did they put any barbed wire on that road? A. They said they did. I was not there.

"Q. Did you hear some had been placed there? A. Yes.

"Q. I will get you to state if your reason for making the special warranty deed, instead of a general warranty deed was because that wire had been placed by that road? A. Yes, in part.

"Q. Do you recall in what year the road running from Ice's Ferry road down to the Mt. Chateau Ferry was constructed? A. I do not know just exactly the year, but it must have been somewhere along in '90, '91, along there.

"Q. Do you mean 1900? A. 1890 or 1891.

"Q. You don't recall just when that was built? A. No, sir."

"This order, when introduced, therefore revealed two things: (1) That the road was established on the 9th day of September, 1898, and that this incident therefore occurred prior to the acquisition of title by the defendant, Grant; his deed having been made on the 3d day of October, 1900. And (2) that one purpose of the establishment of the road was the operation of a ferry in competition with the plaintiff's ferry and at one-half the rates.

"When, in connection with these facts, it is considered that Grant's deed runs only to the northwest line of this road, and that, as shown by the plat, its terminus perhaps lies east of the line from the White Oak stump to the point of rock—B to C—and therefore on land not claimed by Bayles, it is easy to see that the incident was not an act of ownership on the part of the plaintiffs, nor an assertion of title hostile to the defendant, but a mere effort on their part to annoy and harass a business rival.

"(c) The order was admissible, in the third place, to fix the date of the establishment of this road and the incidents connected therewith, as to which the recollection of both the witnesses Marshall Dunn and William Bayles were admittedly at fault."

While, as we have said, there is nothing in the record to show that the presiding judge instructed the jury that this evidence could have no effect in determining the controversy as an adjudication of the defendant's rights, yet it does appear that the objection to the introduction of this order was general in its terms, and, such being the case, it is subject to the rule, as contended by the defendant in error, that the court will not hold an adverse ruling on such a paper to be error,

if it appears from the evidence that it could be read for any purpose. The rule in this respect is that:

"Where a paper is offered in evidence to the jury, and a general objection is made to its being read, and the objection is overruled, this court will not hold such a ruling to be error if such paper could be properly read as evidence for any purpose." *Stansbury v. Stansbury's Administrators*, 20 W. Va. 23; *Cobb v. Dunlevie* (W. Va.) 60 S. E. 384.

It is clear to us that it was competent to prove an act of ownership on the part of William Bayles, the grantor of the defendant in error, as well as to negative an act of ownership on the part of the plaintiffs in error. It appears from the evidence that the witnesses Dunn and Bayles were unable to recollect definitely as to the establishment of this road and the incidents connected therewith. When this evidence is considered as a whole, we think it was clearly competent as such for the purposes hereinbefore mentioned, and we are of opinion that the ruling of the lower court in admitting the same was not error. At most, if error at all, it was harmless error and is not sufficient to justify us in disturbing the verdict of the jury.

As to the third assignment of error, it is insisted that the same is based upon a false assumption as to the location of the corner of the Moore tract at C on the plat. The question as to whether C is or is not a corner was submitted to the jury in the preceeding instruction No. 6. It is well settled that:

"If all the instructions considered together are harmonious and consistent and cover all the material issues involved in the case, then the charge is sufficient, notwithstanding a single instruction standing alone may not correctly or fully state the law."

For example, where an instruction as to the burden of proof is obscure, the error is immaterial where others given on the same subject clearly state the law.

The learned judge who tried this case submitted a number of instructions to the jury embodying every phase of the questions presented by the evidence clearly and intelligently, and, under the circumstances, when we consider these instructions as a whole in the light of the evidence, we fail to find any reason for reversing the ruling of the court in this respect.

This being a suit in ejectment, as hereinbefore stated, it necessarily involves questions of law relating to the rules governing a jury in ascertaining the true location of boundary lines. We have carefully considered each of the instructions submitted to the jury bearing upon this point and are of opinion that they are in strict harmony with the rule in such cases. The law in this respect is so well defined that we deem it a work of supererogation to undertake to write an elaborate opinion in regard to questions that are well settled in this branch of the law.

For the reasons herein stated, the judgment of the Circuit Court is affirmed.

Affirmed.

UNITED STATES v. BALL et al.

(Circuit Court of Appeals, Fourth Circuit. July 17, 1908.)

No. 800.

INTERNAL REVENUE—TAX ON DISTILLED SPIRITS—ASSESSMENT ON DISTILLER FOR DEFICIENCY OF PRODUCTION.

Under Rev. St. § 3309, as supplemented by Act March 1, 1879, c. 125, § 6, 20 Stat. 340, and Act May 28, 1880, c. 108, § 8, 21 Stat. 147 (U. S. Comp. St. 1901, p. 2158), which require a distiller to pay internal revenue tax on spirits to the amount of at least 80 per cent. of the capacity of his distillery as estimated according to law, he cannot be relieved from the payment of any part of such tax because the materials used by him are of such inferior quality or condition that they will not produce such percentage; but, where he is a fruit distiller within the proviso of said supplemental acts, an assessment for the deficiency cannot be made against him unless the notice of such deficiency thereby required shall have been given him by the commissioner within six months after receipt of his monthly report, and an assessment made without such notice is void.

In Error to the Circuit Court of the United States for the Western District of North Carolina, at Wilkesboro.

A. E. Holton, U. S. Atty.

Before PRITCHARD, Circuit Judge, and WADDILL, and DAYTON, District Judges.

PRITCHARD, Circuit Judge. This was a civil action tried at the May term, 1905, of the United States Circuit Court at Wilkesboro. The United States brought suit against the defendants, upon the distiller's bond of William T. Ball, upon which William T. Ball was principal, and Thomas W. Collins and Squire M. Dickerson were sureties. The breach of the bond complained of was the failure of the said Ball to comply with the provisions of the law, in that he refused to pay an internal revenue tax assessed against him to the amount of \$89.70 for spirits produced by said Ball during the months of August and September, 1900, on which the law required to be produced by him under the producing capacity of his distillery; the distillery in question being a brandy distillery.

It was agreed that the following special verdict be drawn up and filed in the case:

Special Verdict.

United States of America, Western District of North Carolina, District Court, at Wilkesboro, N. C., May Term, 1905.

United States v. W. T. Ball et al. Special Verdict.

The following issues have been submitted to the jury, viz.: (1) Did the defendant execute the bond sued on? (2) Is there a breach thereof? (3) What, if anything, is due the plaintiff thereon?

The jury finds the following special verdict: That the defendant duly executed the bond, and operated a fruit distillery thereunder during the months of August and September, 1900. That the survey which was accepted by the defendant, W. T. Ball, fixed the daily producing capacity at 42.84 gallons per day of 24 hours work. That during the month of August said distillery operated 97 hours, and used and distilled 1,687 gallons of apple pomace, and produced 146 gallons of brandy, 100 proof, upon which the tax was paid, and that during the month of September, the defendant operated said distillery

180 hours, and used and distilled therein 3,175 gallons of pomace, and produced therefrom 168 gallons of apple brandy, 100 proof, upon which the tax was paid. That the defendant produced and tax paid all the spirits from the pomace used, and distilled in said distillery during the above-named period, which was capable of being produced on the said pomace. The fruit being of an inferior quality and condition for quick distillation, that calculating the hours of time worked upon the basis of 24 hours per day and the capacity of the distillery at 42.84 gallons per day, we find that the defendant failed to produce 80 per cent. of his capacity, which deficiency amounts to 81.7 gallons, and the tax thereon amounted to \$89.90, assessed on April list, 1901. That counting the material used for the two months as a whole, as he was so assessed, he produced and paid tax upon 24.8 gallons more than the 80 per cent. required. There was no evidence that the defendant had notice from the collector of the above-named deficiency until after the assessment was made, and the assessment was based upon the survey of the returns of the distiller.

Upon the forgoing facts, if the court shall be of opinion that the defendants are liable, then the jury finds that there was a breach of the bond, and that the defendants are indebted to the plaintiffs thereon in the sum of \$89.90, with the penalty and the interest as the court may adjudge; otherwise we answer the second issue "No," and the third issue "Nothing."

Upon which special verdict the following judgment was rendered:

Judgment.

Filed in this office September 20, 1907.

Milton McNeill, Clerk.

In the Circuit Court of the United States, Fourth Circuit, May Term, 1907,
Adjourned to September 16, 1907.

United States v. W. T. Ball and Others.

This cause coming on to be heard at this term of the court, and being heard upon the special verdict found by the jury at May term, 1905, and upon the facts therein found, the court holds that there was no breach of the bond, and the plaintiff is entitled to recover nothing. Whereupon it is on motion of Finley and Hendren, attorneys for the defendant, adjudged that the plaintiff recover nothing, and that the action be dismissed.

The only question presented is as to whether the facts found in the special verdict entitled the defendant to the relief granted by the court below. The learned judge who tried the case below based the judgment of the court on the fact:

"That the defendant produced and tax paid all the spirits from the pomace used and distilled in said distillery during the above-named period, which was capable of being produced on the said pomace. The fruit being of an inferior quality and condition for quick distillation, that calculating the hours of time worked upon the basis of 24 hours per day and the capacity of the distillery at 42.84 gallons per day, we find that the defendant failed to produce 80 per cent. of his capacity, which deficiency amounts to 81.7 gallons, and the tax thereon amounts to \$89.90 assessed on April list, 1901. That counting the material used for two months at a whole as he was so assessed he produced and paid tax upon 24.8 gallons more than the 80 per cent. required."

It was also found by the jury that the survey of said distillery fixed the daily producing capacity at 42.84 gallons per day of 24 hours work; that during the month of August said distillery operated 97 hours, and used and distilled 1,687 gallons of apple pomace, and produced 146 gallons of brandy, 100 proof, upon which the tax was paid, and that during the month of September the defendant operated said distillery 180 hours, and used and distilled therein 3,175 gallons of pomace, and

produced therefrom 168 gallons of apple brandy, 100 proof, upon which the tax was paid. The assessment against the distillery was based upon the survey of the distillery that had been accepted by the distiller, which, among other things, provided that the distiller should be liable for taxes on 80 per cent. of the producing capacity of his distillery, the capacity being determined on the basis of 1 gallon of spirits for every 14 gallons of pomace used.

Section 3309, Rev. St. (U. S. Comp. St. 1901, p. 2158), among other things, provides that the actual product of a distillery to be assessed shall in no case be less than 80 per cent. of the producing capacity of the distillery as estimated according to law. Adopting the method provided by this section, by computing the number of hours worked on the basis of 24 hours per day, we find that the defendant failed to produce 80 per cent. of his capacity, and that such deficiency amounts to 81.7 gallons; the tax on the same being \$89.90. As heretofore stated, the court below ruled that, inasmuch as the fruit used was of inferior quality and condition, it was not capable of producing the 80 per cent. of the capacity of the distillery as required by law, and that therefore there was no breach of the distiller's bond, and that the plaintiff below was not entitled to recover. This brings us to a consideration of the question as to whether there is any provision in the internal revenue law by which a distiller may be relieved from the requirements of the statute which provides that he must produce 80 per cent. of the producing capacity as indicated by a survey of the distillery.

After an exhaustive investigation of the statutes in question, we fail to find anything to sustain the ruling of the court below. In the case of *United States v. Singer*, 82 U. S. 120, 21 L. Ed. 49, in discussing this phase of the question, among other things, the court uses the following language:

"The system thus adopted was designed to prevent the secret production of spirits and consequent evasion of the government tax, and it seems well suited to accomplish the purpose. It at least reduces the limits within which fraud can be practiced to 20 per cent. of the capacity of the distillery. * * * Every one is advised in advance of the amount he will be required to pay if he enters into the business of distilling spirits, and every distiller must know the producing capacity of his distillery. If he fail, under these circumstances, to produce the amount for which by the law he will in any event be taxed if he undertakes to distill at all, he is not entitled to much consideration."

In the case of *Collector v. Beggs*, 84 U. S. 189, 21 L. Ed. 624, Justice Strong, in referring to the liability of the distiller, among other things, says:

"In no case could he escape from liability to pay a tax on at least 80 per cent. of what his distillery was estimated to be capable of producing.
* * *"

Also, in the case of *United States v. Ferrary*, 93 U. S. 628, 23 L. Ed. 832, the court says:

"* * * The twentieth section of the act also enacts that the quantity of spirits returned, together with the deficiency assessed, shall in no case be less than 80 per cent. of the producing capacity of the distillery, as estimated under the former provisions of the act. Thus, a liability is imposed upon the distiller of a tax of 50 cents upon 80 per cent., at least, of the producing ca-

capacity of the distillery, and such capacity is ascertained and information of it is given to the distiller before he commences his manufacture."

And in the case of *Weitzel v. Rabe*, 103 U. S. 343, 26 L. Ed. 320, it is said:

"* * * Under the law the distiller must pay a tax equal to 80 per cent. of his estimated producing capacity, whether the spirits are actually produced or not. Consequently, to save himself from taxation beyond his actual production, he must keep his distillery running all the time within 20 per cent. of its full capacity."

Thus it will be seen that, under the provisions of the internal revenue law, the distiller is required to produce at least 80 per cent. of the producing capacity of his distillery, and before he begins the operation of his plant a copy of the survey of his distillery is delivered to him, which, among other things, contains the information that he is required to pay taxes, in any event, on 80 per cent. of the capacity of his distillery. Such being the law, if a distiller uses defective fruit or material from which he cannot produce 80 per cent. of the capacity of his distillery, he does so with full knowledge that he will be assessed on the basis of 80 per cent. of his producing capacity, notwithstanding he may fail to produce such amount, owing to the character of the material used in the product of the same.

It is contended that the distiller in this instance would be entitled to relief under the following provision of section 3309a:

"* * * The commissioner of internal revenue upon the production to him of satisfactory proof of the actual destruction, by accidental fire or other casualty, and without any fraud, collusion or negligence of the distiller of any spirits in process of manufacture or distillation, or before removal to the distillery warehouse, shall not assess the distiller for a deficiency in not producing eighty per centum of the producing capacity of his distillery as established by law when the deficiency is occasioned by such destruction, nor shall he, in such cases, assess the tax on the spirits so destroyed. * * *

This provision can have no bearing on the case at bar, inasmuch as there was no destruction of spirits; there being simply a failure to produce the 80 per centum of the capacity of the distillery as fixed by the survey. The use of fruit of an inferior quality cannot be construed to be a casualty, and there is no pretense here that any spirits were destroyed, as contemplated by the foregoing provision.

It was insisted in the court below by counsel for the defendant that the decision of this court in the case of *Authel H. Freeman v. United States* (decided November term, 1907) 157 Fed. 195, 84 C. C. A. 643, was controlling in this case. In that case suit was instituted against *Authel H. Freeman*, a distiller, as principal, and the *National Security Company*, as surety, to recover the sum of \$2,302.52 alleged to be due as taxes upon spirits deposited in the distillery warehouse of said *Freeman*, together with 5 per cent. penalty and interest from the 1st day of January, 1904. It was admitted that the packages of distilled spirits upon which the taxes were claimed were manufactured by the said *Freeman* and duly deposited in a bonded warehouse. It was also admitted that the warehouse in question was accidentally destroyed by fire without fraud, collusion, or negligence on the part of the distiller or his surety. A demurrer was interposed in the court below by

the plaintiff upon the ground that the answer was insufficient and did not set forth facts sufficient to constitute a legal defense. The demurrer was overruled, and judgment was rendered in favor of the government for the amount sought to be recovered. This court held, in that case, that, inasmuch as it was admitted by counsel for the government that the spirits in question were accidentally destroyed by fire without any fraud, collusion, or negligence on the part of the plaintiff in error, the distiller, under the provision of section 3309a, as amended by Act March 1, 1879, c. 125, § 6, 20 Stat. 340, and Act May 28, 1880, c. 108, § 8, 21 Stat. 147 (U. S. Comp. St. 1901, p. 2158), was entitled in that action to assert the right thus conferred as a defense to such action. However, in the case at bar no such contention is made, and there is nothing in the record to bring this case within the purview of the provisions of the statute which provides that, in cases of destruction by fire or other casualty, the distiller shall be relieved from assessment for a deficiency resulting from a failure to produce 80 per cent. of the producing capacity of his distillery.

If the record in this case showed that the stands containing the pomace were destroyed by fire or other casualty, then, in that event, the distiller and his bondsman would not be liable to assessment for the 80 per cent. of the producing capacity of the distillery; but inasmuch as the proof clearly shows that the fruit used by the distiller was converted into spirits and not destroyed, as contemplated by the provisions of the section hereinbefore referred to, the court is powerless to grant any relief to the defendant upon that ground.

While this is true, nevertheless there is another phase of this question which is entitled to serious consideration at our hands. While a brief was filed by counsel for the government, for some reason none was filed in behalf of the defendants in error. We are therefore without information as to all of the contentions of the defendants below; but, in this connection, we deem it our duty to consider the last proviso of section 3309a. The proviso reads as follows:

"Provided further, that no assessment shall be charged against any distiller of fruit for any failure to maintain the required capacity, unless the commissioner shall, within six months after his receipt of each monthly report, notify such distiller of such failure to maintain the required capacity."

This proviso, as appears from an inspection of the record, was not called to the attention of the court below. It is plain and explicit and clearly fixes a limitation upon the commissioner as to the extent of his power to make an assessment, to wit, that he must give notice to the distiller within six months after the receipt of each monthly report as to his failure to maintain the required capacity, and, in the event of failure to do so, he does not have the power to make the assessment in pursuance of the provisions of section 3309.

It appears from the record that the tax sought to be collected was claimed to be due on spirits produced as far back as August, 1900, and, among other things, it was found by the jury:

"That there was no evidence that the defendant had notice from the commissioner of the above-named deficiency until after the assessment was made, and the assessment was based upon the survey of the returns of the distillery."

The fixing of this limitation as to the time and manner in which the commissioner may make an assessment is a wise provision and was intended as a protection to brandy distillers. Brandy distilleries are only operated during the fruit season, which usually lasts from two to three months, and, being required to make monthly reports, it is but just that they should be notified, either while the distillery is in operation or at an early date thereafter, as to any failure to produce the amount of spirits required by the survey under which they operate. It was evidently the purpose of Congress to require the commissioner, in cases where he deemed it his duty to make an assessment, to act with promptness in notifying the distiller that he had failed to maintain the required capacity of his distillery. To make an assessment a year or two after the distiller had ceased operations would be to place the distiller at a great disadvantage, and in order that controversies of that kind might be speedily determined while the whole matter was fresh in the mind of the distiller, and that he might be able to furnish proof in cases where his fruit had been accidentally destroyed by fire or other casualty, it was provided that no assessment should be made until he had been given notice of the same.

When properly analyzed, the proviso heretofore referred to means that the commissioner shall not have power to make an assessment against a fruit distiller until he shall have given the distiller notice of his failure to maintain the required capacity, and that such notice must be given within six months after his receipt of the monthly report upon which the assessment is proposed to be made. Therefore, when it appears that an assessment was attempted to be made without first giving the distiller notice that he had failed to maintain the required capacity of his distillery, such assessment would be void; or, if it should appear that, although notice was given, but such notice was not given within six months after the receipt of the monthly report upon which it was based, such proposed assessment would be void.

It is not necessary to pass upon the proposition as to whether a tax assessment in every instance purports verity and is *prima facie* evidence that the tax is due, inasmuch as the finding of the jury shows that the commissioner did not give the notice required by the statute. He was without power to make an assessment in accordance with the provisions of section 3309, and the proposed assessment is therefore utterly void and without force.

For the reasons stated, it follows that the government was not entitled to a judgment in the court below upon the findings of fact by the jury. The judgment of the Circuit Court is affirmed.

Affirmed.

CHESTERTOWN BANK OF MARYLAND v. WALKER.

(Circuit Court of Appeals, Fourth Circuit. July 18, 1908.)

No. 797.

1. BILLS AND NOTES—CONTRACT FOR ATTORNEY'S FEE—VALIDITY.

Under the law of Maryland, a contract in a note to pay a collection fee if the note is not paid at maturity is valid to the extent of a reasonable fee actually expended or contracted to be paid, but no further.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 221.]

2. BANKRUPTCY—PETITION TO REVISE—FAILURE OF RECORD TO SHOW ERROR.

An order of a District Court, reducing the amount of a claim made by a creditor of a bankrupt for a collection fee contracted for in the note given by the bankrupt in a state where such a contract is valid only to the extent of a reasonable fee, cannot be reversed by the Circuit Court of Appeals on a petition to revise, where there is no evidence in the record to show what would be a reasonable fee for the services which have been rendered by the creditor's attorney or the amount the creditor has paid or contracted to pay for the same.

Petition for Revision of the Proceedings of the District Court of the United States for the District of Maryland, in Bankruptcy.

Hope H. Barroll (Chas. T. Wescott, Hope H. Barroll, and M. DeK. Smith, on the brief), for petitioner.

Alonzo L. Miles, for respondent.

Before PRITCHARD, Circuit Judge, and BOYD and DAYTON, District Judges.

DAYTON, District Judge. Catharine F. Walker filed her petition to be declared bankrupt in the United States District Court for the District of Maryland, was so adjudged, the matter was referred to a referee, and a trustee appointed. On the 7th of September, 1907, she filed her petition, directed to the judge of said court, setting forth that since filing her petition in bankruptcy she had raised a sum of money sufficient to pay all her creditors the full amounts due them, together with such costs of the bankruptcy proceedings as might be allowed by the court, but that she was advised that she had not the power and authority to settle with her creditors without order of the court dismissing this bankruptcy proceeding. The prayer was that the petition be dismissed, and that notice be given creditors as provided by section 58a(8) of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 561 [U. S. Comp. St. 1901, p. 3444]). Notice was, by order of that day, given to creditors by publication, to show cause, on or before September 21, 1907, why the prayer of said petition should not be granted. On this last-named day certain creditors filed answers objecting to the dismissal of the proceeding, and thereupon the matter was set down for hearing on the 28th of September, 1907, all objecting creditors were directed to produce their claims and the referee and trustee to return statements of expenses and costs incurred, on or before that day. On September 22, 1907, the Chester-town Bank filed its claim, verified by the oath of its cashier, in which it is stated that Catharine F. Walker was, at the time of the filing of

her petition in bankruptcy, and still is, indebted to said bank in the sum of \$28,000 for cash loaned her and evidenced by promissory note attached and secured by a mortgage, dated February 2, 1905. The note attached is dated August 2, 1906, and made payable six months thereafter to said bank at its banking house in Chestertown for \$28,000 and provides: "And if not paid when due we agree to pay five per cent. commission for collecting the same." In the statement filed, the bank claims the note, \$28,000, interest, \$1,124.67 (to October 1, 1907), and \$1,456.26 "attorney's commission at 5 per cent. (to Marion DeK. Smith, Atty.)" The referee returned statements of his costs and also of the secured and unsecured claims, and on the 28th day of September, 1907, the court entered an order disallowing to the Chestertown Bank the "5 per cent. commission for collecting its debts of \$28,000 and \$500, aggregating \$1,481.63," and in lieu thereof allowed its attorney, Smith, \$250 for his services and directed the bankruptcy proceeding to be dismissed upon the payment of the debts and costs set forth. To revise this order touching the disallowance of the "5 per cent. commission for collecting" said two debts of \$28,000 and \$500, aggregating \$1,481.63, and in lieu thereof allowing to its attorney \$250 for his services, the Chestertown Bank has filed this petition in this court, to which Catharine F. Walker has filed her answer denying the right of petitioner to a revision.

It is undoubtedly true that in a number of states it is held legal for creditor and debtor to contract that in case the debtor fail to pay upon maturity that then the creditor may recover, in addition to his debt, interest and costs, a reasonable sum for attorney's fees for collection, and this has been held to be the law in Maryland. *Bowie v. Hall*, 69 Md. 434, 16 Atl. 64, 1 L. R. A. 546, 9 Am. St. Rep. 433; *Gaither v. Tolson*, 84 Md. 638, 36 Atl. 449. It is also true that in other states such contracts are held void, and in no state where usury laws are in effect are they permitted to be enforced, if such charges are either unreasonable or made a subterfuge, for usurious exactions. A creditor would not, for instance, under the law of Maryland, under such a contract be permitted to exact a commission of \$500 for collecting a \$100 debt. Nor would it be permitted to collect a commission of \$1,400 "for collecting" a debt of \$28,000, which the debtor came forward, an hour after it was due, to pay and before any attorney had been employed to collect it, for, as said in *Bowie v. Hall*, supra, the purpose of such a provision "is clearly not to put any money above the legal rate of interest into the pocket of the lender, but merely to enable him to get back his money with legal interest, and nothing more." And this statement of the law is quoted and approved in *Gaither v. Tolson*, supra. Very interesting discussions touching the validity and effect of this kind of contracts, pro and con, can be found in *Wilson Sewing Machine Co. v. Moreno* (C. C.) 7 Fed. 806, and *Merchants' Nat. Bank v. Sevier* (C. C.) 14 Fed. 662, and note; also, note to *Bowie v. Hall*, 1 L. R. A. 546, and note to *Wright v. Traver*, 3 L. R. A. 50. Recognizing that the law in Virginia and West Virginia, two other states in this circuit, as set forth in *Toole v. Stephen*, 4 Leigh (Va.) 581, in regard to this question, is squarely the opposite to that in Maryland, we here distinctly disclaim

any purpose to determine the question as an original proposition, because we are not required to do so by the conditions of this case. In this record there is absolutely no evidence to show that the bank ever employed an attorney in the matter, that such attorney ever in fact took any steps to collect, or, if he did, whether such sum was a reasonable compensation for his services, or whether the bank contracted with him to pay him such sum, or a smaller one therefor. For ought we can know, from the record which we are asked to revise, the bank may have contracted with him for these services for a sum of \$250 and is seeking to recover for itself the balance of over \$1,200 which, under such conditions, would be clearly usury. The action of the court below strongly indicates that the bank was not under obligation to pay any such sum or any other sum above \$250 or that any sum above \$250 was reasonable for the services actually performed. In the absence of all evidence to the contrary, we must conclusively assume that the court below acted rightly. The note does not provide for payment "of such reasonable attorney's fees and commissions as it (the bank) may incur in the collection of this debt not to exceed five per cent.," but it provides: "If not paid when due we agree to pay five per cent. commission for collecting the same." Pay to whom? The bank. Is this to be construed that Mrs. Walker was to pay this 5 per cent., amounting to over \$1,400, to this bank in addition to principal and interest, regardless of whether or not it had incurred any such cost of collecting? Certainly not, but it is to be construed that she was to pay such commissions to the extent of 5 per centum in case the bank reasonably had to incur liability for and pay such commissions; not otherwise. In its petition this bank admits "that no testimony was taken in connection with the determination of the question as to whether said attorney's commissions were a proper part of the provable claims of your petitioner"; but it alleges that its attorney stated upon the hearing in the court below that the note and mortgage had been put in his hands for collection, and he had taken certain steps towards collection. This may all be true, but we are not permitted to revise the action of the court below upon the statements of this petition wholly unsupported by any evidence in the record.

The function of a petition to revise is certainly not to raise new issues of fact in this court, but, on the contrary, to point out errors at law existing on the face of the record presented to us from the court below. Again, it is to be noted that the bank itself did not by its proof of claim assert any right to this 5 per cent. commission. While it added the sum in its "statement," in the affidavit made by its cashier in proof of its demand it stated:

"That the said Catharine F. Walker * * * is, justly and truly indebted to said corporation in the sum of twenty-eight thousand dollars, that the consideration of said debt is as follows: Cash loaned said Catharine F. Walker on her promissory note hereto attached, and that no part of said debt has been paid, that there are no set-offs or counterclaims to the same, and that the only securities held by said corporation for said debt are the following: A mortgage dated February 2, 1905, on certain real property of said Catharine F. Walker, situate in Queen Anne's county, Md."

Clearly this affidavit does not furnish proof of this claim for 5 per cent. commission for collecting, but, on the contrary, excludes it, and the court below and this court may well assume that because it was not just, had not in fact been incurred, and under the circumstances was not reasonable, were the reasons why this bank's cashier in making affidavit to its claim would not and did not mention it. But finally, some seven days after the order complained of had been entered by the court below, this bank filed its petition asking leave to file the mortgage securing said indebtedness. This leave was granted, and the mortgage is here made part of the record. The objection to our considering as "evidence" this document produced after the hearing may be waived, for it is sufficient to say that if considered, instead of sustaining, it defeats the petitioner's claim in this particular. It clearly provides that this 5 per cent. commission was to be payable out of the proceeds of sale made under the mortgage and no such sale was made.

Therefore for these reasons the petition to revise must be dismissed, with costs to respondent.

Dismissed.

WESTERN UNION TELEGRAPH CO. V. WILLIAMS.

(Circuit Court of Appeals, Fourth Circuit. July 30, 1908.)

No. 794.

1. TELEGRAPHS AND TELEPHONES—DELAY IN DELIVERY OF MESSAGE—MEASURE OF DAMAGES.

In an action against a telegraph company to recover damages for the failure to properly transmit or promptly deliver a message, where punitive damages are not recoverable the injured party is entitled to recover, not according to the degree of defendant's negligence, but compensation for the injury he has actually received.

[Ed. Note.—Measure of damages in actions against telegraph and telephone companies, see notes to *Western Union Tel. Co. v. Coggin*, 15 C. O. A. 235; *Western Union Tel. Co. v. Morris*, 28 C. O. A. 59.]

2. SAME—ACTION FOR DAMAGES.

Evidence considered, and *held* insufficient to show that plaintiff sustained any pecuniary injury from the failure of the defendant, a telegraph company, to promptly transmit and deliver a message which entitled him to recover damages.

In Error to the Circuit Court of the United States for the Northern District of West Virginia, at Philippi.

F. B. Enslow and Herbert Fitzpatrick, for plaintiff in error.

C. O. Strieby, for defendant in error.

Before PRITCHARD, Circuit Judge, and WADDILL and BOYD, District Judges.

BOYD, District Judge. H. Gates Williams brought this suit in the circuit court of Tucker county, state of West Virginia; the same having been commenced by summons issued on the 16th of May, 1907, which was served upon the agent of the Western Union Telegraph Company, defendant, on the 17th of May, 1907. After the commencement of

the suit, upon the petition of the defendant, the same was removed for trial into the Circuit Court of the United States for the Northern District of West Virginia. Williams, the plaintiff below, and who will hereafter be referred to as the plaintiff, filed his declaration in trespass on the case, and by his suit sought to recover of the Western Union Telegraph Company, the plaintiff in error here, defendant below, which will hereafter be referred to as the defendant, damages in the sum of \$2,500 for failure to deliver a telegram. The defendant filed its plea of not guilty, to which the plaintiff replied generally, which is the practice in West Virginia, and thereupon the issues were raised. The case was tried in the Circuit Court of the United States at Philippi in November, 1907, a verdict rendered by the jury in favor of the plaintiff for \$125, and judgment accordingly entered. The case is before us upon exceptions taken by the defendant during the trial, upon exceptions to instructions given by the court to the jury, and upon exceptions to the refusal of the court to give instructions requested by the defendant. The testimony shows that on the 19th of May, 1906, about 7 o'clock in the evening, William M. Bliss, a resident of the borough of Brooklyn, city of New York, delivered to the agent of the defendant in Brooklyn a telegram to be sent collect, addressed to H. G. Williams, Davis, W. Va., the original of which on the face of the telegram is in the words and figures following:

The Western Union Telegraph Company, Incorporated.		
24,000 Offices in America.	Cable Service to all the World.	
Robert O. Clowry, President and General Manager.		
Receiver's No.	Time Filed.	Check.
25.	12:50	Collect 4 ex.

Send the following message subject to the terms on back hereof, which are hereby agreed to.

May 19th, 1906.

To H. G. Williams, Davis, W. Va.

Mr. Carminecke found dead this A. M.
81259.

W. M. Bliss, 31 Brooklyn Ave.

On the back of this telegram was the following stipulation:

"The company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission."

The 19th of May, 1906, was on Saturday, and the telegram was delivered by the company to the plaintiff at Davis, W. Va., on Sunday night following. "Carminecke," named in the telegram, was shown to have been "Godfrey Carminecke," who was the father-in-law of the plaintiff. Godfrey Carminecke lived in Brooklyn, in an apartment which he rented from William M. Bliss, the sender of the telegram. Some time during the morning of May 19, 1906, Carminecke was found dead in his room, and Bliss, after notifying by telegram a Mr. Carminecke, who was a nephew of the deceased and who lived in New York, delivered to the agent of defendant the telegram to plaintiff above set out. The plaintiff's testimony further shows that if the telegram had been delivered on Saturday night he could have left shortly thereafter on a train for New York, but the delay in delivery made it

impossible for him to leave Davis, W. Va., for New York until 8 o'clock Monday morning, May 21, 1906, and that the plaintiff did leave on a train at that hour accompanied by his wife and children, and that they arrived in New York about 1 o'clock that night. Upon his arrival he procured rooms for himself and his family, and at an early hour Tuesday morning went to the flat where Carminecke had been found dead, to look after and provide for the burial of the corpse. When the plaintiff reached the place where Carminecke was found dead, the body was in an advanced stage of decomposition, though the nephew had arrived at the place shortly after he was notified on Saturday. The services of an undertaker were secured, and after necessary preparations a vault was hired and the body deposited therein. The plaintiff then returned to his home at Davis, W. Va., and shortly thereafter made another trip to New York to look after some effects which the deceased had left. The damages claimed by the plaintiff are based upon the alleged fact that by reason of the delay in delivering the telegram he did not have time to make arrangements for attention to his business during his absence in New York, and he states in his testimony that this caused an expenditure of some \$20 or \$25. He further contends that having arrived at New York in the night and being compelled to remain in the apartments which he had employed for his family until the next morning, and because of some irregularity in the car service he had to hire carriages, which cost him \$10. A further element of damages is the fact that he states if he had had the telegram delivered in time his second trip to New York would not have been necessary, and also that he is entitled to have returned to him a certain amount which he paid for packing and crating some of the effects of the deceased which were allotted to the plaintiff's wife and which he packed and shipped to Davis, W. Va., and upon which he paid the freight. He made a further claim for an alleged expenditure of a small amount for things he had bought for his children. Also he claimed damages for an alleged overcharge by the undertaker, which he said was \$150, when \$75 was a reasonable compensation therefor, but during the progress of the trial it was ascertained this last item was paid from the estate of the deceased, and the court held it could not be sustained as an element of damages.

We have examined with care the testimony in this case, and our conclusion is that it was error in the trial court not to direct a verdict for the defendant as requested at the close of the testimony. Taking all of the plaintiff's testimony, and indeed all of the testimony in the case together, we cannot see any ground to hold that by reason of the delay in delivering this message he sustained any pecuniary damage. If the telegram had been delivered on Saturday night, plaintiff says he would have left on the first train. Then, if it was necessary for him to incur an expenditure to provide some one to attend to his business, he had no more time to do it if the telegram had been delivered to him when he says it should have been than he did when it was actually delivered, and this item of expenditure would have been necessary in any event, if necessary at all. It cannot be said that the fact that he secured rooms and maintenance for his family and himself when he got to New York was any unusual expense which would not

have been incident to the trip whenever made, nor is the fact that he employed carriages to be considered exceptional so as to constitute an element of damage. There is no evidence to show that if plaintiff had gone at the shortest moment after the telegram was sent that the expenses incident to the securing of a vault would not have been incurred, so we feel compelled to eliminate this item. The plaintiff does not advise us as to the things he bought for the children, so we are left to assume that they were such as the necessities of the trip required, and therefore they would have been necessary whenever the trip was made. Plaintiff seemed to have relied largely upon the position that the nondelivery of the telegram caused him to return to New York to look after the property and thus incurred the expense of a second trip, because, he said, on the trip to the funeral he did not have time to do this. It appears in the record that the deceased father-in-law left some estate, and from this the undertaker's charges and the rental of the vault were paid, and there remained a quantity for distribution among the children. In this plaintiff's wife had an interest. He returned to New York, the property was divided among the next of kin, and the portion which came to plaintiff's wife he caused to be crated and shipped to Davis, W. Va., and he paid the freight on it. Now, how the cost of this trip and the expenditure incident to the crating and shipping of that property can be an element of damages in this case we frankly admit we are unable to see.

In actions of this character, seeking damages resulting from failure to properly transmit or promptly deliver telegraphic messages, the injured party is entitled to recover, not according to the degree of negligence of the company, but compensation for the injury he has actually received, and this rule applies except in cases where punitive damages may be allowed. This latter element, however, does not enter this case, so, taking all the evidence, we readily conclude that there was no pecuniary damage resulting to the plaintiff because of the nondelivery of the telegram in question, and, being of this opinion, we think it was error in the court below not to instruct the jury as requested to return a verdict for the defendant. Another exception in the case is upon the refusal of the court to instruct the jury that, plaintiff having failed to present his claim in writing within 60 days after the filing of the message, his recovery was barred. We do not deem it necessary, in view of what we have said heretofore, to pass upon that question for, as we have stated, upon the testimony as delivered in the case, with all reasonable and legal deductions and inferences to be drawn therefrom, plaintiff's contention for damages cannot be sustained.

The judgment of the Circuit Court for the Northern District of West Virginia is therefore reversed.

Reversed.

UNITED STATES v. ATCHISON, T. & S. F. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. August 22, 1908.)

No. 2,566.

RAILROADS—SAFETY APPLIANCE ACT—CAR COUPLINGS—DUTY IMPOSED IS ABSOLUTE.

The safety appliance law of Congress, in the situations in which it is applicable, imposes upon a railway company an absolute duty to maintain the prescribed coupling appliances in operative condition, and is not satisfied by the exercise of reasonable care to that end. *St. Louis, Iron Mountain & Southern Ry. Co. v. Taylor*, 210 U. S. 281, 28 Sup. Ct. 616.

[Ed. Note.—Duty of railroad companies to furnish safe appliances, see note to *Felton v. Bullard*, 87 C. C. A. 8.]

(Syllabus by the Court.)

In Error to the District Court of the United States for the District of Colorado.

For opinion of the court below, see 150 Fed. 442.

Ralph Hartzell, Asst. U. S. Att'y., and Luther M. Walter, Special Asst. U. S. Att'y. (Earl M. Cranston, U. S. Att'y., on the brief).

Henry T. Rogers (Pierpont Fuller, on the brief), for defendant in error.

Before SANBORN and VAN DEVANTER, Circuit Judges, and PHILIPS, District Judge.

VAN DEVANTER, Circuit Judge. This writ of error challenges a judgment for the defendant in a civil action to recover a penalty for an alleged violation of the safety appliance law of Congress embodied in Act March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), Act April 1, 1896, c. 87, 29 Stat. 85, and Act March 2, 1903, c. 976, 32 Stat. 943 (U. S. Comp. St. Supp. 1907, p. 885). Stripped of matters about which there is no controversy here, the violation charged consisted in hauling a car, in the usual course of transportation, when one of the couplers thereon was broken and inoperative, so that it could not be coupled or uncoupled without the necessity of a man going between the ends of the cars. The trial was to a jury, and the single question presented to us is whether or not the duty of the defendant, in respect of the maintenance of the coupler in an operative condition, was correctly stated in the portion of the court's charge, which reads:

"The act, however, must necessarily have a reasonable construction. These couplings will get out of repair, and it takes time to repair them. It takes time to discover whether or not they are out of repair. It is the duty of the railway companies to use prudence and the ordinary diligence of a business man, keeping in view the purposes of the act, to keep these couplings in repair. * * * And it is for you to determine in this case whether or not the defendant used reasonable care in ascertaining whether the car was in good repair, and then, again, whether the defendant used reasonable care in putting the coupler in good repair, after it ascertained that it was out of repair. If you find that it did use reasonable care in both instances, then it is not liable, and you should return a verdict in favor of the defendant; otherwise, you should find for the United States."

Applying to the evidence the law as so interpreted, the jury returned a verdict for the defendant, which the court declined to disturb upon a motion for a new trial. *United States v. Atchison, etc., Ry. Co.* (D. C.) 150 Fed. 442. That the interpretation of this law of Congress has been attended with difficulty is attested by many varying opinions in the reported cases, and that there are considerations tending to sustain the construction placed upon it by the District Court is attested by the opinion rendered upon the motion for a new trial and by the sustaining opinions in others cases, notably *St. Louis & S. F. Ry. Co. v. Delk* (C. C. A.) 158 Fed. 931; but, as we read the opinion of the Supreme Court in the more recent case of *St. Louis, Iron Mountain & Southern Ry. Co. v. Taylor*, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061 (s. c. 71 Ark. 445, 78 S. W. 220; 83 Ark. 591, 98 S. W. 959), it is now authoritatively settled that the duty of the railway company in situations where the congressional law is applicable is not that of exercising reasonable care in maintaining the prescribed safety appliance in operative condition, but is absolute. In that case the common-law rules in respect of the exercise of reasonable care by the master and of the nonliability of the master for the negligence of a fellow servant were invoked by the railway company, and were held by the court to be superseded by the statute; it being said in that connection (page 294 of 210 U. S., page 620 of 28 Sup. Ct. [52 L. Ed. 1061]):

"In deciding the questions thus raised, upon which the courts have differed (*St. Louis & S. F. Ry. v. Delk* [O. C. A.] 158 Fed. 931), we need not enter into the wilderness of cases upon the common-law duty of the employer to use reasonable care to furnish his employé reasonably safe tools, machinery, and appliances, or consider when or how far that duty may be performed by delegating it to suitable persons for whose default the employer is not responsible. In the case before us the liability of the defendant does not grow out of the common-law duty of master to servant. The Congress, not satisfied with the common-law duty and its resulting liability, has prescribed and defined the duty by statute. We have nothing to do but to ascertain and declare the meaning of a few simple words in which the duty is prescribed. It is enacted that 'no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard.' There is no escape from the meaning of these words. Explanation cannot clarify them, and ought not to be employed to confuse them or lessen their significance. The obvious purpose of the Legislature was to supplant the qualified duty of the common law with an absolute duty deemed by it more just."

While the defective appliance in that case was a drawbar, and not a coupler, and the action was one to recover damages for the death of an employé, and not a penalty, we perceive nothing in these differences which distinguishes that case from this. As respects the nature of the duty placed upon the railway company, section 5, relating to drawbars, is the same as section 2, relating to couplers, and section 6, relating to the penalty, is expressed in terms which embrace every violation of any provision of the preceding sections. Indeed, a survey of the entire statute leaves no room to doubt that all violations thereof are put in the same category, and that whatever properly would be deemed a violation in an action to recover for personal injuries is to be deemed equally a violation in an action to recover a penalty.

Because, in view of the later decision in the Taylor Case, the instruction before quoted did not embody a correct statement of the law, the judgment is reversed with a direction to grant a new trial.

UNITED STATES v. DENVER & R. G. R. CO.

(Circuit Court of Appeals, Eighth Circuit. August 22, 1908.)

No. 2,567.

RAILROADS—SAFETY APPLIANCE ACTS—PLEADING—COMPLAINT TO RECOVER PENALTY—NOT NECESSARY TO NEGATIVE EXCEPTION IN PROVISIO OR EXERCISE OF REASONABLE CARE—IF ONE COUPLER BE INOPERATIVE AND THERE BE ACTUAL AND SUBSTANTIAL HAULING IN INTERSTATE TRAFFIC STATUTE IS VIOLATED.

A complaint under the safety appliance law of Congress to recover a penalty for hauling a car in moving interstate traffic in violation of section 2 (Acts March 2, 1893, c. 196, 27 Stat. 531, and April 1, 1896, c. 87, 29 Stat. 85 [U. S. Comp. St. 1901, p. 3174] amended by Act March 2, 1903, c. 976, 32 Stat. 943 [U. S. Comp. St. Supp. 1907, p. 885]), relating to automatic couplers, is not demurrable (a) because it fails to negative the matter of the exception created by the proviso to section 6 (27 Stat. 532 [U. S. Comp. St. 1901, p. 3175] amended by 32 Stat. 943 [U. S. Comp. St. Supp. 1907, p. 885]); or (b) because it only shows that one of the couplers was out of repair and inoperative, and that it was so because the uncoupling chain was "kinked"; or (c) because it fails to negative the exercise of reasonable care on the part of the railway company in maintaining the coupler in operative condition; or (d) because, although showing an actual and substantial hauling of the car in moving interstate traffic, it fails to specify how far the hauling was continued, or is silent in respect of any actual use of the defective coupler.

[Ed. Note.—Duty of railroad companies to furnish safe appliances, see note to *Felton v. Bullard*, 37 C. C. A. 8.]

(Syllabus by the Court.)

In Error to the District Court of the United States for the District of Colorado.

Ralph Hartzell, Asst. U. S. Atty., Luther M. Walter, Special Asst. U. S. Atty. (Earl M. Cranston, U. S. Atty., on the brief).

Henry McAllister, Jr. (Joel F. Vaile and Elroy N. Clark, on the brief), for defendant in error.

Before SANBORN and VAN DEVANTER, Circuit Judges, and PHILIPS, District Judge.

VAN DEVANTER, Circuit Judge. The matter here in controversy is the sufficiency of the complaint in a civil action to recover penalties under the safety appliance law of Congress. Act March 2, 1893, c. 196, 27 Stat. 531; Act April 1, 1896, c. 87, 29 Stat. 85 (U. S. Comp. St. 1901, p. 3174) amended by Act March 2, 1903, c. 976, 32 Stat. 943 (U. S. Comp. St. Supp. 1907, p. 885). There are four counts in the complaint, each charging a distinct hauling of a car in moving interstate traffic when one of the couplers with which it theretofore had been properly equipped was out of repair and inoperative. In the District Court all the counts were held insufficient upon demurrer. The particular reason for the ruling is not disclosed, but in support of it the defendant makes several objections to the

complaint. The first of these is that the plaintiff does not negative the matter of the exception created by the proviso to section 6 of the act of March 2, 1893, as amended by the act of April 1, 1896, which gives the right of action for the penalty. This objection must fail, because it is opposed to the settled rule that an exception created by a proviso or other distinct or substantive clause, whether in the same section or elsewhere, is defensive, and need not be negated by one suing under the general clause. *United States v. Cook*, 17 Wall. 168, 21 L. Ed. 538; *Ledbetter v. United States*, 170 U. S. 606, 611, 18 Sup. Ct. 774, 42 L. Ed. 1162; *Schlemmer v. Buffalo, etc., Co.*, 205 U. S. 1, 10, 27 Sup. Ct. 407, 51 L. Ed. 681; *Smith v. United States*, 85 C. C. A. 353, 157 Fed. 721, 727; *Id.*, 208 U. S. 618, 28 Sup. Ct. 569, 52 L. Ed. —. The second objection is that there is no allegation of any facts showing that the condition of the coupler was such as to make the hauling of the car unlawful. It is also untenable. The statute makes the hauling unlawful if the car be not equipped with "couplers coupling automatically by impact, and which can be uncoupled, without the necessity of men going between the ends of the cars," and the complaint, taking the second count as an illustration, alleges that the hauling occurred "when the coupling and uncoupling apparatus on the 'B' end of said car was out of repair and inoperative, the uncoupling chain being kinked on said end of said car, thus necessitating a man or men going between the ends of the cars to couple or uncouple them, and when said car was not equipped with couplers coupling automatically by impact, and which could be uncoupled, without the necessity of a man or men going between the ends of the cars." This allegation could be improved in point of directness, but it was evidently intended to mean, and we think it does mean, that the coupler on the "B" end of the car was out of repair, in that the uncoupling chain was kinked, and that, in consequence, that coupler was inoperative in that it would not couple automatically by impact, and could not be uncoupled, without the necessity of a man going between the ends of the cars. If that was so, one of the couplers with which the car was equipped did not meet the requirements of the statute. But it is said that in truth a coupling between such an inoperative coupler and an operative one can be automatically effected by impact, and an uncoupling thereof can also be effected, without the necessity of a man going between the ends of the cars, if he happens to be on that side of the track from which the lever of the operative coupler can be manipulated, or if he crosses to that side by going around, climbing over or crawling under the cars. That this is so has been shown in other cases which have been before this court (*Morris v. Duluth, etc., Ry. Co.*, 47 C. C. A. 661, 108 Fed. 747; *Gilbert v. Burlington, etc., Ry. Co.*, 63 C. C. A. 27, 128 Fed. 529), but, passing the question whether we can here take notice of the fact so asserted and shown, we cannot assent to the contention which is founded upon it, namely, that an inoperative coupler—that is, one which cannot be properly manipulated preparatory to effecting a coupling or an uncoupling, as the case may be, without a man going between the ends of the cars—is yet to be regarded as conforming to the statute, because another coupler capable of being so manipulated can be coupled therewith and uncoupled therefrom, without a man going between the cars, if he submits to whatever of incon-

venience or risk may be incident to getting at the lever of the operative coupler. An all-sufficient answer to this contention is that the statute in terms requires that every car to which it applies shall be equipped with "couplers" of a prescribed operative type, and the reasonable attainment of its manifest object renders it necessary that the coupler at each end of the car shall conform to this requirement. *Johnson v. Southern Pacific Co.*, 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363; *Chicago, etc., Co. v. Voelker*, 65 C. C. A. 226, 129 Fed. 522, 70 L. R. A. 264.

The third objection is that there is no allegation of any failure on the part of the defendant to exercise reasonable care in maintaining the coupler in operative condition. It must also fail, because the duty which the statute imposes upon a railroad company, in that regard is not qualified by the common-law rule of reasonable care, but is absolute, as has been recently and authoritatively settled in *St. Louis, Iron Mountain & Southern Ry. Co. v. Taylor*, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061. See, also, *United States v. Atchison, Topeka & Santa Fé Ry. Co.* (C. C. A.) 163 Fed. 517.

The last objection is that there is no sufficient allegation of a hauling of the car. It must share the fate of the others. The statute inhibits a hauling "in moving interstate traffic," and the complaint, taking the second count as an illustration, alleges that the defendant "hailed over its line of railroad one car, to wit, Pere Marquette 41,948, used in moving interstate traffic to wit, bullion consigned from Murray, in the state of Utah, to ——— New York Harbor, in the state of New York," and "hailed said car, with said interstate traffic, over its line of railroad out of its yards at Minturn, in the state of Colorado, in an easterly direction, when" one of the couplers thereon was out of repair and inoperative, as before stated. The criticism made of this allegation is that it does not specify how far the hauling was continued, or its purpose, and is silent respecting any actual use of the defective coupler; but the answer to this is that the allegation does sufficiently show an actual and substantial hauling in moving interstate traffic, and that, this being so, it is immaterial, under the statute, how far the hauling was continued or whether there was any actual use of the defective coupler.

As the objections made to the complaint are untenable, and as none other is perceived by us, the judgment is reversed with a direction to overrule the demurrer and to take such further proceedings as may be agreeable to law.

DUNN MFG. CO. et al. v. STANDARD COMPUTING SCALE CO.

(Circuit Court of Appeals, Sixth Circuit. May 25, 1908.)

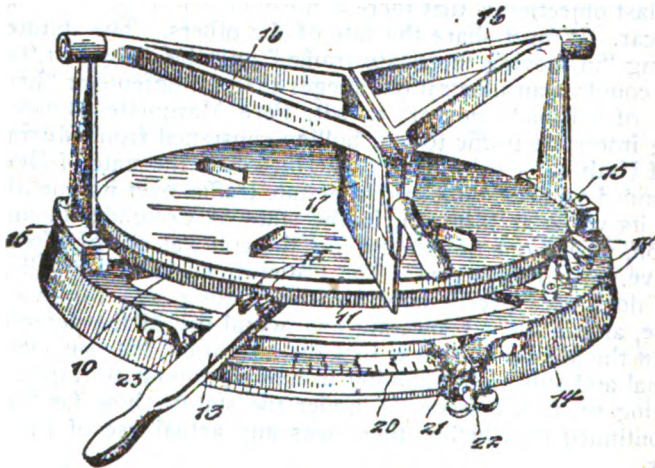
No. 1,761.

PATENTS—INVENTION—COMPUTING CHEESE CUTTER.

The Dunn patent, No. 800,431, for a computing cheese cutter, consisting of a new combination of old elements, which eliminates certain parts of prior machines and simplifies the mechanism, so as to produce a better and more practicable and salable machine, discloses invention; also held infringed.

Appeal from the Circuit Court of the United States for the Eastern District of Michigan.

This is a bill to enjoin infringement of patent No. 800,431, issued to H. F. Dunn and assigned to appellants, who were complainants below. The Circuit Court held the patent void for want of patentable novelty, and dismissed the bill. The patent is for an improved computing cheese cutter. The patentee in his specifications says that his invention "consists in first ascertaining the value of the cheese or the sum desired to be realized from the sale of an article in portions, and providing the apparatus with a single row of characters indicating the total possible values of a cheese or such other article desired to be sold in pieces. A designator is then set to the character in such row of indications representing such ascertained value of the cheese or sum to be realized from its sale, whereupon the movement of said cheese carrier is so limited that such movement will measure off a definite money's worth of said cheese or other article, which measured portion may then be served. Thus it will be seen that my invention dispenses with the necessity for dealing with such incidental matters as weights and prices per pound and presents only the simple and ultimate result, to wit: A cheese or other article is to be sold for so much money, and the apparatus is set to cut said cheese or article into portions that will realize said sum of money." Figure 1 of the patent, set out below, is a perspective view of a cheese cutter, and sufficiently shows the inventions for the purposes of this opinion.



In that drawing 10 shows the cheese carrier, provided with teeth upon its periphery and adapted to be engaged by the pawls, 12, upon the arm, 13, fulcrumed concentric with the carrier. "The carrier and arm, 13, are revolvably supported by a base, 14, provided with uprights, 15, between which extends a knife-carrying frame, 16, having knife, 17, secured thereto and adapted to sever portions of the cheese or other article upon the carrier, 10. Upon said base, 14, are one or more retaining pawls, 18, engaging with said teeth, 11, for retaining the carrier, 10, in such positions as it may be moved to by the pawl or pawls, 12, upon arm, 13. Secured to base, 14, is a longitudinal bearing plate or bar, 20, provided with a single row of indications representing the total prices or the total money value desired to be realized from the sale of a cheese or other article to be sold in portions. Upon said plate, 20, is a stop block or member, 21, provided with a set screw, 22, adapted to secure said block or member, 21, at any position upon said bar, 20; said block or member, 21, being set to the character upon said bar, 20, representing the value of the cheese or the money to be realized from its sale, whereby each movement of lever, 13, throughout the space limited upon one side by the contact of lever, 13, with said block or member, 21, and upon the other side by a projection or

fixed stop, 23, of plate, 20, will drive the carrier, 10, to measure a predetermined money's worth of said cheese, which may be either 5, 10, 15, 20, 25 cents, or any other sum of money previously determined upon and provided for by the spacing of the graduations upon bar, 20. The total-value graduations on this scale-bar consist of marks which are designated by figures indicating such total values arranged inversely as to their respective distances from the fixed stop, so that the highest figure will be nearest the fixed stop, and such distances not only correspond to aliquot parts, respectively, of such total values, but also to aliquot parts or sector portions of the carrier."

The claims in issue are 2, 7, and 10, which read as follows:

"2. The combination of a cutting mechanism, a carrier for the article to be cut in portions, means for moving said carrier, a scale-bar having a fixed stop and inverse total-value graduations indicating sums of money to be realized from the sale of such articles and governing the size of said portions in accordance with the total value, and means in adjustable engagement with said scale-bar for limiting the motion of the means for moving said carrier, substantially as specified."

"7. In a cheese-cutter, the combination of a base-frame, a scale-bar carried by said frame, and inversely graduated in total values of different cheeses, a rotary table on said base-frame, a table-rotating lever having movement over said scale, and an adjustable stop engaging said scale-bar for limiting the movement of said lever, substantially as specified."

"10. In a cheese-cutter, the combination with a base-frame, a rotary carrier thereon for cheeses of different values, a reciprocating operating lever for said carrier, a scale-bar on said base-frame, a fixed stop on said scale-bar, total-value graduations inversely arranged at distances directly increasing from said fixed stop, and an adjustable stop engaging said scale-bar to limit the movement of said operating lever, whereby pieces of constant value will be cut from cheeses of different values substantially as specified."

V. H. Lockwood, for appellants.

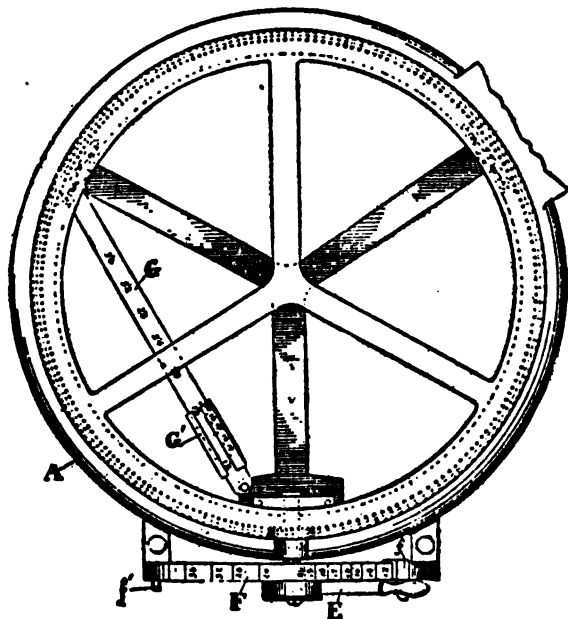
C. H. Fisk, for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge (after stating the facts as above). It is not of consequence that the elements of each claim may be old, for the claims are for a combination, and if the combination be new, or if by a new mode of organization new or better results are obtained, the patent may be sustained. The first step, as shown by the history of the art, was a cutter organized with a scale which was capable of measuring equal proportional divisions of the pieces to be cut off; but if the cheese differed in weight or value another slip must be taken. This was taken by both McCroskey and F. P. Dunn, to say nothing of the devices which preceded them. The two patents in evidence issued to McCroskey and the later patent to F. P. Dunn, also in evidence, show mechanisms which by adjustment were adapted to cut proportional and equal divisions without regard to the weight of the cheese or the total value to be realized. For this reason, while involving some change in organization, they were held by the learned trial judge to anticipate. The validity of the patent in suit must turn upon whether such structural changes have been made in appellant's organization of old elements as to produce a simple and more practical operating machine than those shown by the old art.

We may start with the significant fact that not one of the alleged anticipating devices proved a success as a practical and salable cheese cutter. Such devices are sold to retail grocers. The well-known conditions which a successful computing cheese cutter had to meet re-

quired not only one which should be economical in construction, but above all else it must be simple in operation. This want of simplicity of operation was the trouble with those cutters from the old art which most nearly anticipate the patent in suit. They were undoubtedly clumsy and difficult of easy operation. Then they failed, and the device of the complainants is shown to have in large degree supplanted them. This fact does not always prove invention, for the methods of exploiting may sell an inferior machine over a superior one not pushed. But if there be doubt about the matter of utility, doubt about the merit of a new organization, the scale may be turned by evidence of public approval. We need not consider any of the numerous patents issued for cheese cutters, for it is plain that the patents to McCroskey and that to F. P. Dunn exhibit the last advances. If they do not so completely anticipate as to leave no room for H. F. Dunn, the patentee whose invention is in suit, his patent is sustainable. Indeed, we go further. The F. P. Dunn patent, whether conceded or not, is the closest approximation, and we shall for the most part confine ourselves to a contrast of that device with the patent in suit. As the case must turn upon certain parts only of the computing cutters put in contrast, we here show a figure taken from the brief of Mr. Lockwood, attorney for the appellants, showing the location of the graduated scales of the F. P. Dunn patent:



This diagram illustrates the resemblances as well as the chief differences, omitting the actuating mechanism, for the claims in suit do not involve that feature. The scale-bar, F, showing graduations beginning at 12 and running up to 36, represents the different weights

of cheeses. If the cheese was known to weigh 20 pounds and the sale price was 20 cents per pound, the adjustable stop, *f*, would be moved so as to stop at 20 on the scale-bar. Then by a movement of the lever, *E*, from the fixed stop, *f'*, until it is stopped by the previously adjusted movable stop, the knife, not shown in the figure, would, when operated, cut a division of cheese which would represent one-fourth of a pound, or one-eightieth of the entire circumference of the cheese. Being a 20 cents per pound cheese, that proportional part thus served would have a value of 5 cents. To this extent the F. P. Dunn device was capable of cutting slices of a known value of 5 cents, or a limited number of multiples of 5, and was, therefore, in some sense a value-cutting cutter, as well as a weight cutter. But if the cheese weighed more or less than 20 pounds, or was to be sold for more or less than 20 cents per pound, the graduated total weight scale shown in the figure above at *F* had to be supplemented by the proper adjustment of two other graduated scale-bars, shown in the figure at *G* and *G'*. These scale-bars, according to the patent, are located beneath the rotary cheese board or carrier, which rests on the base, *A*. To set it when any cheese is to be sold for more or less than 20 cents per pound, this cheese carrier must be removed. Then the slicing scale-bar, *G'*, must be moved upon the scale-bar, *G*, until the figure representing the price per pound registers with the figure representing the total weight of the cheese. The patentee then says that when these weight and price figures register "a red line, *g*, to the right of the numbered graduations upon slide, *G'*, will then indicate upon the scale-bar, *G*, where the adjustable stop must be set to cut 5 cents worth of cheese." When the adjustable stop is placed as indicated by the figures pointed to by *g*, the cutter is ready for operation. The necessity for the setting or adjustment of these distinct graduated scales, two of which can be only reached by taking off the rotary carrier board, while plain enough to one familiar with the art, and perhaps soon acquired by the quick-minded and expert with mechanics, is manifestly a slow and complicated operation to be followed by the average grocery clerk. It was not easily understood or easily explained. An effort to operate the cutter confirms the evidence showing the difficulty in inducing purchases due to a want of simplicity of operation.

The device in suit contrasts most favorably in the matter of simplicity of operation with the best type of the old art, the F. P. Dunn cutter. Referring to the figure and the description of the patent involved, heretofore set out, it will be seen that, instead of three graduated scale-bars by which to set the cutter for cheeses when of greater or less value than 20 cents per pound, there is but one graduated scale-bar, and that one adjustment, and that exceedingly simple, is necessary for a cheese of any weight or price. That scale is a total-value scale. The figures show the various values from \$2 up to \$8. The weight being known and the price per pound, the one is multiplied by the other for the total value, and the movable stop, *21*, is moved to stop at the figure showing total value of the cheese. This sets the scale so that, when the lever arm is moved from the fixed stop into contact with the movable stop, the cheese knife cuts equal divisions of the value of 5 cents, or any multiple up to 25. That is the whole

operation. The feature of the patent in suit is the single scale, which the patentee calls his "total-value system." That, he says, consists in "a scale-bar with a fixed stop and a movable slide or stop, and an operating lever moving adjacent to this scale-bar, and a series of graduations representing total values of cheeses; these graduations being arranged to run inversely with reference to the fixed stop."

To say that he has substituted only a total-value scale-bar for the weight scale of the F. P. Dunn device is not altogether true, for he has also substituted his simple total-value scale for their scale-bars and their graduated scales, two of them inconveniently located, which single scale does all that the three could do. The evidence shows that by reason of the simplicity in the operation of the device of the patent it supplied a demand of the trade and has met with larger sales. The patentee did not take the first nor the second step. He did not first invent a cheese cutter which was an adjustable value cutter. What he did was to so simplify the operation of such cutters as to adapt them to the trade, and met a demand which many others had tried to supply. Neither McCroskey nor F. P. Dunn made a success. The appellants first made and sold the F. P. Dunn device. When they made and put the device of the patent upon the market, it superseded the other. The appellees have joined in paying tribute to the practical merit of the later invention, for they have copied it so closely as to compel the concession in argument that, if the patent of the appellants is valid, they infringe.

The change to a single total-value scale-bar also involved structural changes by which a single graduated scale-bar adjusts the cutter, which required two or more in the McCroskey and F. P. Dunn inventions. Former experimenters may have had some dim notion of the interchangeability of the total-weight scale with a total-value scale, but none of them had carried any such concept into a single practical total-value scale. The elimination of unnecessary scale-bars differently graduated and inconveniently placed, by substituting a single scale-bar conveniently placed and so graduated as to do the work of two in the McCroskey and of three in the F. P. Dunn patent, involved such mechanical or structural changes as to constitute invention. *Davis v. Perry*, 120 Fed. 941, 57 C. C. A. 231; *Brown v. Piano Company*, 134 Fed. 735, 67 C. C. A. 639; *Hobbs Manufacturing Company v. Gooding et al.*, 111 Fed. 403, 406, 49 C. C. A. 414; *Decoco Company v. George E. Gilchrist Company*, 125 Fed. 293, 298, 299, 60 C. C. A. 207. In *Western Electric Company v. North Electric Company*, 135 Fed. 80, 89, 67 C. C. A. 553, 563, we said, speaking by Judge Severens, that:

"While the mere assembling in a new organization of parts of old systems to perform the same functions in their new places (as in *Goodyear Tire Company v. Rubber Tire Wheel Company*, 116 Fed. 363, 53 C. C. A. 583) is not invention, yet where they are so taken, and are organized in a new and useful manner so as to produce a more beneficial result, there may be invention; and where the combination displays the exercise of inventive skill and genius beyond that possessed and exercised by those skilled in the art, and the discovery is of something new and useful, invention should be recognized."

Again, in *Sanders v. Hancock*, 128 Fed. 424, 433, 434, 63 C. C. A. 166, 176, the same judge, speaking for this court, said:

"We have in several instances held valid combinations of old elements when from their different location in the new organization a different mechanical result was effected and a beneficial use subserved. Thus, in *Star Brass Works v. General Electric Company*, 111 Fed. 398, 49 C. C. A. 409, the new location given to the brush which takes off the current from a trolley wheel on street railway cars, which effected a more advantageous transmission of the current and afforded better protection to the brush, was patentable."

In *Stilwell Company v. Eufaula Cotton Oil Company*, 117 Fed. 410, 54 C. C. A. 584, where the opinion was by Judge Day, now Justice Day, we held the location of a conveyor of oil meal in a new and different place in the machinery, which effected a better result, constituted patentable invention.

We do not find anything in the occurrences in the Patent Office, as shown by the file and wrapper and contents, which can be of advantage to the appellees. True, he was required to amend his claim. The word "inverse," or "inversely," in describing the graduated scale-bar, was changed, so that the claim read "a scale-bar (inversely) graduated in total values. * * *" But the defendants use this "inversely" graduated scale-bar. It may be that such an inversely graduated scale-bar was not new. This does not affect the question as to whether the organization as claimed in combination is such an improvement over the same elements in the structures of the old art as to involve invention. Neither does the fact that the claims before such amendment were rejected conclude us with respect to the novelty of the invention, either with or without the limitations imposed. As amended, the Patent Office deemed the invention of sufficient merit to be patentable, and with that conclusion we agree. What we might think of the claims without the limitations is not here involved, as we do not rest our conclusion upon the novelty of the inverse graduations as a distinct element. The claims in issue are valid and infringed.

Reversed, for further proceedings in accordance with this opinion.

RIDGWAY DYNAMO & ENGINE CO. v. PHOENIX IRON WORKS.

(Circuit Court, W. D. Pennsylvania. July 28, 1908.)

No. 47.

PATENTS—ANTICIPATION—GOVERNORS FOR STEAM ENGINES.

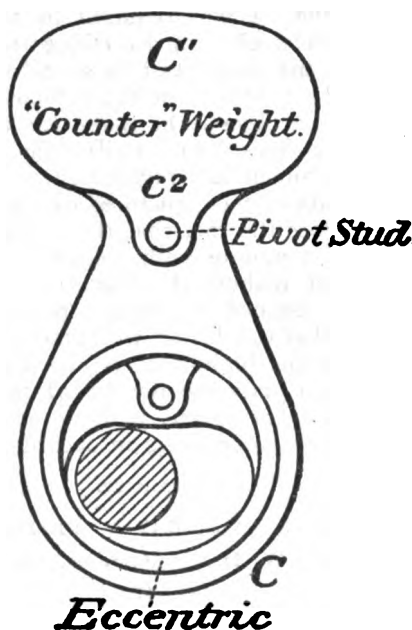
The first six claims of the Begtrup patent, No. 387,205, for a governor for steam engines are void for anticipation by the Penney patent, No. 322,637, and the first six claims of the Begtrup patent, No. 536,505, also for a governor, are void for anticipation by the Rites patent, No. 534,579.

In Equity. Suit for infringement of letters patent No. 387,205, issued August 7, 1888, and No. 536,505, issued March 26, 1895, both granted to Julius Begtrup for steam engine governors. On final hearing.

Fred. H. Ely (R. A. Parker, of counsel), for complainant.

J. Snowden Bell, Thomas W. Bakewell, and Clarence P. Byrnes, for respondent.

BUFFINGTON, Circuit Judge. This case concerns the governors of steam engines. The old type of governor, consisting of two swinging balls revolving in horizontal planes on a vertical spindle, responded so quickly to variations in speed as to work with jerks. This resulted in what was known as "racing." To obviate such objection, inertia governors were devised, and to this class the patent in suit belongs. This general type has a centrifugal-acting weight connected to and rotating with the engine shaft. As speed increases, the centrifugal force causes the weight to move outwardly, and when it slackens to move inwardly. The weight is so connected with the valve governing the steam supply to the cylinder as to vary the supply thereof, automatically furnishing more steam as the speed decreases, and less as it increases. Of this type the patents in suit were improvers, not pioneers. The prior patent to Penney, No. 322,637, is fairly illustrated by this drawing:

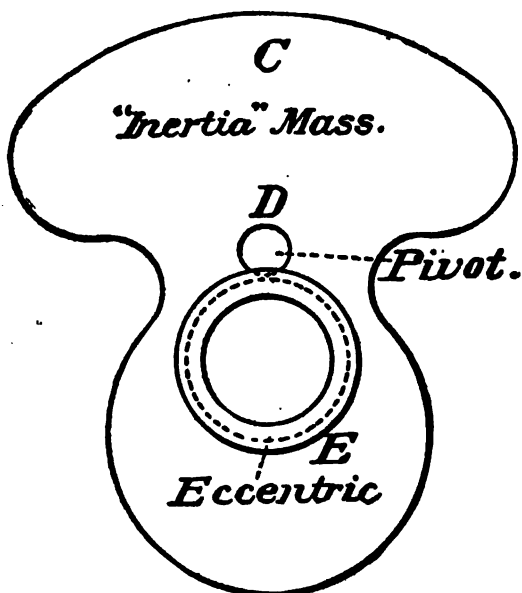


—wherein the eccentric, C, is pivoted on an axis, C², which is not coincident with the axis of the driving shaft and is connected, as shown in Fig. 1 of the patent, by a rod, D, and a stud, C², with centrifugal weights, E and F, counterbalanced by an intermediate spring, G. Rigidly connected to the eccentric is a counterweight, whose function Penney thus describes:

"The eccentric's counterweight assists the centrifugal balls and the spring in maintaining uniformity of engine speed by its tendency to preserve its own velocity under momentary changes in the speed of the crank-shaft, due to variations in the steam pressure or the load put upon the engine. Under an increase of speed of the crank-shaft this counterweight, C, lags behind somewhat for the time being, and causes a shifting of the eccentric so as

to increase its eccentricity; and consequently cut off steam earlier, while under a decrease of speed of the crank-shaft the said counterweight outruns the other parts somewhat for the time being and shifts the eccentric so as to cut off steam later. This incidental function of the counterweight, C, is so desirable that I make its heft adjustable, as before described, so that it may be loaded to foster this function, somewhat at the expense of its function of balancing the eccentric. The best practical heft of this counterweight for any given engine and speed can be readily determined by trials."

In his first patent in suit, No. 387,205, Begtrup, the patentee, differing from his prior patent, No. 326,092, wherein "the eccentric and momentum or inertia wheel or mass are separate parts, each one having its own pivot of oscillation," made "the eccentric integral with the inertia wheel either cast on it or securely fastened to it by bolts, screws, or rivets, or the inertia wheel and eccentric both rigidly secured to a common pivot shaft journaled in the disk or pulley upon which the governor is mounted, so that the said common pivot-shaft forms a rigid connection between eccentric and inertia wheel." The device is shown in the accompanying cut:



This dead weight, called by Penney a "counterweight" and by Begtrup an "inertia mass, which I preferably give the shape of a wheel," but by both integrally fastened to the eccentric, seems to us to perform the same function in both. Indeed, this seems to be conceded by complainant's expert, who, while asserting that Penney's counterweight is not an inertia weight, yet says:

"This counterbalance, like all counterbalances, necessarily has weight and inertia, and as this inertia happens to act in the helpful, instead of the harmful, direction, it would have incidentally a beneficial influence, and that incidental beneficial influence is recognized in the Penney patent in which it is stated: 'This incidental function of the counterweight, C, is so desir-

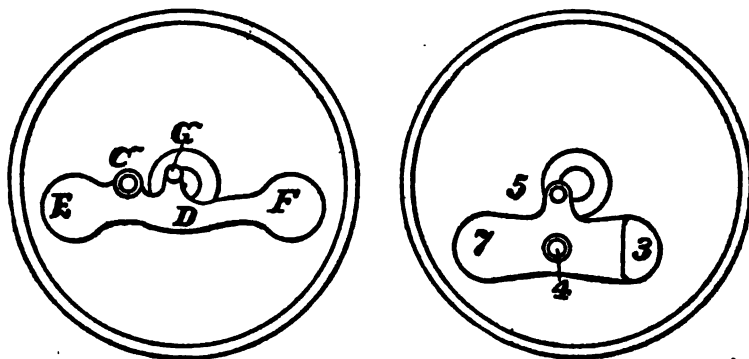
able that I make its left adjustable, as before described, so that it may be loaded to foster this function, somewhat at the expense of its function of balancing the eccentric."

He also concedes that if the word "inertia" and the phrase "substantially described" are excepted, the six claims of Begtrup's patent here in controversy apply to and are descriptive of Penney's device. We have been unable to find in such expert testimony any sufficient reason for giving to the inertia mass, or the preferable form of an inertia wheel of Begtrup's device, any different significance, or, when its inertia is overcome, any different functional effect from that exerted by Penney's counterweight. In both devices the inertia of the weight contributes to preserve uniformity of speed and the centrifugal force of the weight to selections of speed, and they both use centrifugal force and the inertia of an inertia mass or counterweight for the conjoint purpose of selecting and maintaining speed uniformity. Such being the case, it follows that the six claims in question of Begtrup's patent, No. 387,205, are void.

Turning next to Begtrup's patent, No. 536,505, the first six claims of which are here involved, we note that the general principles thereof are found in Penney's prior patent, No. 322,637, and Begtrup's prior patent, No. 387,205. Its novelty therefore is confined to structural details. As to the claims in suit, complainant's expert concedes they are descriptive of the device shown in Rites' patent, No. 534,579. His testimony is as follows:

"XQ 19. Referring now to the second Begtrup patent, No. 536,505, is it not a fact that claim 2 thereof applies to and is descriptive of the construction show in Fig. 3 of the Rites patent, No. 534,579, dated February 19, 1895? A. I think so. XQ. 20. Do you make the same answer with reference to claims 3, 4, 5, and 6 of the Begtrup patent, No. 536,505? Are they and each of them descriptive of the apparatus shown in Fig. 3 of the Rites patent, No. 534,579? A. I should say yes, adding that, as regards claim 3, my understanding of Fig. 3 of the Rites patent, is: The left-hand end of the inertia weight is the heavier end; in other words, that if a line be dropped from the center of pivot, 4, to the center of the shaft, the center of gravity of the weight will be always to the left of that line."

We herewith reproduce in substantial form the devices shown, Fig. 1 of Begtrup's and Fig. 3 of Rites' patent:



They are practically the same thing. Rites' pivot, marked 4, is C of Begtrup; Rites' weight, 7, is Begtrup's E; Rites' eccentric, 5, is Begtrup's G; and the six claims of Begtrup here in controversy are descriptive of this Rites' device, as are also some of the claims in the interference proceeding between Rites and Begtrup. That proceeding resulted in a decision in Rites' favor, to whom a patent, applied for in advance of Begtrup, issued.

In view of these facts, we are constrained to hold the claims in controversy in the present case, which are descriptive of Rites' device, are invalid.

Let a decree be drawn dismissing this bill.

KNAPP v. ATLANTIC MACH. WORKS.

(Circuit Court, D. Maryland. August 24, 1908.)

1. PATENTS—INFRINGEMENT—CAN LABELING MACHINE.

The Cornell and Knapp patent, No. 561,656, for an improvement in can labeling machines, *held* valid, and infringed as to claims 2, 3, and 5.

2. SAME.

The Cornell patent, No. 514,705, for an improvement in can labeling machines, *held* valid, but not infringed.

3. SAME—ANTICIPATION.

The Cornell patent, No. 612,825, for a can labeling machine, claim 1 *held* valid and infringed. Claim 6, for an expansible follower to press and hold the label against the can while it is being pasted, *held* void for anticipation.

In Equity. On final hearing.

L. S. Bacon and Bacon & Milans, for complainant.

E. Oliver Grimes and Arthur Stewart, for defendant.

MORRIS, District Judge. This is a bill in equity, in usual form, for injunction and account for infringement of certain patents belonging to the complainant, all relating to improvements in can labeling machines. The defense is noninfringement and nonvalidity of the complainant's patents.

The patents in suit are: First. Patent No. 561,656 to E. W. Cornell and Frederick H. Knapp, dated June 9, 1896, for improvement in can labeling machines. Second. Patent No. 514,705 issued to E. W. Cornell, dated February 13, 1894, for an improvement in can labeling machines. Third. Patent No. 612,825 issued to E. W. Cornell October 25, 1898, for a can labeling machine. The devices intended to be covered by these three patents are combined in an automatic labeling machine manufactured by the complainant, by which cylindrical cans for hermetically preserved goods which are delivered either empty or filled into one end of the machine, and are delivered from the other end with labels properly pasted upon them. This, the proofs show, is done by complainant's machine with great rapidity and accuracy, so that the machine is a notable commercial success.

In the first patent, No. 561,656, infringement is alleged of claims 2, 3, and 5. Claim 5 is for the combination of the feed disks and the

conveyer mechanism, by which greater speed is given to the conveyer than to the feed disks, so that the cans as fed into the machine are automatically spaced apart while being carried through the machine. The cans, as they roll down the inclined runway into the machine, come in contact with a revolving disk which controls the motion of the can, and makes it revolve slowly, and holds it back until it comes in contact with a more rapidly moving conveyer which carries it rapidly forward. By this difference of speed between the feeding disks and the conveyer, the cans are spaced apart so that they do not interfere with each other during the pasting process which follows. This method of feeding the cans has proved successful in operation. The devices are fully described in complainant's patent and are substantially the same as in defendant's machine. I think the device was patentable and is infringed by defendant's construction.

The cans so spaced are carried along the runway by an endless feed belt, and by coming in contact with a paste roll they have applied to them a coating of paste, about an inch wide, running from end to end on the cylindrical side of the can. If, after receiving this strip of paste, the can continued to revolve on the conveyer belt, the paste would come off on the belt. To prevent this, is the purpose of the device claimed in claims 2 and 3 of the first patent. This is accomplished by what are called "keeper rolls," which cause the edges of the endless conveyer belt to tilt so that the edges only of the belt engage with the ends of the cans, and so prevent the face of the feed belt from coming in contact with the paste on the cans. This essential result is obtained in defendant's machine in substantially the same way. And, although it may be said that in complainant's machine the keeper rolls operate to push the edges of the belt down, and in defendant's machine the keeper rolls operate to cause the edges to resist the upward push of the cans, the result is precisely the same and the means employed substantially the same. I think claims 2 and 3 are good, and are infringed.

In the second patent, No. 514,705, the devices are intended to draw the label closely around the can, and to bring the lap end into contact with the zone of paste on the can. It is an ingenious device, which operates very successfully, but is difficult to describe. A rod lies across the receptacle containing the labels, and, as the label is wound around the can, the rod keeps the label tight and pulls the lap end from the paste, so that, with the paste which adheres to it, it laps over the opposite end of the label and is secured to it. This rod is controlled by a spring which forces it as soon as it is released from the label on the can to return to its original position across the next label. It is called an "oscillating rod" on account of this movement. The defendant's rod is differently affixed to the machine, and serves a different purpose. Its purpose is simply to exert a slightly holding pressure on the label as it is being taken up by the can. The paste on the lap end of the label in defendant's machine is not obtained from the can by being run over it and drawn out by the rod, but is applied by a belt carrying paste which is applied to the end of the label. The rod does not oscillate, as described in complainant's patent, and does not draw the lap end of the label from the paste on the can. It is fair to

say, therefore, that the rod in defendant's patent does not operate in the same way nor for the same purpose as the complainant's device does, and that there is no infringement of the specific claims of the second patent.

The third patent is No. 612,825, October 25, 1898. This patent claims devices for two separate purposes. The first claim is for a device by which, if an occasional can somewhat longer than the others is fed into the machine, the side rails which guide the cans through the runway will yield and allow the longer can to pass through the machine. This the complainant does by having on one side of the runway a fixed continuous guide rail and on the opposite side a guide rail composed of independent yielding sections. A fixed rail and an opposite yielding rail which permitted a movement backwards and forward was not new; but that did not meet the difficulty of an occasional longer can among a number of cans of normal length. To meet this difficulty, the inventor broke up his yielding rail into a sufficient number of independently movable sections actuated by springs, so that the long can would only displace the section as it came into contact with it, and would not displace the others which would then properly guide the cans of normal length. In my opinion this device discloses an invention that is not shown in any prior device in the art. It is both useful and novel, and is infringed by the device used on defendant's machine.

The sixth claim of the third patent, No. 612,825, is also put in suit by the complainant's bill of complaint. The complainant's machine, for the purpose of supplying the labels to be taken up by the revolving cans, has a package of labels in a receptacle or box just beneath the runway on which the cans are moving. It is necessary that the top label of the package should be evenly presented to the can as it passes over the box. This is done by a movable bottom to the box which is given a step by step movement upward. It is also important that the follower should press upward evenly, and for that purpose should cover the whole under surface of the labels and touch the sides of the box to insure the edges of the label being evenly pressed upward. To accomplish this the follower is made in more than one piece, the outer pieces being forced outwardly by springs, which insure the outer pieces being kept in close contact with the sides of the box.

The claim is as follows:

"6. In a can labeling machine, the combination with a can-runway and the label receptacle located therein, the movable follower or bottom of said receptacle consisting of a series of laterally-adjustable spring-actuated sections substantially as described."

As to the specific device of this claim, I think it is anticipated by two prior patents, viz.: Patent to Rice, No. 59,748, November 20, 1866, for an expansible follower to be used in a tobacco press, made in two pieces, with a spring interposed between them to keep the outer edges of the follower in close contact with the walls of the box in which the follower moves in compressing the tobacco. Patent to Chambers, No. 259,269, June 6, 1882, for a self-adjusting follower for use in hay presses, made to accommodate the varying width of

the box, by making the follower in two pieces, which are expanded against the sides of the box by springs. These two patents show that it was not new to have an expansible follower made in parts and the outer edges pressed firmly in contact with the sides of the box by springs. I am of opinion that the specific device claimed in claim 6 of complainant's patent No. 612,825 was not new.

On the whole case, I am of opinion that the complainant is entitled to a decree in his favor as to the devices which I have sustained. The machine constructed by the complainant combining the devices as to which I have sustained the patented claims has gone, as the proofs show, into most successful use as a practical machine, capable of labeling from 85,000 to 100,000 cans per day, and is recognized as a most meritorious automatic contrivance, which has greatly reduced the cost of labeling, and expedited the work, and has advanced the art to which it is applicable.

NEW YORK PHONOGRAPH CO. v. NATIONAL PHONOGRAPH CO. et al.

(Circuit Court, S. D. New York. February 5, 1908.)

1. PATENTS—LICENSE—CONSTRUCTION.

An exclusive license to sell phonographs within a stated territory granted by an assignee of patents therefor from the patentee, with the further right to such improvement patents as should be granted to him within a term of 15 years, must be construed with reference to such patents and as covering only phonographs containing the patented inventions and improvements which are owned by the licensor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 305.]

2. SAME—SCOPE—RIGHTS OF LICENSEE AS AGAINST THE LICENSOR.

Where the executory provisions of such contract of assignment to the licensor, which required the patentee to assign future improvement inventions, also required the assignee corporation to pay to him annually a stated sum for experimental expenses and to pay the cost of the future patents, and by reason of its insolvency and dissolution it failed to make such payments, the assignor was not thereafter bound to make improvements or patent his inventions for the benefit of the assignee, and such patents as he did procure did not inure to the benefit of the assignee nor its licensee, nor was a purchaser of the assets of the assignee with notice of the license bound to fulfill such executory agreement for the licensee's benefit.

3. SAME.

A provision of a license contract prohibiting the licensor from granting to others any rights for the use of phonographs or supplies therefor within the licensed territory construed, and held limited to the phonographs and supplies manufactured under the patents and which were covered by the license.

4. SAME.

A grantor of an exclusive license under patents within a certain territory, and also its successors, who are in privity with it as to such license, are estopped, as against the licensee, to deny the validity of such patents, or that they expired before the term for which they were granted by reason of the expiration of prior foreign patents for the same inventions.

5. SAME—VIOLATION OF INJUNCTION—CONTEMPT OF COURT.

A defendant, which, as successor to the grantor to complainant of an exclusive license to sell and use within a certain territory phonographs and phonographic supplies embodying patents owned by the licensor,

was enjoined from violating such license agreement by selling such phonographs and supplies within the licensed territory *held* in contempt of court for a violation of such injunction.

In Equity. Motion for attachment for contempt for violation of injunction.

Tomlinson, Tompkins & Tomlinson (Louis Hicks, John C. Tomlinson, and Millard F. Tompkins, of counsel), for complainant.

Robinson, Biddle & Benedict (William J. Wallace and Charles L. Buckingham, of counsel), for defendants.

HAZEL, District Judge. This is a motion for an attachment against the defendant, National Phonograph Company, for violating the injunctive decree of this court. After an exhaustive discussion of the issues herein, this court at final hearing reached the conclusion that the complainant was entitled to protection of its exclusive license contract rights as evidenced by the contracts dated October 12, 1888, February 6, 1889, and July 1, 1893 (see 136 Fed. 600, for statement of facts and opinion), and its decree was subsequently affirmed by the Circuit Court of Appeals. 144 Fed. 404, 75 C. C. A. 382. The effect of the injunction is disputed. It reads as follows:

"Now, therefore, we do strictly command, enjoin and restrain you, the National Phonograph Company, and you, its officers, agents, clerks, servants, employés, attorneys, successors, assigns, associates, dealers, confederates and all persons in privity with the National Phonograph Company, and each and every of you under the penalty that may fall thereon, perpetually from directly or indirectly, selling or leasing within the state of New York, phonographs and supplies therefor, to others than complainant and from using within the state of New York, phonographs and supplies therefor, and from causing to be sold or causing to be leased or causing to be used, within the state of New York, phonographs and supplies therefor, by others than complainant, and from selling for use or licensing for use, within the state of New York, phonographs and supplies therefor, by others than complainant in violation of the provisions of and of the rights of the complainant under certain contracts as extended, bearing date October 12, 1888, between the North American Phonograph Company and the Metropolitan Phonograph Company, and also between Thomas A. Edison, the Edison Phonograph Company, the Edison Phonograph Works, the North American Phonograph Company and Jesse H. Lippincott, and a contract bearing date the 6th day of February, 1889, between the North American Phonograph Company and John P. Haines, and a contract bearing date July 1, 1893, between complainant and the North American Phonograph Company."

The question is: Does the injunction restrain the use and sale by the defendant within the licensed territory of phonographs and supplies generally, or does it simply restrain the use and sale in the licensed territory of phonographs and supplies which embody the patents and inventions of Thomas A. Edison owned by complainant's licensor as restricted by its dissolution for insolvency and the sale of its assets?

The conclusions of the court that the rights of the complainant sprung from the contractual relation, that it was not chargeable with laches in the enforcement of its rights, that there was an extension of the license, that rights and privileges under the contract were not granted in perpetuity, that complainant's exclusive territorial rights

at the date of the decree had been wrongfully invaded by the defendant, and that the complainant had not forfeited its license rights, must be regarded as *res judicata*. Assuming the jurisdiction of the court, the rule is well settled that the order of the court must be strictly obeyed, even though it appears to have been erroneously made or to have given broader relief than was justified or warranted by the facts. To adjudge the defendant guilty, however, of a violation of the injunction, resort must be had to the decision as interpreted and construed by the court.

The defendant contends that on the date of the injunction it abandoned and dispensed with the use in its talking machine of certain unexpired patents issued to Mr. Edison, and that no legal right exists to this proceeding. To intelligently pass upon the question presented, we must not overlook the original contract by which the title of the phonograph patents and the territorial rights were granted "in perpetuity," nor the provisions binding Mr. Edison to assign patents and improvements under certain conditions for a period of 15 years from August 1, 1888. This court in its former decision held that a license to manufacture and sell a patented article could not be extended beyond the life of the patent, and by the term "in perpetuity" the parties could not have intended, in the absence of express limitation, to prolong such license rights for a period beyond the life of any improvement or patented invention. The American Company, by the contract of October 12, 1888, secured the exclusive title and interest in and to the phonograph patents, inventions, and improvements for such period as the patentee then had or might, as provided in paragraphs 4 and 5 of the contract of August 1, 1888, thereafter acquire the monopoly of his inventions. It is inconceivable that the complainant could obtain any greater or different rights than had its licensor. Properly interpreted, the decision of the court must be deemed to hold that the complainant did not buy the right to sell, use, or let phonographs and appliances separate and distinct from the patents under which they were manufactured. The language of the bill apparently supports this view. Moreover, the recitals in the numerous contracts emphasize the assignment of the phonograph patents and improvements. Concededly the phonograph and appliances are referred to in general terms also, yet, construing the original and subsequent contracts in their entirety, as we must to ascertain the intent of the parties, I think they intended to be understood as contracting in relation to phonographs and supplies which were invented by Mr. Edison, and not in the broad sense contended by the complainant. The provisions of paragraphs 4 and 5 of the contract of August 1, 1888, are of essential importance. They were wholly of an executory character and bound the North American Phonograph Company to pay the sums of money specified for experimental expenses. Failing in this undertaking, such executory provisions, upon the dissolution of the said company and sale of its assets, became inoperative, and in my estimation Mr. Edison was not thereafter obliged to make improvements or patent his inventions for the benefit of the North American Company. *People v. Globe Mu-*

tual Ins. Co., 91 N. Y. 174; Griffith v. Boom & Lumber Co., 46 W. Va. 61, 33 S. E. 125; 10 Cyc. 1312; Bradford Belting Co. v. Kisinger-Ison Co., 113 Fed. 811, 51 C. C. A. 483.

The confirmation agreement by which the Metropolitan Phonograph Company received renewed assurances of its contract rights, notwithstanding the failure of Mr. Lippincott and the North American Company to comply with certain conditions of the earlier agreement, did not suspend or annul the existing obligation to perform or pay for the experimental expenses in making improvements upon the phonograph and for procuring patents nor after the dissolution operate as a waiver thereof. It is probable, if creditors or parties in interest had offered to perform the contract of the North American Company prior to sale of its assets, that Mr. Edison could have been compelled to assign his later inventions or improvements; but, without compensating him for experimental expenses or paying for the patents of the improvement subsequent to the dissolution, I am unable in the absence of fraud, to perceive any force in the contention that the complainant is entitled to the benefits of such later improvements. The fourth paragraph provides that inventions and improvements should be assigned to the company "without further compensation"; but Mr. Edison probably would not have been obliged to conduct any experiments as a result of which improvements could have been made, unless remunerated as specified in the fifth paragraph. The compromise agreement with the receiver of the North American Phonograph Company specifically refers to claims for royalties and damages, and not to payment of the annual amounts under paragraph 5. It is true that the principle of the cases cited in my former opinion is substantially to the effect that a purchaser of the assets of an exclusive licensor of a patent with notice of the existence of license rights succeeds to the ownership of the patent and the rights and responsibilities of the licensor. This principle, however, is not thought broad enough to justify the holding in this case that the defendant was bound to fulfill the condition imposed by paragraphs 4 and 5, which, as we have seen, complainant's licensor was unable to perform.

The so-called negative covenant: The Haines contract, dated February 6, 1889, in the first provision prohibited similar grants to others of any rights for the use of the phonographs or supplies therefor, for the licensed territory during the period for which the license was granted. Much reliance is placed by complainant upon the phraseology of this provision, which refers in broad terms to phonographs and phonographic supplies. There are other portions of the contract from which it may fairly be argued that all "phonographs delivered were to be phonographs of the contract"; that is to say, that the grantors could not sell or license phonographs of any kind, patented or unpatented, except by permission of the licensee. Yet the contracts in their entirety, together with the situation and circumstances, are believed to require a restriction of the negative covenants of the complainant's predecessors to the phonographs and phonographic supplies manufactured under the Edison patents and improvements prior to the dissolution of the American Company and the sale of its as-

sets. Clause 4 of the agreement of February 6, 1889, seems to support such view for it states that the phonographs and supplies which were agreed to be delivered to complainant were "made and to be used under the patents and rights herein described during the continuance of this agreement."

I now come to a consideration of the question: Has the defendant in the production of its talking machine used the patents, inventions, and improvements made by Mr. Edison during the period from August 1, 1888, to February 18, 1896, the time of sale of the assets of the North American Phonograph Company? The affidavits read on the motion show that the so-called gold moulded records used by the defendant in the state of New York were manufactured under Edison's basic patent, No. 484,582, dated October 18, 1892. The defendant contends that such patent is not infringed by the use or sale of its product, and, to sustain infringement, that it must be proven that the defendant actually produced the process within this state. Inasmuch, however, as the rights of the complainant were contract rights, this contention is not maintainable. That said process for sound producing records was manufactured by the Edison Phonograph Works, and is used and sold by the defendant corporation to its customers, jobbers, and agents in the licensed territory, is undeniable. That the process was trivial and a mere feature or step in the general process resulting in a mold for making the record is thought unimportant. Edison patents, Nos. 414,760 of November 12, 1889, 430,274 and 430,278 of June 17, 1890, were used by the defendant at the date of the injunction and in violation thereof, although such patents have since expired; and the unexpired patents, Nos. 448,780 of March 24, 1891, 465,972 of December 29, 1891, 484,583 and 484,584 of October 18, 1892, 499,879 of June 20, 1893, and 513,097 of January 28, 1894, are used by the defendant in the manufacture of its phonographs and supplies, and, moreover, are used, let, or sold in the state of New York through its jobbers, dealers, or selling agents in violation of complainant's exclusive rights. The defendant also continues to wrongfully use patent No. 713,209, issued November 11, 1902, subsequent to the insolvency of complainant's licensor. Such invention was held to have been made in 1888, as appears from the decision of the Circuit Court of Appeals in *National Phonograph Company v. Lambert*, 142 Fed. 164, 73 C. C. A. 382.

The defendant asserts that some of the patents enumerated are invalid for lack of invention or prior use, and that others, which had first been patented in foreign countries, have expired. Under the circumstances of this case, the defendant must be estopped to deny the validity of the patents in suit granted to Mr. Edison against this complainant. *Mathews Co. v. Lister* (C. C.) 154 Fed. 490; *Mellor v. Carroll* (C. C.) 141 Fed. 992; *Hurwood Co. v. Wood* (C. C.) 138 Fed. 835; *Continental Co. v. Pendergast* (C. C.) 126 Fed. 381; *Consolidated Co. v. Finley Co.* (C. C.) 116 Fed. 629; *Force v. Sawyer Co.* (C. C.) 111 Fed. 902. These adjudications emphasize the point that a patentee and a corporation controlled by him are in privity, and both are estopped to assert the invalidity of the patent against an assignee thereof. Nor can the defendant successfully insist that such

patents have expired, since a prior foreign patent for similar invention has become the property of the public. *United Shoe Machinery Co. v. Caunt* (C. C.) 134 Fed. 239. Rev. St. § 4887 (U. S. Comp. St. 1901, p. 3382), provides that patents which have been patented previously in a foreign country shall be limited to expire with the foreign patent; but, as the right of the complainant was derived from the exclusive license in controversy, the limitation contained in the statute is believed to be inapplicable. The United States Edison patents on their face conveyed monopoly rights for a period of 17 years, and they make no reference to any foreign patents. Although in *United Shoe Machinery Co. v. Caunt*, supra, the defendant expressly obligated himself not to contest the validity of a patent licensed by him, I regard the principle announced there as not inapt to the case at bar.

The next point argued by counsel for defendant is that the defendant can, without violating the terms of the injunction, sell and license in New Jersey phonographs and phonographic supplies for use in the territory licensed to the complainant. This question is not open for review or further consideration. In the former decision it was held, for reasons there stated, that the defendant had wrongfully invaded the territory of the complainant.

A case of unlawful use of the patents and inventions hereinbefore specified in complainant's territory and a violation of the injunction granted on March 26, 1906, has been made out, and such use of the phonographs and supplies having been intentional the defendant is guilty of contempt.

The record of the trial and of this motion and briefs submitted are tremendously voluminous. The expenses of complainant for printing, etc., and preparations of this motion must have been large. Under the circumstances, the judgment of the court is that the defendant pay a fine of \$2,500, \$1,500 of which shall be paid to the complainant for expenses incurred in the prosecution of this motion, and the remainder to the United States. *Christensen Eng. Co. v. Westinghouse Co.*, 135 Fed. 774, 68 C. C. A. 476.

Attachment may issue accordingly.

KILBOURN et al. v. HIRNER.

(Circuit Court, E. D. Pennsylvania. July 8, 1908.)

No. 25.

EQUITY—PLEADING—CROSS-BILL—PATENTS—SUIT TO OBTAIN PATENT.

In a suit in equity under Rev. St. § 4915 (U. S. Comp. St. 1901, p. 3392), to compel the issuance of a patent, against the patentee who was adjudged priority of invention in interference proceedings, a cross-bill by defendant for infringement of his patent is not germane to the original bill and will not be entertained.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 448.]

In Equity. On motion by defendant for order directing substituted service of cross-bill upon counsel for complainants and motion by complainants to strike off cross-bill.

Hector T. Fenton and Whitaker & Prevost, for complainants.
Henry N. Paul, Jr., and Joseph C. Fraley, for defendant.

J. B. McPHERSON, District Judge. The original bill in this case was filed under section 4915 of the Revised Statutes (U. S. Comp. St. 1901, p. 3392), and seeks to compel the issue of a patent to the complainants after several decisions against them in interference proceedings and upon appeal therefrom. The defendant filed an answer denying the complainants' priority and right to a patent, and upon the same day filed a cross-bill, in which he charged that the complainants were infringing his invention, and asked for the usual decree awarding an injunction and ordering an account. As the original complainants are not residents of this district and have no place of business therein, the defendant moved for substituted service of the cross-bill upon their counsel of record; this motion being met by a counter motion on the part of the complainants to strike off the cross-bill on three grounds: First, because it was prematurely filed; second, because it was filed without leave of the court; and, third, because in substance it is not a cross-bill in respect of any of the matters charged in the original bill.

As it seems to me, it is only necessary to consider the last of these grounds, for I think that the fate of both motions is involved in the answer that should be given to the same question, namely: Is the subject-matter of the cross-bill so germane to the original bill that a proper disposition of the chief controversy can hardly be made until, or unless, the dependent controversy is also decided? To this question I think the answer should be in the negative. The charge of infringement is a new and distinct matter, which (as it seems to me) should be made the subject of an original bill. No doubt, if the situation were reversed, and if this were a suit for infringement brought by the complainants, and the defendant were seeking to file a cross-bill to secure the hearing provided for by section 4915, the defense thus offered would perhaps be legitimate and germane. *Appert v. Brownsville Plate Glass Co.* (C. C.) 144 Fed. 115. But the present action is not such a suit. No material issue is tendered by the original bill, except the issue of prior invention, and it certainly is not necessary, or even convenient, to the settlement of such a controversy, to enter upon a trial in the same proceeding of the additional and contingent question whether the original complainants are infringing the defendant's right, provided it should be ultimately determined that he has any right at all. Of course, he has for the present an apparent right based upon the proceedings in the Patent Office and in the courts of the District of Columbia; but, as long as he is exposed to the statutory attack in the Circuit Court under section 4915, the final result of the litigation may be to overthrow his patent altogether. In that event, his cross-bill would obviously be wholly useless. I think the point raised by the complainants' motion has been decided against the cross-bill in *Stonemetz, etc., Co. v. Brown Folding Machine Co.* (C. C.) 46 Fed. 851; *Fidelity Trust Co. v. Mobile Railway Co.* (C. C.) 53 Fed. 852; *Westinghouse, etc., Co. v. Mustard* (C. C.) 87 Fed. 339; *Stuart v. Hayden,*

72 Fed. 410, 18 C. C. A. 618; and Rickey Land Co. v. Wood, 152 Fed. 23, 81 C. C. A. 218.

As the motion to strike off the cross-bill must prevail, the motion for substituted service goes with the bill and need not be separately considered.

In re JAMES DUNLAP CARPET CO.

(District Court, E. D. Pennsylvania. July 31, 1908.)

No. 2,741.

BANKRUPTCY—PROVABLE DEBTS—CONTINGENT LIABILITY.

A contract liability of a bankrupt, which was contingent at the time the petition was filed, but became definite and capable of liquidation within the year allowed for making proof, is provable against the estate under Bankr. Act July 1, 1898, c. 541, § 63a(4), 30 Stat. 562 (U. S. Comp. St. 1901, p. 3447).

In Bankruptcy. On certificate of referee concerning claim of Peter J. Brady.

John J. Foulkrod, Jr., for trustees.
Edw. E. Mercelis, for claimant.

J. B. McPHERSON, District Judge. The question for determination appears from the following certificate of the referee:

"That on the 30th day of March, 1907, the James Dunlap Carpet Company was adjudicated an involuntary bankrupt, and the matter was referred to the undersigned as the referee in the cause.

"That in the course of the proceedings before him a claim was filed against the estate of said company by Peter J. Brady in the sum of \$1,718.72, founded upon an oral contract.

"That said claim was objected to by the trustees in bankruptcy, who asked that 'formal proof of facts alleged in the said claim be made before said claim shall be allowed.'

"That a hearing was had in the matter of said claim and objection thereto, at which hearing counsel on behalf of trustees and counsel on behalf of said claimant were present. That after consideration of the evidence produced and the argument of counsel, the referee made an order on April 6, 1908, disallowing said claim.

"That within 10 days after the making of said order, to wit, on the 16th day of April, 1908, the said claimant filed a petition praying that said order be certified to your honorable court for review.

"That pursuant to said petition for review the following is respectfully submitted:

"Facts.

"The said Brady resides at No. 180 McDonough street in the borough of Brooklyn, city of New York.

"Upon hearing before the referee it was agreed by counsel that in lieu of taking testimony by commission to New York, the affidavit of the claimant should be evidence of the facts required to be testified to by the claimant in order to liquidate his claim under section 63, subdivision 'b,' of the Bankruptcy Act. Act July 1, 1898, c. 541, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3447).

"The said affidavit sets forth that prior to September, 1905, he (the said claimant) was employed by the above-named bankrupt as a salesman upon a commission. At that time the New York office was in charge of a Mr. McReynolds, who was employed at a salary of \$6,000 a year, and claimant was under his supervision. In September, or early in October, of that year, James

Dunlap, president of the above-named bankrupt company, requested deponent to go to Philadelphia, and in the interview that followed stated to the deponent that the arrangement with Mr. McReynolds was not satisfactory, and would be terminated at the expiration of the year for which he was employed, which would be November 1, 1905. That he then asked deponent if he would take charge of the sales office in New York for the year beginning November 1, 1905. That Dunlap then said that the salary would be \$2,500 per year, payable monthly, and that if the year was prosperous deponent would also be paid a commission, in addition to his salary. That Dunlap said he would not fix the amount of such commission, but that deponent could trust him to do what was right about it. That deponent replied that he would be glad to accept the offer, and Dunlap concluded the interview by remarking: "Then you are engaged for the year." That deponent then entered upon and continued in such employment for the full year for which he was engaged as aforesaid, and in or about the month of October, 1906, before said year expired, he went to Philadelphia and had an interview with James Dunlap in which the results of the year then ending were discussed, and Dunlap then said that the year had not been entirely satisfactory, and he could not afford to pay any commission, but that he would renew the contract for another year on the same terms. That deponent replied that he felt the business could be increased, and that he was satisfied Dunlap would do what was right, and that he (deponent) was willing to continue the arrangement for another year."

The referee rejected the claim on the ground that it was purely contingent, and therefore, at the time of the filing of the petition in bankruptcy, there was no fixed liability absolutely owing, as required by section 63a. With this order I feel obliged to disagree. In my opinion the claim is supported by the decision of the Circuit Court of Appeals of the Third Circuit in *Moch v. Market St. Nat. Bank*, 107 Fed. 897, 47 C. C. A. 49. In that case the claim rested upon the bankrupt's liability as indorser of commercial paper held by the claimant. The paper fell due after the petition in bankruptcy was filed, and thereupon the claim was admitted to proof within the prescribed year. This action of the court below was sustained by the Court of Appeals, although the liability was contingent at the time when the petition was filed; the provability of the claim being put by the Court of Appeals upon clause 4 of section 63. Substantially that appears to be the situation in the case now under consideration. It may be assumed that Brady's claim was contingent when the petition against the carpet company was filed, but, as the claim became definite and capable of liquidation within the year, it appears to fall directly within the ruling in *Moch v. Bank*. It is undeniable that claims may exist of such a character as to be incapable of liquidation, either at any time or within the year prescribed by the statute. Concerning such claims I have nothing to say now. The present decision is confined to a situation where the claim, although originally contingent, becomes capable of liquidation within the prescribed period.

The order of the referee is reversed, and he is directed to receive further testimony, if any shall be offered, in liquidation of the claim.

INTERNATIONAL TEXT BOOK CO. v. INHABITANTS OF CITY OF AUBURN.

(Circuit Court, D. Maine. August 12, 1908.)

No. 611.

INJUNCTION—SUBJECTS OF RELIEF—ENFORCEMENT OF ORDINANCE.

An ordinance providing that "no person shall distribute on the public streets, or from any building, handbills, cards, circulars or papers of any description except newspapers," is within the police powers of a city, and its enforcement cannot be enjoined as an interference with interstate commerce at suit of a complainant engaged in such commerce, which seeks to advertise its business by the distribution of circulars, etc.; no discrimination between persons in such enforcement being charged.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 155.]

In Equity.

See 155 Fed. 986.

D. C. Harrington and Emery G. Wilson, for complainant.

Henry W. Oakes, for respondent.

HALE, District Judge. This cause in equity now comes before the court for final hearing on bill, answer, and proofs. The complainant corporation is a citizen of Pennsylvania. It is located at Scranton in that state, and is engaged in furnishing instruction to persons by correspondence and by transmission through the mails of books, pamphlets, and other means of instruction, both written and printed. It claims that such furnishing of instruction and such transmission through the mails constitute commerce, and that this method of instruction and transmission to persons outside of the state of Pennsylvania constitutes interstate commerce. The bill complains of the following ordinance of the city of Auburn, Me.:

"No person shall distribute on the public streets or from any building handbills, cards, circulars or papers of any description except newspapers."

It also complains of another section of the same ordinance, which provides that:

"Any person who shall violate any of the provisions of this ordinance to which a particular penalty is not attached, shall be liable to a fine or penalty not exceeding twenty dollars for each offence."

The bill charges:

"That the complainant's delivery of merchandise and books, and the giving of instruction by correspondence to students in the city of Auburn, Me., as heretofore stated, is interstate commerce, and the above defendant has no authority to regulate the same or impose said penalty fee upon complainant, its agents, representatives, employes, or servants, as a condition for the carrying on thereof of its business in soliciting persons to take courses of instruction or distributing circular matter, and, so far as it purports to interfere with complainant, is unconstitutional and void, and that said ordinance is in violation of article 1, § 8, cl. 3, of the Constitution of the United States, which provides that Congress alone shall have the power to 'regulate commerce with foreign nations, and among the several states, and with the Indian tribes.'"

It seems quite clear that, so far as the complainant's business is teaching alone, it is not commerce. Whether or not teaching, accompanied by the transmission of the written and printed matter which the complainant is accustomed to send, can be held to be commerce is not beyond question. Some of the Circuit Courts of the United States have held that the business of this corporation, consisting of the delivery of merchandise and books and the giving of instruction by correspondence to persons outside Pennsylvania, constitutes interstate commerce. On the other hand, in the recent case of *International Text Book Company v. Lynch* (Vt.) 69 Atl. 543, the Supreme Court of Vermont has taken the opposite view, and has said that:

"The transportation of letters and printed matter of all kinds is regulated by the postal laws of the country, and not by the laws of interstate commerce."

I am informed that the Vermont case has been carried by writ of error to the Supreme Court of the United States.

It is not, however, necessary for this court to decide whether the complainant's delivery of books and papers and giving instruction by correspondence to students of the city of Auburn constitute interstate commerce, within the meaning of the federal Constitution. Even if the courts should hold that such acts constitute interstate commerce, still, in my opinion, complainant is not entitled to an injunction. The proofs fail to show that, in enforcing the ordinance in question, the agents of the respondent city imposed any unreasonable or troublesome conditions upon the complainant corporation, or that they discriminated against nonresidents, or that they sought to invade any power which has been confided to Congress exclusively by the federal Constitution. The ordinance itself seems to me to be within the police power of a city. A commercial corporation is undoubtedly entitled, as one of its instrumentalities, to advertise and to solicit business in any orderly and reasonable way; but the federal courts cannot be invoked to lend their processes to enforce every kind of advertising and solicitation that can suggest itself to any person or corporation engaged in commerce. It is only proper and orderly advertising and solicitation that can be protected. This ordinance does not prevent the proper and orderly solicitation of business by means of handbills distributed to, or brought to the attention of, people at their places of business, or when engaged in business pursuits. It seeks to prevent the obstruction of the streets of a city by the solicitation of persons while traveling. It seeks to protect citizens from inconvenience and annoyance. It seeks to prevent interference with the good order of the highways and avenues of a city. It seeks to prevent them from being covered with scattered paper, and from being used as places of business, in a manner tending to interfere with the rights, comfort, and convenience of the public. It is unnecessary to cite the line of cases in which the Supreme Court has held that a city has, within its police powers, the right to make regulations promotive of domestic order. In my opinion, the ordinance in question belongs to this class of municipal legislation, is a regulation within the police powers of

a city, and is not an interference with the reasonable conduct of the complainant's business.

The decree must be that the bill be dismissed, with costs to the respondent.

In re GEORGE W. SHIEBLER & CO.

(District Court, E. D. New York. April 14, 1908.)

1. BANKRUPTCY—PAYMENTS BY BANKRUPT TO ATTORNEY—PROCEEDINGS TO TEST VALIDITY.

Proceedings to test the propriety of payments made by a bankrupt to his attorney for services previously rendered, as well as those to be rendered, in the bankruptcy proceeding itself, should be taken by motion to fix the allowance and for an order requiring the return of any amount considered to have been excessive.

2. SAME—PREFERENCE.

A payment made by a bankrupt to his attorney immediately prior to the bankruptcy for services previously rendered, so far as the question of its being preferential is concerned, stands upon the same ground as a payment to any other creditor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 267.]

In Bankruptcy.

Lewis Squires, for trustee.

Henry P. Ketcham, for respondent.

CHATFIELD, District Judge. The present motion is an application on the part of a trustee to compel repayment into the bankrupt estate of the sum of \$600, which amount was paid to the attorney who prepared and filed the petition and schedules in voluntary bankruptcy. This money was paid prior to the filing of the petition, and included the amount charged for services rendered through a considerable period prior to the filing of the petition. In these services the attorney for the bankrupt was endeavoring to effect a settlement of the bankrupt's affairs, looking up the condition of his estate, advising him with reference to litigation, and, in general, acting as personal counsel under circumstances which ultimately showed the necessity on the part of the client of going through bankruptcy. The moving papers show that the services charged for were apparently actually rendered, and it is not disputed that the amount charged, namely, \$600, was not an unreasonable fee for such services. The trustee, however, claims that, aside from what could properly be approved as disbursements and as a reasonable allowance, under section 64b (3) of the act of July 1, 1898 (chapter 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447]), "for the professional services actually rendered, * * * to the bankrupt in voluntary cases, as the court may allow," the payment was in the nature of a preference, and should be repaid to the estate.

The trustee takes the position that, under the provisions of sections 67e and 60b, the trustee might even bring an action for the repayment of the entire \$600, leaving the attorney to a subsequent allowance at the hands of the court. But it is considered that the provi-

sions of section 60d, although aimed at the recovery of undue payments for "services to be rendered," are analogous in so far as they give this court an opportunity to determine what allowance shall be made under the provisions of section 64b (3), above quoted. Hence proceedings to test the propriety of payments to an attorney for all services, namely, those rendered before the payment as well as those services to be rendered in the bankruptcy proceeding itself, should be taken in the form of a motion to fix the allowance, and for an order directing the return of the balance, unless an issue is raised.

As has been said before, the attorney receiving the payment undoubtedly had a claim against the bankrupt's estate, and would have had an attorney's lien upon any papers or the proceeds of any litigation which might have been in his possession; but the affidavits here show that the payment of \$600 was for services rendered and to be rendered, and it nowhere appears that any property was in the hands of the attorney to which a lien might attach.

It therefore appears to the court that the payment beyond the amount of a reasonable allowance may have been to that extent preferential, and must be treated as a payment to any other creditor. Under the provisions of section 57g, the claim of a creditor who has received a preference, void or voidable, cannot be allowed until the property preferentially paid has been surrendered, and in the present instance this would make it necessary to direct the attorney to repay to the trustee the amount by which the sum of \$600 exceeds the allowance to him for services and disbursements in connection with the bankruptcy proceeding, if the payment proves to have been preferential.

The payments do not seem to have been made from time to time as services were rendered, and hence cannot be considered as having been made for value received at the time of payment, but were in settlement of a running account, and the attorney is thus in the same position as any other creditor whose claim had been paid within four months and during insolvency.

The question of the amount of the allowance for fees and disbursements in the proceeding, and the determination of any issue, will be referred to the referee as special commissioner, to hear and report thereon.

THE CRETAN.

(District Court, D. Maryland. May 26, 1908.)

COLLISION—SCOW LYING IN SHIP CHANNEL AT NIGHT—INSUFFICIENT LIGHTS.

A steamship, proceeding cautiously through a channel at night past an anchored dredge at a speed only sufficient to give her steerage way, held not in fault for a collision with a loaded scow, 125 feet long, which had been cast off by the dredge and had drifted so as to extend into the channel in front of it for 145 to 165 feet, with no one on board and a light only on the end next the dredge, which was not readily distinguishable from other lights on and near the dredge.

In Admiralty. Suit for collision.

Arthur D. Foster, for libellant.

Daniel H. Hayne, for respondent.

MORRIS, District Judge (orally). On a dark night the loaded scow was turned loose from the dredge and shot out to the southeastward. The flood tide carried the scow up into the channel and off the easternmost side of the dredge, so that there was a space between the nearest point of the scow to the nearest part of the dredge of from 20 to 40 feet. The scow was 125 feet long, so that the easternmost corner of the scow projected into the channel from 145 feet to 165 feet. The light on the scow, if there was a light, was on the end nearest to the dredge, and there was no light upon the end which projected out into the channel. The light, if it was there, was placed where it could not be readily seen from the approaching steamer, for the reason that there were numerous lights on the dredge, and there were 12 stake lights in the water running out from the easternmost end of the dredge. There was no one on the drifting scow. She had only 2 feet freeboard and her upper surface was wet mud, so that she was hardly distinguishable in the darkness of the night from the water itself.

I am satisfied that the Cretan was proceeding very slowly, and at the time of the collision her engines had been stopped for eight or ten minutes, from a point about a quarter of a mile from the dredge, in order that she might pass the dredge at a very slow rate of speed. I find that the Cretan was on her proper side of the channel, and was not navigating imprudently close to the dredge. Considering that the steamer was approaching, if it was necessary for those in charge of the dredge to let the scow drift into the channel as she did, the least precaution that they should have taken would have been to have had a man on the scow with a light to wave to the approaching steamer, and the dredge should have sounded danger signals with her whistle.

Everything connected with the navigation of the Cretan indicates great caution on her part, and the slowest speed consistent with steerage way. I am satisfied that the collision was occasioned by the fact that the scow was allowed to drift out into the channel without any one on board, and without any light on the end which extended into the channel. The only thing the Cretan could have done, which she did not do, was to have reversed her engines; but, as she had a right-hand screw, to have reversed would have turned her bow towards the scow. The master's judgment was that his best chance to clear the scow was not to reverse, but to starboard his helm, and I think this, under all the circumstances, was a prudent maneuver and was nearly successful. That those on the Cretan did not see the scow until about 50 feet from her is not, under all the circumstances, to be attributed to the steamship as a fault.

I do not find any fault on the part of the steamship Cretan, and the libel must be dismissed.

In re HAMMOND et al.

(District Court, E. D. New York. May 29, 1908.)

BANKRUPTCY—INVOLUNTARY PROCEEDINGS—ACTS OF BANKRUPTCY.

A petition in involuntary bankruptcy *held* demurrable for failure to allege facts essential to constitute acts of bankruptcy, but with leave to the petitioning creditors to amend.

In Bankruptcy. Involuntary proceedings. On demurrer to petition. Henry M. Brigham, for petitioning creditors. Altkrug & Kahn, for alleged bankrupts.

CHATFIELD, District Judge. Several demurrers to the petition in bankruptcy have been interposed. The first objection urged under the demurrer is that the bankrupts are alleged in the petition to have executed a bill of sale of their premises for a nominal consideration within four months of the bankruptcy, and that at the time of filing the petition the bankrupts were insolvent. Any allegation of insolvency at the time of making the bill of sale was omitted. Under section 3 of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422]) such an allegation was necessary.

The next ground of objection is that the petition states that judgments were suffered to be entered against the bankrupts, but does not state that they were not vacated within five days before a sale or final disposition.

The third ground of objection is that preferential payments are alleged to have been made, but no particular payments are recited, and no allegation is made that any transfer of property referred to was with intent to prefer the creditors to whom the property was transferred.

Each of these grounds of demurrer is good in the sense that the objection is as to a jurisdictional fact which must be established in order to keep the estate in bankruptcy, but, inasmuch as other creditors' rights have accrued, and inasmuch as the petition was dated upon the 9th day of April, whereas the transfer in question was made upon the 4th of April, in order to secure a past indebtedness, and as the petition contains the general statement that preferential payments have been made to creditors while the alleged bankrupts were insolvent, this would seem to be a proper case for amendment of the petition rather than for absolute dismissal.

The demurrer will be sustained on all three grounds, with leave to the petitioning creditors within five days to file an amended petition showing specifically the acts upon which bankruptcy is claimed and the conditions under which said acts were committed.

In re SELIGMAN.

(District Court, E. D. New York. June 11, 1908.)

BANKRUPTCY—COMPOSITION—GROUNDS FOR REFUSING TO CONFIRM.

The fact alone that a bankrupt, in a statement made a year before his bankruptcy to a creditor, overstated his assets, the statement not being shown to have been materially false or made for the purpose of obtaining credit, is not sufficient to justify the court in refusing to confirm a composition which appears to be for the best interests of the creditors and to which all except one have consented.

In Bankruptcy. On motion to confirm composition.

Joseph L. Young, for bankrupt.

Charles M. Russell, for objecting creditor.

CHATFIELD, District Judge. The bankrupt has applied for leave to carry out a composition, and reference has been had, upon notice to creditors, for an examination of the bankrupt after his schedules were filed, in accordance with section 12 of the bankruptcy law. Act July 1, 1898, c. 541, 30 Stat. 549 (U. S. Comp. St. 1901, p. 3426). Upon the hearing of the application for the confirmation, one creditor, representing about 10 per cent. of the liabilities of the bankrupt, has opposed the confirmation, upon the ground that the bankrupt had, some 12 months ago, stated in writing to the objecting creditor that his stock of goods then on hand represented a cost price of \$14,000. The objecting creditor had previously consented to the composition, but because of additional information represented to the court that the bankrupt, if the proceedings were carried on, would not be entitled to a discharge, and that therefore the court should take the matter under consideration, and give time for further examination of the books of the bankrupt. Upon this objection an examination of the bankrupt has been had, and his testimony is to the effect that none of the goods included in his stock one year ago have been sold or removed, and that he has accounted for everything except what has been sold in the ordinary course of business. An accountant has also made a personal examination of the books in the possession of the receiver, and has reported that a trial balance, as of June 30, 1907, would show an increase of liabilities and reduction of assets, making a difference of \$8,000, from the statement made by the bankrupt at that time to the objecting creditor. The condition of the estate indicates that probably not more than 30 per cent. could be realized if no further expenses were involved, and the bankrupt has deposited funds sufficient to cover a payment of 25 per cent. net.

The law provides (section 12, subd. "d") that a composition shall be confirmed if the judge is satisfied that: (1) It is for the best interests of the creditors; (2) the bankrupt has not been guilty of any acts or failed to perform any duties, to the extent of causing a bar to his discharge; and (3) the offer and its acceptance are in good faith and have not been made or procured by acts or promises forbidden by the statute.

There would seem to be no question under the first and third grounds. Nothing has been shown by which it could be considered, in the face of the consents by all of the creditors, that their interests would be advanced by a refusal of the composition, nor has anything been shown to impugn the good faith of the composition offered.

As to the second ground, it does not seem that the statement of the assets, made a year ago, is so plainly a sufficient objection to the discharge of the bankrupt that the composition should be refused upon that ground. In order to have a statement sustained as an objection to a discharge, it must be shown to have been materially false, and to have been made for the purpose of obtaining credit, and upon all the circumstances here, and also in view of the fact that the objecting creditor has once consented to the composition, it would seem as if the bankrupt were entitled to have this question decided in his favor.

Inasmuch therefore as further investigation of the objection would not seem to benefit the estate, it will be overruled, and the composition approved.

An exception to the ruling will be allowed to the objecting creditor.

ZULKOWSKI v. AMERICAN MFG. CO.

(Circuit Court, E. D. New York. May 11, 1908.)

PLEADING—BILL OF PARTICULARS—ACTION BY SERVANT FOR PERSONAL INJURIES.

Where the complaint, in an action by a servant against the master to recover for personal injuries, contains only general allegations of negligence in permitting the machine on which plaintiff was working to become and remain out of repair and in failing to give proper instructions and make proper rules for plaintiff's protection, the defendant is entitled, on seasonable motion therefor, to a bill of particulars.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 956.]

At Law. On motion by defendant for bill of particulars.

Charles Dushkind, for plaintiff.

Thomas F. Magner, for defendant.

CHATFIELD, District Judge. This case has been at issue for over three years. Upon service of process the case was immediately removed into the United States court, but was not noticed for trial or placed upon the calendar of this court until March, 1908. The complaint alleges injury to the plaintiff while working upon a machine belonging to the defendant, and sets up negligence because of (1) fault on the part of the defendant, in that the machine was out of order; (2) that through defects and improper care and supervision the machine started without warning; and (3) that the defendant did not give proper instructions and promulgate proper rules, so as to protect the plaintiff while working upon the machine. The defendant's answer denies the allegations of negligence, and affirmatively alleges contributory negligence and assumption of risk on the part of the plaintiff. The defendant now asks for a bill of particulars as to the defects in the machine, and as to the notice of the defendant with reference

thereto, and in what way the machine was not kept in repair by the neglect of the defendant, as well as what rules and regulations the defendant neglected to give and enforce. Following the allegations of the complaint, the motion for a bill of particulars demands information as to a number of phases of these questions, but all of these demands bear upon the general propositions above stated.

While the defendant may be assumed to have known the basis of the alleged cause of action, in that an answer was filed denying these allegations, nevertheless it is apparent from the pleadings that the defendant could not ascertain from the complaint the essential allegations of fact upon which the plaintiff intended to base the conclusions set forth in his complaint.

Inasmuch as the defendant, as has been said, does not seem to be guilty of laches in not making this motion during the time in which the plaintiff has taken no action, and inasmuch as it would seem that the defendant needs particulars as to the matters specified in its demand, before it can prepare for trial, the motion will be granted, and the plaintiff directed to furnish a bill of particulars within 10 days after the entry of an order.

In re VOGT.

(District Court, E. D. New York. March 23, 1908.)

BANKRUPTCY—BANKRUPTCY COURT—JURISDICTION.

Where the holders of chattel mortgages on a bankrupt's property made no claim for the enforcement of the mortgages as such at the time of the sale of the property under an order directing that the liens, if any, should be transferred to the proceeds, all the parties having consented to the jurisdiction of the bankruptcy court, all claims with reference to the fund should be determined therein, if possible, and the trustee should not be permitted to litigate such questions in the state court, unless he showed good reason therefor.

2. SAME—RIGHTS TO FUND—DETERMINATION.

Where property of a bankrupt subject to the lien of certain mortgages was sold under an order transferring the lien to the proceeds, whether the creditors were estopped to raise any question or make any claim, except that litigated in a prior suit in a state court, could not be determined in the bankruptcy proceedings until the trustee or the creditors had elected what course they would pursue, and had petitioned the referee to proceed with the administration of the estate.

Application by the trustee of Jacob Vogt, a bankrupt, for an order requiring a referee to pay over certain money to the trustee. Denied. See 159 Fed. 317.

Roger Foster, for the Franks.
Francis B. Mullin, for trustee.

CHATFIELD, District Judge. This application is in certain ways a renewal of a former motion, but some additional considerations come up which should be referred to.

The order directing a sale of the property held under chattel mortgage, which has been set aside, directed the receiver to hold the pro-

ceeds as a special fund to await the further order of this court upon due notice to all creditors who had appeared or might thereafter appear, and that the lien of the chattel mortgage (which has since been declared invalid) should be transferred to that fund. The present situation finds this fund a part of the estate, still in the hands of the receiver, and subject to whatever order this court may make. It is impossible to determine whether the Franks have lost the right to appear as general creditors and prove any claim until they shall have applied to do so, or until the case is taken up before the present referee and determination is made by him as to the allowance or disallowance of what claims may be presented, or until he refuses to allow the proof of claims, if the time for so doing has expired. The two prior chattel mortgages may be invalid as mortgages, but that cannot be determined on this motion, as has been said before. It is apparent that the Franks consented to come into bankruptcy, and made no claim for the enforcement of the two first chattel mortgages, as mortgages, at the time of the sale. Whether they have been estopped by so doing is another question that should not be determined on the present motion. The court is of the opinion that, inasmuch as all of the parties have consented to the jurisdiction of the bankruptcy court, these questions must be determined in this court, unless the trustee shows some sufficient reason for going into the state court, if he has any cause of action therein. It is also apparent that this court should compel the parties to litigate their differences in the bankruptcy proceedings if possible, the creditors, as has been said before, having given up possession, consented to the sale free from liens, and agreed to the deposit of the proceeds under the orders of the United States court. To go further, however, and to say that these creditors have been estopped from raising any question or from making any claim, except the particular claim which was litigated in the suit in the state courts, is a proposition that was not decided by Judge Thomas in making the former order, and, as this court has repeatedly said, cannot be determined until the trustee or the creditors have elected what course they will pursue, and have asked the referee to proceed with the administration of the estate.

If the trustee claims that the Franks have lost all rights as creditors in any form, he should proceed with the administration of the estate. If he desires to contest the validity of any claim which they have or now make, he should attack that claim directly. If the Franks have any claim, they should proceed to establish it before the referee, and the administration of the estate should be set in motion.

The present application to determine the rights of the various parties must be denied.

HENKEL v. SEIDER et al.

(District Court, E. D. New York. June 27, 1908.)

BANKRUPTCY—CONVEYANCES WITH INTENT TO DEFRAUD.

Conveyances of property made by bankrupts to their wives, respectively, within four months prior to their bankruptcy, *held* to have been made without present consideration, in contemplation of insolvency, and with intent to hinder, delay, and defraud their creditors, and to be voidable under Bankr. Act July 1, 1898, c. 541, § 67e, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3449).

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 274.]

In Equity. Suit by trustee in bankruptcy.

Leon Lauterstein, for plaintiff.

Morris H. Hayman, for defendants.

CHATFIELD, District Judge. The trustee in bankruptcy has brought suit in this court to set aside two conveyances, made by the bankrupts about one month prior to the filing of the petition in bankruptcy, and has alleged that these conveyances were made with intent to hinder and defraud the creditors of the bankrupts, and made at a time when they were insolvent. Issue was joined both on the question of insolvency and on the question of intent. Testimony has been taken, and the case submitted on the testimony for decision by this court. The relief asked was a decree directing the reconveyance of the property transferred.

There would seem to be no question upon the evidence that the bankrupts gave the deeds in question, with the idea of securing to their wives the two houses covered by the deeds, so that title to these houses would not be vested in the bankrupts if trouble with creditors should ensue. The condition of the bankrupts at the time of making the deeds was such that, even if they were justified in considering themselves not insolvent, nevertheless the pressure upon them was so strong that it is an irresistible conclusion that they were contemplating insolvency, and making conveyances of real estate accordingly. This is sufficient to bring the transaction within the provisions of subdivision 1 of section 3 of the statute of July 1, 1898, defining acts of bankruptcy, and also section 67e (Act July 1, 1898, c. 541, 30 Stat. 546, 565 [U. S. Comp. St. 1901, pp. 3422, 3449]).

Inasmuch as it seems to the court that the conveyances were not for a present consideration, and as they were made within four months prior to the filing of the petition, judgment must be granted for the trustee.

PAULHAMUS v. SECURITY LIFE & ANNUITY CO.

(Circuit Court, M. D. Pennsylvania. July 16, 1908.)

No. 81, January Term, 1907.

1. INSURANCE—LIFE INSURANCE POLICY—CONSTRUCTION—WHAT LAW GOVERNS.

Where a life insurance policy sued on was a Pennsylvania contract, plaintiff's right to recover thereon in the federal courts sitting in Pennsylvania will be governed by the law of that state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 173-175.]

2. SAME—MISREPRESENTATIONS ACT PA. JUNE 23, 1885 (P. L. 134).

Act Pa. June 23, 1885, § 1 (P. L. 134), provides that, whenever the application for a life insurance policy contains a clause of warranty of the truth of the answers therein contained, no misrepresentation or untrue statements in such application, made in good faith by the applicant, shall effect a forfeiture or be a ground of defense in a suit on any policy issued on faith of such application, unless the misrepresentation relate to some matter material to the risk. *Held*, that a misstatement of fact warranted to be true, which is material, will avoid the policy, regardless of the ignorance or good faith of the warrantor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 568.]

3. SAME—DISCLOSURE OF DISEASE—NOTICE.

Where insured stated that he had been operated on for undescended testicle, and gave the names of the physicians who attended him, by which the exact nature of his trouble could have been ascertained, his statement was sufficient to put the insurance company on inquiry; it not being expected that the answers in the application should be more than general.

4. SAME—APPLICATION—ATTACHMENT TO POLICY.

Act Pa. May 11, 1881, § 1 (P. L. 20), requires insurance companies to attach to policies correct copies of the application as signed by the applicant, where the application is made a part of the policy, and declares that, unless so attached, no such application shall be received in evidence in any controversy between the parties to or interested in the policy, nor is the application to be considered a part of the policy or contract. *Held*, that where the terms of a policy sued on made the statements in the application and those made by the insured to the company's medical examiner warranties and a part of the contract, both, though on separate sheets, were nevertheless a part of the application, so that the statements so made to the medical examiner, not having been attached to the policy, could not be availed of by the insurer to show a breach of warranty.

5. TRIAL—MOTION FOR JUDGMENT—SPECIAL VERDICT—EFFECT OF EVIDENCE.

Where, in an action on a life insurance policy, the case was before the court on a motion for judgment on a special verdict, the only material question concerning the report of insurer's medical examiner, on which the policy was issued, was as to the legal effect to be given thereto under the facts reported; it being immaterial as to how it was introduced in evidence.

6. INSURANCE—ACTION ON POLICY—DIRECTED VERDICT.

Where, in an action on a life insurance policy which was a Pennsylvania contract, defendant's entire defense rested on alleged breaches of warranty contained in the medical examiner's report, which was not attached to the policy, and was therefore unavailable to defendant under the express provisions of Act Pa. May 11, 1881, § 1 (P. L. 20), plaintiff was entitled to a directed verdict on proving the policy, proofs of death, and nonpayment.

At Law. Action on a policy of life insurance.

At the trial the court submitted certain questions, which were answered by the jury as follows:

(1) When C. E. Paulhamus, in applying for the policy of insurance in suit, stated that his former occupation had been that of a painter and paper hanger, and that his present occupation was that of real estate and insurance, no other statement being made as to any other present occupation—

(a) Was that a full, complete, and true answer? Answer: Yes.

(b) Was it material to the risk that he should answer truthfully as to such occupation? Answer: No.

(c) Did he answer as he did in good faith? Answer: Yes.

(2) Was the undescended testicle, for which C. E. Paulhamus was operated upon in November, 1899, in a cancerous condition? Answer: No.

(3) The said C. E. Paulhamus, in reply to the question: "Have you ever had any serious illness or disease, except diseases incident to childhood? If so, give particulars"—having answered, "Yes, operation five years ago for hernia," and also to the questions put by the company's medical examiner: "How long since were you attended by a physician or professionally consulted one? For what disease? Give full particulars as to date, duration, severity, etc., of each disease you have had. Give the name and residence of attending physician"—having answered: "(A) Five years. (B) Surgical case. Operation for undescended testicle. (C) Dr. G. D. Nutt, Williamsport, Pa. (D) Dr. J. W. Van Horn, Montoursville, Pa."—

(a) Did he, in so answering, make full, complete, and true answers with regard thereto? Answer: Yes.

(b) Were the answers that he so gave full, complete, and true, so far as he had information or knowledge? Answer: Yes.

(c) Did he answer in good faith? Answer: Yes.

(d) Was it material to the risk that he should answer truthfully in the premises? Answer: Yes.

(4) When C. E. Paulhamus, in applying for the insurance policy in suit, in reply to the question put by the company's medical examiner: "Have you hernia, or have you ever been ruptured? If so, do you now wear a suitable truss?"—answered, "No"—

(a) Was this true? Answer: No. (b) Did he so answer in good faith? Answer: Yes. (c) Was this a matter material to the risk? Answer: Yes.

(5) When C. E. Paulhamus, in applying for the insurance policy in suit, in reply to the questions put by the company's medical examiner: "Have you ever had cancer, or any tumor, enlarged glands, or abscesses," answered "None"—

(a) Was that a true answer? Answer: No.

(b) Did he so answer in good faith? Answer: Yes.

(c) Was it something material to the risk? Answer: Yes.

(6) When C. E. Paulhamus, in applying for the insurance policy in suit, in reply to the question put by the company's medical examiner: "Have you had any illness, disease, or injury, other than as stated by you above? If so, state full particulars"—made answer, "None, except mild diseases of childhood"—

(a) Was that true? Answer: No.

(b) Did he answer in good faith? Answer: Yes.

(c) Was that a matter material to the risk? Answer: Yes.

(7) When C. E. Paulhamus, in applying for the insurance policy in suit, in reply to the question put by the company's medical examiner: "Have you, or any of your family or relatives, ever been under treatment at any hospital, asylum, cure, or sanitarium?"—answered, "No"—

(a) Was that true? Answer: No.

(b) Did he so answer in good faith? Answer: Yes.

(c) Was that a matter material to the risk? Answer: Yes.

The jury thereupon, at the suggestion of the court, returned the following special verdict:

We, the jurors impaneled in this case, do find the following to be the facts, and make return thereof, and of the answers which we have made to certain questions submitted by the court, which together herewith are to constitute a special verdict:

(1) The plaintiff, Harriet C. Paulhamus, is the widow of Cameron E. Paulhamus, deceased, and the beneficiary named in a policy of insurance taken out by the said C. E. Paulhamus in the Security Life & Annuity Company of America, defendant, on December 16, 1905, for the sum of \$3,000, a copy of which is attached to the plaintiff's statement and made a part hereof.

(2) There was duly paid to the said company by the said C. E. Paulhamus the sum of \$92.31 on account of the first premium due on said policy, which, with the 25 per cent. advanced by the company at his request under the provisions of the policy, paid the first premium due thereon in full.

(3) The said C. E. Paulhamus departed this life August 24, 1906, within the first year after the date of said policy, as the result of a surgical operation for a tumor, from loss of blood or shock. Due notice of the loss was given to the said company, and proofs of death were made in accordance with the requirements of the policy, which proofs were received by the company September 5, 1906.

(4) Indorsed on the back of the said policy is the following:

"Application.

"I hereby apply to the Security Life & Annuity Company of America for a policy of \$3,000 on my life, upon the 20 Pay A. D. plan. Amt. annual premium, \$123.06.

"1.—My full name is *Cameron Elise Paulhamus*, and I reside at No. *West Broad St.*, in the city of *Montoursville*, county of *Lycoming*, state of *Pennsylvania*.

"2.—My former residence was *Williamsport, Pa.* My former occupation has been *Painter & Paper hanger*. My present occupation or business is (state specifically the kind of business) *Real Estate & Ins.* My other occupations are _____.

"3.—My place of business is *W. Broad St.*, and my P. O. address is *Montoursville, Pa.*

"4.—I was born on the *21st* day of *July*, 1869, in *Montoursville, Pa.*; age (nearest birthday) *36*.

"5.—The full name of the beneficiary to whom the insurance is to be payable is *Harriet Champion Paulhamus*, residing in *Montoursville, Pa.*

"6.—The relationship of the beneficiary to me (the person proposed for insurance) is *wife*.

"7.—The age of the beneficiary (nearest birthday) is *34*.

"8.—The insurable interest, if other than a relative, is _____.

"9.—The premium on this contract is to be \$123.06, payable *annually* in advance; and the policy is to be issued on the advance dividend plan, under which the company agrees to advance for me, against the policy contract, 25% of each premium during the advance dividend period of *twenty* years, which advances are to bear interest at 3½% annually compounded, until paid by the application of dividends or otherwise. The contract is to contain a guarantee to cancel these advances and interest in the event of my death during the advance dividend period.

"10.—I am now insured for \$_____ in the following companies or associations, to wit: _____.

"11.—Have you ever (a) been declined or postponed by any life insurance company, or received a policy different in form from the one originally applied for; or (b) been intemperate; or (c) had any serious illness or disease, except diseases incident to childhood? If so, give particulars. (d) Is there any history of insanity or consumption in your family, i. e., among parents, broth-

ers or sisters, uncles or aunts? If so, give particulars. (a) No. (b) No. (c) Yes. Operation 5 years ago for hernia. (d) No.

"I have paid \$92.31 to the undersigned soliciting agent, and have been furnished with his receipt for the same to make the insurance herein applied for binding from the date of approval by the company's medical director.

"I hereby agree that, if I have made an error in the statement of my age as given above, the company may adjust the insurance so as to conform to my true age, either by an increase in premium or proportionate reduction in the amount of insurance.

"I hereby agree that, if any premiums on said insurance be not duly paid, all previous payments shall be forfeited, except as provided in the company's contract.

"I hereby agree that, in case the premiums are not paid annually in advance, the unpaid portion of each annual premium shall be a lien on the contract and on any renewal thereof.

"I hereby agree that active service in the army or navy in time of war shall invalidate the insurance, unless a permit for such service shall have been applied for and granted by the company, and the extra premium paid on notifications; and it is agreed that at any time within one year after the date of the issue of the contract travel and residence in the torrid zone, and engagements in any of the following occupations or employments: Handling electric wires or dynamos, blasting, mining, submarine labor, aeronautic ascensions, the manufacture, handling, or transportation of inflammable or explosive substances, or services in any switching or coupling of cars—will render the contract, and any and all renewals thereof, void; and that self-destruction, sane or insane, and death in consequence of violation of law, within the above period, are not risks assumed by the company under this contract.

"I further agree that in any distribution of surplus the principles and methods which may then be in use by the company for such distribution, and its determination of the amount equitably accruing to this contract, shall be and are hereby ratified and accepted by and for every person who shall have or claim any interest in this contract.

"It is hereby agreed that all the foregoing statements and answers, and also those I make to the company's medical examiner, are warranted to be full, complete, and true, and are offered to the company as a consideration for the contract, which shall not take effect until this application has been accepted by the company, at the executive office in Philadelphia, Pa., and the first premium shall have been paid to and accepted by the company, or an authorized agent, during the life and good health of the person herein proposed for insurance. It is also hereby agreed that all claims of every kind against the company, and all liability of the insured, shall terminate whenever this contract ceases to be in force, except as otherwise expressly stipulated in the contract. I have read a sample blank form of the contract applied for, to be issued on the above-named plan, and I hereby accept the conditions of the same, and I agree that no statements, promises, or information made or given by the person soliciting or taking this application shall be binding on the company, unless such statements, promises, or information be reduced to writing, and presented to, and approved by, the officers of the company at the executive office. The agreements made in this application and contract applied for, taken together, shall constitute the entire contract between the parties hereto.

"I hereby waive my privilege to have my physician refuse to answer questions respecting my health.

"Dated at Montoursville this 11th day of December, 1905.

"Cameron Else Paulhamus, Applicant."

This is a true copy of the paper signed by the insured, except that at the foot of said paper appears the following: "Witness: E. T. Morrison"—and on the side: "To be examined by Dr. W. B. Konkle. Address: Montoursville, Pa."

(5) The said C. E. Paulhamus was examined on behalf of said company, before the said policy was issued, by Dr. W. B. Konkle, and on a separate paper made answer in writing to the questions put to him by Dr. Konkle, which paper he also signed, a copy of which, and the report of Dr. Konkle as the company's medical examiner, are as follows:

**REPORT OF EXAMINING PHYSICIAN.
SECURITY LIFE AND ANNUITY COMPANY OF AMERICA.**

Name of Applicant, Cameron Elise Paulhamus. Residence, Montoursville, Pa. Occupation (be specific), Real Est. & Ins. Date of birth? July 21, 1869.

1. A. Are you now in good health? B. Have you been successfully vaccinated? } A. Yes. B. Yes.
2. A. How long since were you attended by a physician or professionally consulted one? } A. 5 years. B. Surgical case. Operation for undescended testicle.
 B. For what disease? Give full particulars as to date, duration, severity, etc., of each disease you have had.
 C. Give the name and residence of attending physician. } C. Dr. G. D. Nutt, Williamsport, Pa.
 D. Give the name and residence of your medical adviser, or family physician, to whom you now refer for a certificate if deemed necessary. } D. Dr. J. W. Van Horn, Montoursville, Pa.
 E. Has any medical examiner given an unfavorable opinion of your physical condition with reference to life insurance or otherwise? } E. No.
3. A. Have you hernia, or have you ever been ruptured? B. If so, do you now wear a suitable truss? C. Do you agree to wear one while insured? } Examiner will note, under Remarks, if Truss is satisfactory.
 A. No. B. C.
4. A. Do you use intoxicating liquors? If so, to what extent (average per day)? } A. No—none.
 B. Have you always been temperate in their use? (If not, explain the duration and extent of excess, and when last.) } B. Yes.
 C. Are you engaged in any way in the sale or manufacture of liquors? } C. No.
 D. Do you use tobacco? If so, in what form and to what extent? } D. Moderately.
5. A. Have you ever or do you now use opium, or its derivatives, chloral, cocaine, or any narcotic, unless regularly prescribed by a physician? (If so, explain fully.) } A. No.
6. A. Have you had insanity, apoplexy, palsy, vertigo, convulsions, sunstroke, congestion, inflammation, repeated or severe headaches, or any other disorder of the brain, or nervous system? } A. None.
 B. Have you had asthma, consumption, spitting of blood, habitual cough, expectoration, palpitation, or any disease of the throat, heart or lungs? } B. None.
 C. Have you ever had cancer or any tumor, enlarged glands or abscesses, chronic diarrhoea, discharge from the ear, dropsy, fistula, gall-stones, gravel, appendicitis or disease of stomach, or intestines, open sores, inflammatory rheumatism, gout, syphilis or stricture, or any disease of the liver, kidneys or bladder? } C. None.
 (Note.—Answers as to syphilis, stricture, etc., may be given to the physicians in confidence.)
 D. Have you any defect in hearing or eyesight, any malformation or varicose veins? } D. None.
7. Have you had any illness, disease or injury other than as stated by you above? (If so, state full particulars.) None, except mild diseases of childhood.
8. Have you, or any of your family or relatives, ever been under treatment at any hospital, asylum, cure, or sanitarium? No.
9. Family History.—The Medical Examiner will please obtain from the applicant, answers in full to the following questions:

	Age (if Living)	Condition of Health	Age at Death	Cause of Death	How Long Ill	Previous Health	Was it Consumption	Father's Father	Age if living	Age at death
Father.....	60	Good	54	Bright's Dis.	1 yr.	Good	No	Father's Father		76
Mother.....	17	"						Father's Mother		55
How Many Brothers Have You Had? }								Mother's Father		78
How Many Sisters Have You Had? }	2		8	Scar. Fev. Chorea	Few days	Good	No	Mother's Mother		57
			11		6 mths.	"	No			

10. A. How many members of your family, uncles and aunts included, have ever had, or now have, consumption? None. Cancer? One. Paralysis or apoplexy? None. Disease of the heart? None. Insanity? None.
 B. Give relationship and particulars. Mother's mother died of cancer. Have you during the last year been associated with a person who has or has had consumption? No. Are you living in a house recently occupied by a consumptive? (Explain fully under Remarks.) No. Is your occupation considered dangerous? No.

It is hereby agreed: That all the foregoing statements and answers, made to the Company's Medical Examiner, are warranted to be true, and are offered to the Company as a consideration of the contract.

(Signature of the person to be insured.) CAMERON E. PAULHAMUS.

Witnessed by the Examiner. W. B. KONKLE.

11. A. How long have you personally known the applicant? 5 years. B. Does the applicant's appearance indicate good health? Yes.
 12. A. Applicant's height, 5 ft. 11 in. Weight, 170 lbs. B. Circumference of chest on full expiration (under vest), 35½ in. C. Circumference of chest on forced inspiration (under vest), 38 in. D. Girth of abdomen (inside trousers), 32 in. E. Did you weigh him? No. F. Are these figures correct? Yes. G. Is he gaining or losing weight? No.
 13. A. Race, white. B. Complexion, fair. C. Shape of chest, broad. D. General figure, erect. E. Give some mark of identification. Knife mark, left arm.

14. Examination of Heart.

- | | |
|---|----------------|
| A. Is the heart's action clear, regular and normal in its force? | A. Yes. |
| B. Is there any murmur, with either sound, or any enlargement of heart? | B. No. |
| C. Is there any atheroma of the radial or temporal arteries, or increased tension? | C. No. |
| D. What is the character of the pulse as to fullness, compressibility and strength? | D. Normal. |
| E. Is it regular? F. What is the pulse rate per minute? | E. Yes. F. 74. |

15. Examination of the Lungs.

- | | |
|--|---------|
| A. What is the number of respirations per minute? | A. 16. |
| B. Is the respiration full and uniform throughout each lung? | B. Yes. |
| C. Is there freedom from unusual sound throughout each lung? | C. Yes. |
| D. Is the percussion normal throughout each lung? | D. Yes. |
| E. Is there any disease of the throat, or any cough? | E. No. |

16. Examination of the Brain, Digestive Organs, Etc.

- A. Has the applicant any disease or disorder of the brain or nervous system? No.
 B. Has the applicant ever had syphilis or stricture? No. C. Is there any eruption on the body? No. D. Is there any discharge from the ear? No. E. Is there any evidence of disease of the stomach, bowels or liver? No. F. Has he had any disease or disorder which affects his present health? No. G. How do you rate the risk—(first-class, good, fair or bad)? Yes.

17. Examination of Kidneys. I hereby certify that the following is the result of a careful examination made by me of the applicant's urine:

- A. Specific Gravity, 1015. B. Reaction, Acid. C. Albumin, No. D. Sugar, No. E. Did applicant pass urine in your presence? Yes. F. Is the urine scanty or overabundant? Normal. Examination of urine is required in all cases. (See instructions.)

18. Examination of a woman. A. Has she passed the change of life?

- B. Is her functional health regular? C. How long has she been married? D. How many children? E. Age of last? F. Is she pregnant? F. Do you suspect womb disease? G. Has she ever been treated for such? H. If so, by whom? I. Any disease of the breast? J. Husband's occupation? J. If any miscarriages, when and how many?

Date, Dec. 12, 1905. Signature of Examiner, W. B. KONKLE, Address, Montoursville, Pa. Please read this paper over carefully before mailing it to the Medical Director, in order that all the questions may be fully answered, thus avoiding correspondence and delay. Forward immediately upon completion.

TO THE EXAMINER: No one, not even the agent, shall be present at this examination. The examiner should ask the applicant the questions (full answers required), and assist him to distinguish diseases from symptoms. "Childbirth," "Debility," "Exhaustion," "Overwork," "Exposure," "Dropsy," "Fever," etc., and especially "Don't Know" are answers which the company will not accept without explanation. The examiner must not be a near relative of the applicant, nor have any pecuniary interest in the policy applied for.

Where space does not fully permit answering questions, and for any additional information which you may wish to convey concerning the applicant, give full details on the reverse side of this application under head of "Examining Physician's Remarks."

The said statements and answers, as so set forth, are those which are referred to by the said C. E. Paulhamus as made to the company's medical examiner in the paper, a copy of which is given above in paragraph 4; but no copy of such statements or answers, or of the said medical examiner's report, was contained in or attached to the policy of insurance in suit or made to accompany the same.

(6) As stated by the said C. E. Paulhamus, in the papers set forth above in paragraph 4, the former occupation of said C. E. Paulhamus was that of painter and paper hanger, and his occupation or business at the time of taking out the policy was that of a real estate and insurance agent, although subsequent thereto he completed certain jobs or contracts for painting and paper hanging which he had previously agreed to do.

(7) On November 23, 1899, under the advice of his family physician, the said C. E. Paulhamus was taken to the Williamsport City Hospital to be operated upon, and was there operated upon, as he well understood, for hernia and for an undescended testicle, and in the course of and as the result of such operation it was found that the said undescended testicle was very much enlarged, weighing a pound and a quarter, was badly diseased, the veins being tortuous and vascular, and the said testicle having the appearance of being in a cancerous condition, but was not in fact cancerous. The said testicle was removed, and after remaining a month in said hospital the said C. E. Paulhamus was discharged therefrom and allowed to go to his home on December 24, 1899; but on January 12, 1900, he returned and complained of pain in his left side, and upon being examined hard lumps were there found, but no operation was undertaken, and he left the hospital again without having been operated upon.

(8) The amount due on the said policy, if it is a valid one, is \$2,968.48 (being the amount of the policy, \$3,000, less \$31.52, the unpaid part of the first premium advanced to the insured, with interest at 3½ per cent. from December 18, 1905, to September 5, 1906), together with interest on the said sum of \$2,968.48 from September 5, 1906, to this date, amounting to \$243.41, making a total of \$3,211.89.

If the court, on being further advised, shall be of opinion, from the facts so found, that the said policy of insurance is valid, and that the plaintiff is entitled to recover thereon, then we, the said jurors, find in favor of the plaintiff the aforesaid sum of \$3,211.89; but if the court, on the other hand, is of opinion that by reason of anything which is so set forth above the plaintiff is not entitled to recover, then we find in favor of the defendant. Judgment to follow thereon in either case in accordance therewith, with costs.

Both plaintiff and defendant thereupon moved for judgment on the foregoing verdict.

James B. Krause and W. W. Champion, for plaintiff.

C. La Rue Munson, for defendant.

ARCHBALD, District Judge. This is an action to recover the amount claimed to be due on a policy of insurance taken out on his own life by C. E. Paulhamus with the defendant company in favor of the plaintiff, his wife, for \$3,000. The jury at the suggestion of the court returned a special verdict, on which the case is now to be disposed of; both parties moving for judgment. The defendants rely, to defeat the policy, on certain statements, material to the risk, which appear in the report of the medical examiner, which were not true, although warranted by the insured to be so. The plaintiff contends that the defendants are not entitled to rely on the medical examiner's report, because it formed a part of the application and was not attached to the policy as required by the Pennsylvania statute. This is a Pennsylvania contract, and is governed in consequence by the law of the state as laid down by the decisions. *McClain v. Provident Sav.*

Life Assur. Soc., 110 Fed. 80, 49 C. C. A. 31. And the statements of the insured, having been warranted to be true, if they are material to the risk and not true in fact, the policy is invalid, unless the defendants, for the reason given, are barred from resorting to them. This result is not saved by section 1 of the Pennsylvania act of June 23, 1885 (P. L. 134), which provides that:

"Whenever the application for a policy of life insurance contains a clause of warranty of the truth of the answers therein contained, no misrepresentation or untrue statement in such application, made in good faith by the applicant, shall effect a forfeiture or be a ground of defense in any suit brought upon any policy of insurance issued upon the faith of such application, unless such misrepresentation or untrue statement relate to some matter material to the risk."

This act was passed to modify the rigor of the law, by which a representation or statement, whether material or not, and though made in good faith, if warranted to be true, avoided the policy, if not true in fact. But it leaves it still in force, where the representation or statement which is warranted is material and untrue, without regard to the ignorance or good faith of the party who warrants it. *March v. Life Ins. Co.*, 186 Pa. 629, 40 Atl. 1100, 65 Am. St. Rep. 887; *Lutz v. Life Ins. Co.*, 186 Pa. 527, 40 Atl. 1104; *Penn Mutual Life Ins. Co. v. Mechanics' Sav. Bank*, 72 Fed. 413, 19 C. C. A. 286, 38 L. R. A. 33.

There are four answers to questions in the medical examiner's report, which the jury have found to be material and at the same time untrue, which are relied on by the defendants to defeat the policy. The first of these was as to whether the insured had ever had hernia or been ruptured, to which he said, "No." The second was as to whether he had ever had cancer, or any tumor, abscess, or enlarged gland, which he answered in the same way. The third was whether he had had any illness, disease, or injury, other than those which he had previously mentioned, to which he replied, "None, except mild diseases of childhood." And the fourth whether he had ever been under treatment at any hospital, which he likewise negatived. The fact is, as found by the jury, that in November, 1899, some six years before the policy was issued, he had been operated upon at the Williamsport City Hospital for hernia and undescended testicle; it being disclosed by the operation, in which the testicle was removed, that it was very much enlarged and badly diseased, having the appearance of being in a cancerous condition, although not so in reality, and that, after remaining at the hospital, he was allowed to go home, but returned again in about three weeks, complaining of pain in his left side, where, on examination, hard lumps were found, but no further operation was undertaken. The jury have found that all the answers were made in good faith, which relieves the insured from any imputation that they were not. The charge of untruthfulness is also obviated, as to two of them, at least, by correct answers given to other questions directed to the same subject. Thus, in the application attached to the policy, in response to the inquiry whether he had had any serious illness or disease, except those incident to childhood, he stated that he had had an operation five years before for hernia, which was

a distinct affirmation of that fact, notwithstanding what he may have had to say about it afterwards, in reply to the somewhat ambiguous inquiry: "Have you hernia [that is, do you have it now], or have you ever been ruptured?" So, also, in the first part of the medical examiner's report, in response to the question, "How long since you were attended by a physician or consulted one professionally and for what disease?" he answered, "Five years, surgical case, operation for undescended testicle," which also gave notice of that particular feature of his ailment and the operation which he had undergone for it. It is true that he does not state that the operation was at a hospital, so as to correct or qualify his subsequent declaration that he had never been treated in one, thus possibly somewhat minimizing it. And it may be that, in the bare statement that he had been operated upon for the trouble specified, its serious character, and the badly diseased condition disclosed by it are similarly not indicated. But he gave the names of the physicians who attended him, by which this could have been followed up, and he certainly told enough to put the company upon inquiry. It is not to be expected that the answers of an applicant for insurance will be more than suggestive, particularly those made to and set down by a physician, who is supposed to be able to correct and interpret them; and the jury have found, in the present instance, that they were full and complete, as well as made in good faith, showing how they regarded them. It may be that in some respects they are inaccurate and open to criticism; but that they are misleading, or that the company was induced by them to accept a risk which they otherwise would not, is hardly to be credited. It is, therefore, difficult to see, taking them all in all, what real ground of complaint there is, or upon what basis it can be justly claimed that the policy should be forfeited.

But, assuming that, as the case stands, the answers are not all that could be desired, and are in fact contradictory and incomplete, if not, indeed, untruthful, amounting to a breach of warranty avoiding the policy, as charged by the defendants, it is contended by the plaintiff that the company is not in a position to take advantage of this; the misstatements of which complaint is made and on which a forfeiture is predicated being found among those taken down by the medical examiner, which, being a part of the application, as it is claimed, should have been attached to the policy in compliance with the local statute in order to give the company the benefit of them. The statute which is thus invoked is Act Pa. May 11, 1881, § 1 (P. L. 20), which provides that:

"All life and fire insurance policies upon the lives or property of persons within this commonwealth, whether issued by companies organized under the laws of this state, or by foreign companies doing business therein, which contain any reference to the application of the insured, or the constitution, by-laws or other rules of the company, either as forming part of the policy or contract between the parties thereto, or having any bearing on said contract, shall contain or have attached to said policies, correct copies of the application, as signed by the applicant, and the by-laws referred to; and unless so attached and accompanying the policy no such application, constitution or by-laws shall be received in evidence, in any controversy between the par-

ties to, or interested in, the said policy, nor shall such application or by-laws be considered a part of the policy or contract between such parties."

The question whether the act applies in the way contended for depends upon the circumstances. By the terms of the policy in controversy the statements and agreements in the application therefor are made a part of the contract, and it is also agreed in the paper signed by the insured, which is claimed by the company to be the real application in the case, that the statements and answers which there appear, and also those made to the company's medical examiner, "are warranted to be full, complete, and true, and are offered to the company as a consideration for the contract, which shall not take effect until this application has been accepted by the company at the executive office in Philadelphia, Pa., and the first premium has been paid," etc.; it being further declared in the same connection that:

"The agreements made in this application and contract applied for, taken together, shall constitute the entire contract between the parties."

The act of 1881 has been frequently before the courts, and, while there is no reported case which exactly corresponds with the one in hand, there are some which approach it closely, if, indeed, they do not in effect rule it. Thus, in *Morris v. State Mutual Assur. Co.*, 183 Pa. 563, 39 Atl. 52, the medical examiner's report was not attached to the policy as a part of the application, and objection having been made to the right of the company to put it in evidence, in consequence, or to show the falsity of certain of its statements, it was rejected by the trial court, and the application attached to the policy, which had been offered by the plaintiff and inadvertently admitted, was also stricken out as not being complete without it, all of which was affirmed on error. It is true that the medical examiner's report in that case, differing from what we have here, was on the same sheet of paper as the application proper, which it followed; the questions in both being also consecutively numbered. The whole paper, furthermore, bore the same date, and was indorsed on the outside as the application of the insured; and, in order to take advantage of certain statements of the insured which appeared in the medical examiner's report, it was in effect conceded by the company in the affidavit of defense to be a part of the application. It was with regard to what so appeared, no doubt, that it was said by the Supreme Court:

"The whole paper is clearly the application, and was properly so construed."

In *Baldi v. Metropolitan Ins. Co.*, 18 Pa. Super. Ct. 599, the paper in question was also a single sheet, divided into three parts, which were severally designated as:

"(A) Application to the Metropolitan Life Insurance Company." "(B) Statements made to the Medical Examiner," and "(C) Medical Examination and Report."

The two parts, A and B, were signed by the insured, but not the part C, opposite to the caption of which were also the words, "No part of the declaration of the applicant." The court below held that C, equally with A and B, was a part of the application, and was there-

fore bound to have been copied into or attached to the policy, in order to be available to the company. In reversing this, on error taken, it was said:

"Considerable stress is laid upon the fact that the clause of the policy relative to the answers and statements contained in the printed and written application is not expressly limited to the answers and statements contained in A and B. This is true; but it does not answer the question for decision, namely, what is the application? This question is to be determined by an inspection of the paper itself. Examining it more critically, we find that part A was signed on January 19, 1896, by the applicant, and contains this clause: 'It is hereby declared and warranted by the undersigned that the answers and statements contained in the foregoing application and those made to the medical examiner, as recorded in parts A and B of this sheet, together with this declaration, shall be the basis and become part of the contract of insurance with the Metropolitan Life Insurance Company; that they are full and true, and are correctly recorded; and that no information or statement not contained in this application' (evidently referring to part A) 'and in the statements made to the medical examiner' (evidently referring to part B) 'received or acquired at any time by any person shall be binding upon the company, or shall modify or alter the declarations and warranties made therein.' Referring, now, to part B, we find that it is headed, 'Statements Made to the Medical Examiner by Francis Rizzo, M. D., in Connection with Application on Reverse of This Sheet.' It is thus made a part of the application. Construing these two parts as a connected whole, we find conclusive evidence as to what answers and statements were intended to be made warranties and part of the contract. They are the answers and statements recorded in parts A and B. These were signed by the applicant. Part C was not. The latter bears date two days after A and B were signed, and for aught that appears in this case may never have been seen by the applicant. The medical examiner was not his agent, but was selected by the company. His declarations, although indorsed on the paper itself, could not be offered in evidence against the plaintiff, in the absence of extrinsic evidence that they were authorized or assented to by him. To remove all doubt upon this point it was expressly noted at the head of part C that it was 'no part of the declaration of the applicant.' This operated to the benefit of the insurer, as well as the insured. By no process of reasoning can it be held that the latter warranted the truth of the answers and statements of the medical examiner contained in part C. It seems to us equally clear that the former [the insurer], in its effort to comply with the provisions of the act of 1881, was justified in treating part C as not part of the application."

This case bears on the one in hand, not so much in what it decides as in what it recognizes. All that it expressly rules is that the part designated as C was not carried into the application, although on the same sheet with it, so as to be required to be copied in or attached to the policy. The rest, no doubt, is obiter, but of a convincing character. It accepts without question that, under practically the same circumstances as we have here, the statements made to the medical examiner are equally a part of the application with that which is in terms so designated, both, by direct reference, being made the basis of the contract of insurance and the statements contained in them being included in the same warranty. The only possible distinction to be observed is that in that case both bore the same date and were on the same sheet of paper, where here they are a day apart and physically separate.

In *Fisher v. Life Association*, 188 Pa. 1, 41 Atl. 467, it does not appear whether the two papers were separate; but the statements made to the medical examiner were declared by the caption to be supplemental to and a part of the application, and, having been omitted from

the policy, the application, which there appeared, was rejected as incomplete, and so inadmissible.

In *Nugent v. Greenfield Life Association*, 172 Mass. 278, 52 N. E. 440, under a similar statute, the statements made to the medical examiner by the insured and signed by him were recognized, the same as in the *Baldi Case*, as forming a part of the application, while the report of the medical examiner to the company was not; the two papers so accepted as forming the application being physically separate, the same as here.

So in *Dimick v. Metropolitan Life Ins. Co.*, 69 N. J. Law, 384, 55 Atl. 291, 62 L. R. A. 774, and *Holden v. Same*, 11 App. Div. 426, 42 N. Y. Supp. 310, the policy having made the answers and statements contained in the application a part of the contract and declared them to be warranties, and the question arising as to what constituted the application, it was held that the statements made to the company's medical examiner, signed by the applicant, and, with the answers in the application proper, declared to be the basis of the contract, the company having been guided thereby in accepting the risk and issuing the policy, were to be taken as forming a part of the application, and so binding upon the insured by virtue of his warranty. And if this is the case as respects the insured, it is difficult to see why it should not equally be the case, the positions being reversed, as respects the company.

Assuming, however, for the sake of argument, that there is nothing in the cases cited which directly rules the one in hand, independent of authority, if that be wanting, it is clear upon principle that the statements made by the insured to the medical examiner formed a part of the application within the meaning of the statute. The evident purpose of the requirement that a copy of the application shall be contained in or attached to the policy is to disclose to the insured the representations and statements with which he is charged, affecting the risk, on which the company has relied in accepting his application and issuing a policy, and which will have to be met in any controversy over it. It is important, therefore, as it certainly was intended, that, entering into and forming a part of the contract by virtue of his warranty and the terms of the policy, as his statements in that connection do, everything of which this can be predicated shall be there set forth. "It is well known," says Mitchell, J., in *Lennox v. Insurance Co.*, 165 Pa. 575, 30 Atl. 940, "that the evil aimed at in this legislation was the custom of insurance companies to put in their blank forms of application long and intricate questions or statements to be answered by the applicant, usually in very small type, and the relevancy or materiality not always apparent to the inexperienced, and therefore liable to become traps to catch even the innocent unwary. The general intent was to keep these statements before the eyes of the insured, so that he might know his contract and, if it contained errors, have them rectified before it became too late."

In the case at bar, by the terms of the policy the application is made a part of the contract, and the statements and agreements therein contained are declared to enter into the consideration. It is also

agreed by the applicant at the foot of the first part of the application that the statements and answers which he there makes, as well as those made to the company's medical examiner, are warranted to be full, complete, and true, and are offered to the company as a consideration for the contract of insurance applied for. The statements made by the applicant himself direct, as well as those made to and set down by the company's medical examiner, are thus linked together, and go before the company as the basis of the policy to be issued. If they were on different halves of the same sheet, and bore the same date, it would be practically impossible to distinguish the case from that of *Morris v. Insurance Co.*, 183 Pa. 563, 39 Atl. 52; the further circumstance that the two were run together there by a serial numbering of the questions being immaterial. But the difference here in date is but a day, one being dated December 11th and the other December 12th, making them substantially the same; and the fact that they are physically detached and appear on two separate pieces of paper is of little consequence when the purpose and use to be made of them are considered. Both are signed by the applicant, thus to that extent fulfilling the requirement of the statute; and both by the terms of the warranty are made a part of the contract in case the application is accepted and a policy issued. Both being thus put on a par, and being of equal importance to the insured, as well as to the company, it does violence to them to separate them, and to assert that one of them is the application of the insured and the other forms no part of it. It is of some significance, also, that in the directions given by the company on the margin of the medical examiner's report it is said, "For any additional information which you may wish to convey concerning the applicant, give full details on the reverse side of *this application*," and that, on the reverse of the same sheet, under the head of "Family Physician's Certificate," the first question is, "How long have you known the party whose life is proposed for insurance in the *foregoing application*?"—the company thus unmistakably indicating on the face of the paper the idea which they had of it. But without dwelling upon that, and independently of it, the statements made by the insured to the medical examiner, as well as those which he himself set down, both being signed by him and warranted to be true, and both by his direct authority and sanction thus going in to the company as the basis of the insurance applied for, are to be taken as together constituting the application on which the risk was accepted and the policy issued, and were therefore required by the statute to be indorsed on or attached to it, the one as much as the other; which not having been done, the company is not entitled to take advantage of anything which appears in either of them.

It is said, however, that the medical examiner's report was offered in evidence by the plaintiff, and that, having been brought into the case in that way, the defendants are entitled to make use of it for any relevant purpose. But the case is now before the court on a motion for judgment on the verdict, and we are not concerned, therefore, with how the medical examiner's report got in, but only with the legal effect to be given to it under the facts reported. If any inquiry, moreover, of this kind, were open to be entered upon, a re-

sort to the record would show that this report was only offered after the court, against the objection of the plaintiff, had required the incomplete application attached to the policy to be offered along with that instrument, thereby opening the door for the evidence which followed with regard to the untruthfulness of certain statements contained in it, to counteract which the plaintiff was compelled to put in the medical examiner's report, which the defendants at once took advantage of, all of which, however, before the case closed, the plaintiff moved to strike out as irrelevant and inadmissible, which should have been granted, according to the view now taken. Upon any such inquiry, therefore, the advantage would not lie with the defendants, and, on the contrary, it would merely serve to show that, had the case been tried by the court as it should have been, it would have stopped with the prima facie case made out by the policy, the proofs of death, and the evidence of nonpayment, upon which a verdict would have had to be directed for the plaintiff. But, as already stated, the jury having found the material facts, the only question at this time is the judgment to be entered on them. The mere circumstance that the medical examiner's report is returned among them does not determine the use that can be made of or the effect that can be given to it; the competency of it, as a matter of law, to affect the policy, having been by no means thereby conceded. *Prov. Sav. Life Assur. Soc. v. Beyer*, 67 S. W. 827, 23 Ky. Law Rep. 2460; *Pitcairn v. Hiss*, 125 Fed. 110, 61 C. C. A. 657. This is to be decided by all the facts found by the jury, and it appearing therefrom that, in disregard of the statute, a copy of the medical examiner's report, forming a part of the application, was not attached to the policy, the statements of the insured therein contained are not to be considered as entering into the contract of insurance, nor can they or those of the so-called application, indorsed on the policy, be resorted to by the company to make out the breach of warranty which is relied on.

Judgment is therefore directed to be entered on the verdict in favor of the plaintiff in the sum of \$3,211.89, with interest from January 16, 1908, and costs.

SAN JOAQUIN & KINGS RIVER CANAL & IRRIGATION CO., Inc., v.
STANISLAUS COUNTY et al.

(Circuit Court, N. D. California. June 29, 1908.)

No. 14,554.

1. WATERS AND WATER COURSES—IRRIGATION COMPANIES—REGULATION OF RATES BY COUNTIES—CALIFORNIA STATUTE.

Under Act Cal. March 12, 1885 (St. 1885, p. 95, c. 115), which provides that the boards of supervisors of the several counties of the state shall estimate as near as may be the value of the canals, ditches, flumes, water ways, and all other property actually used and useful in the appropriation and furnishing of water for sale in the county by any irrigation company, etc., and in like manner to estimate the annual reasonable expenses of such company, including the cost of repairs, and to establish maximum rates of charge for water by such company such that its net annual receipts and profits shall be not less than 6 nor more than

18 per cent. upon the said value of the property, when in making such estimate a deduction is made for deterioration of the plant from year to year, an allowance should be made for such deduction and added to the annual income in fixing the rates of charge to cover the cost to the company of renewal or reconstruction.

2. SAME.

In the fixing of such rates of charge by the boards of different counties in which the water is supplied by the same canal, under the established construction that the statute entitles the company to a net profit of not less than 6 per cent. on the value of its entire plant, and that its earnings in all of the counties must be taken into consideration in determining the reasonableness or legality of any particular rate, the distance of each county from the head of the canal and the consequent loss of water from seepage and evaporation should be taken into account, and as between the respective counties the higher charge should be authorized by the one having the longest flow.

3. INJUNCTION—SUBJECT OF RELIEF—PUBLIC BOARD—AVOIDING MULTIPLICITY OF SUITS.

A court of equity has jurisdiction of a suit by an irrigation company to enjoin the boards of supervisors of the respective counties through which its canal extends from enforcing rates fixed by them under the California statute, which it is alleged do not enable the company to earn in the aggregate the income to which it is entitled under the statute, and to determine in a single suit the legality of such rates, on the ground of avoiding a multiplicity of suits.

4. SAME—PRELIMINARY INJUNCTION.

A bill and the showing made thereunder *held* sufficient to entitle an irrigation company to a preliminary injunction to restrain the boards of supervisors of counties through which its canal extends, and in which it furnishes water to consumers, from enforcing rates of charge established by them until the legality of such rates could be determined, on the giving of a bond to secure the repayment of any charges collected which should finally be held illegal.

In Equity. On motion for preliminary injunction.

Frank H. Short, Garret W. McEnerney, W. B. Treadwell, and Edward F. Treadwell, for complainant.

L. J. Maddux, for county of Stanislaus.

M. F. McCormick, for counties of Fresno and Merced.

MORROW, Circuit Judge. In 1896 the San Joaquin & Kings River Canal & Irrigation Company, a California corporation, and the predecessor in interest of the complainant, a Nevada corporation, brought suit in this court to enjoin the enforcement of an order of the board of supervisors of Stanislaus county, fixing the rates to be charged by the complainant for water distributed by it in said county. The complainant in its bill referred to the laws of the state of California under which it was organized, and set up certain facts concerning the value of the property embraced in its canal system, and averred that the rates so fixed by the board of supervisors were grossly unfair and unreasonable, and, as applied to the complainant's business, would deprive it of its property without due process of law, and would deny to it the equal protection of the laws. Upon a final hearing had in 1902, a decree was entered in favor of the complainant. San Joaquin & Kings River C. & I. Co. v. Stanislaus County (C. C.) 113 Fed. 930. The defendant took an appeal from this decree direct to the

Supreme Court of the United States, upon the constitutional question involved. In that court the provisions of the laws of the state under which the complainant was organized and was continuing to do business were discussed, and the rights of the complainant under such acts considered and as far as necessary determined. The fact was also referred to that complainant's canal extended through the counties of Fresno and Merced, as well as into the county of Stanislaus, and it was held that the rates fixed by Fresno and Merced counties were elements to be considered in determining whether the rates fixed by Stanislaus county were reasonable and just. The opinion of the court concluded with this observation:

"Hereafter, in case the other counties should fix rates in such manner that, taken as a whole, the rates in the three counties would not insure an income of at least 6 per cent., as provided in the act of 1885 (St. 1885, p. 95, c. 115), the company would, of course, not be bound to accept such rates, and a decree in this case would not bind it in regard to the propriety of rates for the future, as fixed by the ordinance of 1896 for the county of Stanislaus."

The decision of the court directed that the judgment of the Circuit Court should be reversed, and the bill dismissed, without prejudice. *Stanislaus County v. San Joaquin C. & I. Co.*, 192 U. S. 201, 24 Sup. Ct. 241, 48 L. Ed. 406. On September 19, 1907, the complainant, following the decision of the Supreme Court that Fresno and Merced counties were necessary, if not indispensable, parties to the controversy, filed the present bill against the boards of supervisors of the counties of Fresno, Merced, and Stanislaus. The jurisdiction of this court is based upon diverse citizenship, also upon the claim that the case involves the construction or application of the Constitution of the United States. The equity jurisdiction of the court is invoked to avoid a multiplicity of suits. The general object of the bill is to have it judicially determined: That certain rates fixed by the supervisors of the counties of Merced, Fresno, and Stanislaus for the sale, rental, and distribution of water by the complainant to the inhabitants of said counties, do not, as a whole, furnish the return for the use of its property as provided by law; that the rates are therefore unreasonable and such as to deprive complainant of its property without due process of law and without just compensation. The present proceeding is upon an order, based upon the verified bill and affidavits, that defendants show cause why an injunction pendente lite should not issue, restraining them, during the pendency of this suit, and until the further order of this court, from enforcing the orders fixing the rates for the sale, rental, and distribution of water mentioned in the bill of complaint.

The defendants have answered the order to show cause by affidavits setting forth certain facts which do not materially controvert the facts set up by complainant in its bill, but which it is contended justified the board of supervisors in making the orders fixing the rates which are the subjects of controversy.

It is alleged in the bill of complaint: That the complainant owns and maintains a system of canals and works for the purpose of diverting, carrying, and distributing water in the counties of Fresno, Merced, and Stanislaus; that said canals and works head on the San Joaquin

river at its junction with the Fresno slough in the county of Fresno, and thence, running through said counties of Fresno and Merced, enter and terminate in the county of Stanislaus; and that it has the right to divert from said San Joaquin river and into said canals not less than 760 cubic feet of water per second, when there is so much water flowing in said river at complainant's head works, and, when less than that quantity is there flowing, then all the waters flowing in said river.

The boards of supervisors of the several counties of the state are required, under the act of the Legislature of the state, approved March 12, 1885 (St. 1885, p. 95, c. 115), to estimate as near as may be the value of the canals, ditches, flumes, waterways, and all other property actually used and useful in the appropriation and furnishing of water by persons, companies, or corporations for sale, rental, or distribution to the inhabitants in the several counties of the state, and in like manner to estimate the annual reasonable expenses of such persons, companies, or corporations, including the cost of repairs, management, and operating such works. Upon these estimates the boards of supervisors are authorized, under section 2 of the act, to establish maximum rates at which water shall be sold, rented, or distributed. The rates are required, under section 5, to produce a net income of not less than 6 nor more than 18 per cent. per annum upon the value of the property used and useful in furnishing such water. In pursuance of this requirement of the statute, the boards of supervisors in Fresno, Merced, and Stanislaus counties estimated the value of complainant's property in each of said counties for the year 1907, and also the annual reasonable expenses of maintaining such property in said counties in furnishing the inhabitants with water for irrigation purposes during said year. These estimates were as follows:

Value of property in Fresno county.....	\$ 116,250 00
Value of property in Merced county.....	750,000 00
Value of property in Stanislaus county.....	335,456 32
Total in three counties.....	\$1,201,706 32

The boards of supervisors of the three counties, as authorized and required by section 2 of the act, fixed the maximum rates which complainant might charge the inhabitants of the counties for each and every kind of irrigation, as follows: In Fresno county 85 cents per acre per annum, in Merced county \$1.65 per acre per annum, and in Stanislaus county \$1.50 per acre per annum. It is alleged in the complaint that the greatest area for irrigation which complainant or its predecessor has ever furnished or been called upon to furnish in said counties is 103,980 acres, as follows: In Fresno county 39,928 acres, in Merced county 52,379 acres, and in Stanislaus county 11,673 acres.

The income from complainant's property in these three counties, based upon the areas stated and the rates fixed by the boards of supervisors, is as follows:

Income:	
In Fresno County.....	\$ 33,938 80
In Merced county.....	86,425 35
In Stanislaus county.....	17,509 50
	<hr/>
	\$137,873 65

Estimated reasonable annual expenses:

In Fresno county.....	\$21,750 00
In Merced county.....	37,000 00
In Stanislaus county.....	35,000 00
	<hr/>
	\$93,750 00

Deducting the estimated expenses from the estimated income, the result as a whole is a net annual income of \$44,123.65, or 3.67 per cent. on the estimated value of the property as determined by the boards of supervisors.

But complainant claims the right to have the equivalent of not less than 6 per cent. per annum on the reasonable value of its property under the provisions of section 5 of the act. This section provides as follows:

"Said boards of supervisors, in fixing such rates, shall, as near as may be, so adjust them that the net annual receipts and profits thereof to the said persons, companies, associations, and corporations so furnishing such water to such inhabitants shall not be less than six nor more than eighteen per cent. upon the said value of the canals, ditches, flumes, chutes, and all other property actually used and useful to the appropriation and furnishing of such water of each of such persons, companies, associations and corporations."

If the complainant is entitled to receive a net income from its property of not less than 6 per cent. per annum, as provided by the statute, and the valuations fixed by the boards of supervisors are correct, then the rates fixed by such boards and which are the subject of controversy do not give the complainant a fair, just, or reasonable return upon the value of its property as a whole, and such rates have the effect to deprive the complainant of its property without due process of law. *Spring Valley Waterworks v. City and County of San Francisco* (C. C.) 124 Fed. 574, 601; *Consolidated Gas Co. v. City of New York* (C. C.) 157 Fed. 849, 879. But this is not all. The estimated reasonable annual expenses of the complainant in operating its canal system, so far as relates to the county of Stanislaus, is, as has been stated, the sum of \$35,000. The maximum rate to be charged for water is \$1.50 per acre per annum. The number of acres irrigated in that county is 11,673. The complainant's income in Stanislaus county would therefore be \$17,509.50, as above stated, or \$17,490.50 less than the estimated expense as determined by the board of supervisors. It cannot be that complainant is required to deliver water at a loss, but that appears to be the position taken by the board of supervisors of Stanislaus county, if any reliance can be placed upon the official estimates placed before the court upon the hearing. It is true that upon the argument counsel for Stanislaus county denied that this estimate of expense for Stanislaus county is correct and claimed that it referred to the expense of the complainant's canal system in all three counties. If this is so, then no estimate has been made by the board of supervisors of Stanislaus county of the expense of complainant's canal system in that county, and there was therefore no basis upon which they could fix a valid rate for that county.

The estimate of valuation made by the board of supervisors of Stanislaus county appears to be based upon a report made to the board

of supervisors by Charles E. Sloan, a civil mining and construction engineer. In this report he says:

"That in June, 1907, he made a thorough and extensive examination of the canals and works of the complainant actually used by complainant for the appropriation and furnishing of water to the inhabitants of the county of Stanislaus; that said examination was made for the purpose of estimating the present value of said canals and works and the annual reasonable expenses incurred by complainant in supplying water to the inhabitants of said county of Stanislaus, which said expenses include the cost of repairs, management and operation of said canals and works; * * * that the said examination was made by minutely examining every part of said canal works from the beginning to the end, and estimating the cost of materials, labor and property of said canal in accordance with the present day prices, and the deducting for depreciation to obtain the present value; that said detailed report, which is hereinafter set forth and made a part of this affidavit, shows that the present cost of said canals and works is four hundred thirteen thousand three hundred six and $\frac{32}{100}$ (\$413,306.32); * * * that after subtracting for depreciation, the present value is estimated to be three hundred thirty-five thousand four hundred fifty-six and $\frac{62}{100}$ (\$335,456.62)."

The report attached to the affidavit contains a detailed statement of the quantity of earth work in cubic yards, the quantity of lumber in feet, telephones, station building, dredger, scrapers, plows, tools, etc., horses, harness, and wagons, scows, skiffs, etc., engineering, superintendency, and incidentals. The cost of the material and work is stated as being \$413,306.32, but from this sum the engineer deducts \$77,849.70 for deterioration in the value of materials. For deterioration in lumber, carpenter work, nails, and iron he deducts \$47,849.70, and for deterioration in earth work he deducts \$30,000, making a total of \$77,849.70, leaving complainant's plant useful for Stanislaus county valued at \$335,456.62. Whether there is such a deterioration in the value of the plant is an issue that cannot be determined upon affidavits, and need not be determined upon this hearing, as the estimate of value made by the board of supervisors of Stanislaus county has taken this deterioration into account and is the net valuation after deducting for deterioration that enters into the total valuation of the whole plant at \$1,201,706.32 for the three counties, and upon which the rates fixed yield the complainant an income of only 3.67 per cent. per annum. But if we admit the claim of deterioration, it has this aspect to be considered: That if a deduction is to be made from the value of the plant on this account, then an allowance should be made for such deduction and added to the annual income, to enable the complainant to renew and reconstruct so as to preserve the integrity of the plant. If this is not done, and the deterioration continues from year to year, as it will, and the rates are reduced accordingly each year, both will eventually decline to a vanishing point. For example, suppose the value of the plant last year was \$1,000,000, and the rates fixed yield a net income of 6 per cent., or \$60,000, without any allowance whatever for deterioration. The value of the plant this year is \$1,000,000, less a deduction for deterioration of, say, 5 per cent. or \$50,000. Deducting that amount from \$1,000,000, we have \$950,000 as the value of the plant upon which the income of 6 per cent., or \$57,000, is to be allowed. If this method of deducting for deterioration from year to year be carried on long enough without any provisions

being made for renewal or reconstruction, the plant and its income will, of course, eventually disappear. To avoid this result there should be a reasonable provision for renewal or reconstruction work, such as is now always provided for in the operation of any well-conducted manufacturing plant, and sanctioned by the courts in determining the reasonableness of rates fixed by public service corporations. *San Diego Land Company v. National City*, 174 U. S. 739, 757, 19 Sup. Ct. 804, 43 L. Ed. 1154; *Stanislaus County v. San Joaquin C. & I. Co.*, 192 U. S. 201, 215, 24 Sup. Ct. 241, 48 L. Ed. 406. It follows that if there is such deterioration going on in plaintiff's works as claimed by the defendants, and no provision is made for renewal or reconstruction, as there is not in the estimates before the court, then the rates fixed by them, which yield an income of only 3.67 per cent. per annum, are still further unreasonable and unjust, for this reason, if for no other.

There is still another feature of this case to be considered, and that is the relative cost of delivering the water through complainant's canals to the inhabitants of the three counties. As before stated, the head works of complainant's canal system are in Fresno county. It runs through Fresno county in the direction of Merced county, through Merced county, into Stanislaus county.

It is alleged in the complaint that complainant is in possession of and is able to furnish at the head of its system of canals 760 cubic feet of water per second; but, owing to the necessary evaporation and seepage of water in said canals, .1243 of said water is lost in delivering the same in said county of Fresno, .339 of said water is lost in delivering the same in said county of Merced, and .5367 of said water is lost in delivering the same in said county of Stanislaus.

The affidavit of J. D. Schuyler, a civil engineer, states that in 1904 he made an examination of complainant's canal for the purpose of determining generally the loss by seepage. His conclusions were that if 1,000 second-feet (that is, cubic feet per second), which he says is about the capacity of said canal, were admitted at the head, the average loss by seepage in the first 30 miles would approximately be about 10 second-feet per mile, in the next 25 miles about 7 second-feet per mile, and in the last 6 miles about 5 second-feet per mile. He concludes that it would be necessary to turn into the said canal at its head not less than 400 second-feet in order that any water should reach Stanislaus county, and that, if 600 feet should be turned in at the head, not more than 150 second-feet would reach the lower end. This loss, whatever it may be, would seem to indicate that complainant ought not to be required to deliver water in Stanislaus county for a less rate than in Merced county, which is nearer the head works; but this is precisely what the rate fixed in Stanislaus county requires. The rate fixed in the latter county is \$1.50 per acre per annum, while the rate fixed in Merced county is \$1.65 per acre per annum. The service rendered by complainant to the inhabitants of Stanislaus county in the delivery of water to them by an open canal, at a distance of 60 or 70 miles from the head works, must, all things considered, be of greater value than a like service rendered to the inhabitants of Merced county, at a distance of 30 to 60 miles from the head works, and if the

rate of \$1.65 fixed for the latter service is reasonable and just, it would seem that the rate of \$1.50 fixed for the former service was unreasonable and unjust in not providing the complainant a reasonable compensation for the service rendered.

This view is further confirmed by the fact that the board of supervisors of Merced county have fixed the rate for that county at \$1.65 per acre per annum, while the board of supervisors of Fresno county, where the head works are located, have fixed the rate at 85 cents per acre per annum, showing that in the judgment of the former board the complainant was entitled to receive a higher rate for the service of delivering water in Merced county than for a similar service in Fresno county. These comparisons indicate that the controversy turns mainly upon the reasonableness of the rates fixed in Stanislaus county. Indeed, it was admitted upon the hearing that the complainant had no substantial controversy with the boards of supervisors of either the counties of Fresno or Merced individually; but, under the decision of the Supreme Court of the United States, the complainant cannot ignore those two counties in having it judicially determined whether it is being deprived of an income to which it is entitled under the law, and, if so, to what extent, if any; either of the counties is at fault. This appears to be a difficult question. The Supreme Court, in referring to it, said:

"Exactly how the question may be hereafter determined as to the percentage of income, where there are three different boards of supervisors who may fix rates for the respective counties, each differing from the other, is not made clear by the statute."

It certainly cannot be determined upon the present hearing. The question now before the court is whether, upon the showing made, the complainant has made out a sufficient case to entitle it to an injunction to preserve the status quo until the case can be heard upon the merits, and in reaching a conclusion upon that question the court must consider the case as a whole. The argument upon the hearing took a wide range, touching questions that can only be determined upon the final hearing.

Whether complainant is entitled to an injunction pending litigation is comparatively a narrow question. In *Glascott v. Lang*, 3 Myl. & C. 451, 455, Lord Chancellor Cottenham said:

"In looking through the pleadings and the evidence, for the purpose of an injunction, it is not necessary that the court should find a case which would entitle the plaintiff to relief at all events. It is quite sufficient if the court finds, upon the pleadings and upon the evidence, a case which makes the transaction a proper subject of investigation in a court of equity."

In *Hadden v. Dooley*, 74 Fed. 429, 431, 20 C. C. A. 494, Judge Shipman, in the Circuit Court of Appeals for the Second Circuit, said:

"When the questions which naturally arise upon the transactions make them a proper subject for deliberate examination, if a stay of proceedings will not result in too great injury to the defendants, it is proper 'to preserve the existing state of things until the rights of the parties can be fairly and fully investigated and determined' by evidence and proofs which have the merit of accuracy."

In *City of Newton v. Levis*, 79 Fed. 715, 25 C. C. A. 161, Judge Sanborn, in the Circuit Court of Appeals for the Eighth Circuit, declared a rule respecting the granting of preliminary injunctions which has since been so often cited with approval by other courts that it may be deemed to have become the established law upon the subject. He says:

"The controlling reason for the existence of the right to issue a preliminary injunction is that the court may thereby prevent such a change of the conditions and relations of the persons and property during the litigation as may result in irremediable injury to some of the parties before their claims can be investigated and adjudicated. When the questions to be ultimately decided are serious and doubtful, the legal discretion of the judge in granting the writ should be influenced largely by the consideration that the injury to the moving party will be certain, great, and irreparable if the motion is denied, while the inconvenience and loss to the opposing party will be inconsiderable, and may well be indemnified by a proper bond, if the injunction is granted. A preliminary injunction maintaining the status quo may properly issue whenever the questions of law or fact to be ultimately determined in a suit are grave and difficult, and injury to the moving party will be immediate, certain, and great if it is denied, while the loss or inconvenience to the opposing party will be comparatively small and insignificant if it is granted."

The questions to be ultimately decided in this case are certainly serious and doubtful, as intimated by the Supreme Court, where there are three different boards of supervisors representing counties each differing from the other in its relation to complainant's canal system, and where the boards differ as to the valuation to be placed upon the property used and useful in delivering water to the inhabitants of their respective counties and the expenses of the complainant in performing this service and the rates to be charged in each county that will yield in the aggregate a net income of not less than 6 per cent. per annum on the value of the property as a whole. To solve these questions fairly will require a very full and accurate investigation, aided by testimony carefully sifted by the usual rules of examination. It cannot be accomplished on a hearing where the evidence is submitted upon affidavits, but the court is required upon this hearing to determine whether the evidence so presented is *prima facie* sufficient to justify the court in restraining the defendants from enforcing the rates established by them pending litigation. To determine this question the court must consider the case in its entirety and as producing aggregate results.

For that purpose a reference to further evidence is necessary. In the former case, *R. H. Goodwin*, an engineer of large experience, was employed by the board of supervisors of Stanislaus county as an expert to estimate the value of the works of complainant's predecessor in interest as of that date, namely, the year 1896. The estimate as made for the board of supervisors by Goodwin had no relation to the amount of capital actually invested in the corporation by the shareholders or the original cost of the property, but was based upon the estimated reasonable value of the property at that date. This method of ascertaining the value was approved by the Supreme Court. *Stanislaus County v. San Joaquin C. & I. Co.*, 192 U. S. 201, 215, 24 Sup. Ct. 241, 48 L. Ed. 406. In the present case, Mr. Goodwin has made

a detailed estimate of the value of complainant's entire canal system for the year 1907. This estimate is attached to an affidavit dated January 8, 1908, in which the affiant declares that his examination of the property was very thorough and complete, and occupied a period of about 50 or 60 days. The estimate is in elaborate detail and, as in the previous case, is not based upon the original cost of the works, but upon their estimated reasonable value at the time of the examination. It appears from this detailed estimate that complainant's head works were of the value of \$84,732.23, that its canal system in Fresno county was of the value of \$312,947.38, that in Merced county the system was of the value of \$524,175.60, and that in Stanislaus county the system was of the value of \$74,457.42. The aggregate value of complainant's head works and canal system in the three counties named was therefore the sum of \$996,312.63. In addition to this valuation is the value of the land occupied by the canals and their rights of way, which does not appear in Mr. Goodwin's affidavit; but this valuation is furnished by the affidavits of parties claiming to have knowledge of the lands in the locality where the canals are situated. In Fresno county the average valuation is given at \$15 to \$20 per acre, in Merced county at \$60 to \$70 per acre, and in Stanislaus county at \$100 per acre. The land occupied in Fresno county for head works is 78.44 acres, and for canals 1,288.50 acres, making a total of 1,366.94 acres, which, at \$15 per acre, the lowest valuation, would be of the total value of \$20,504.10. The land occupied by canals in Merced county is 2,016.63 acres, which, at \$60 per acre, the lowest valuation, would be of the total value of \$120,997.80. The land occupied by canals in Stanislaus county is 290.90 acres, which, at \$100 per acre, would be of the total value of \$29,090. These valuations of the lands occupied by the head works and canals make a total of \$170,591.90, which amount, added to the valuation of \$996,312.63 for the head works and canals, makes a total of \$1,166,904.53 for complainant's physical properties employed in the business under consideration. There is, however, the additional value of the right to divert 760 cubic feet of water per second from the San Joaquin river for irrigation purposes, which it is alleged in the complaint is of the value of \$760,000. In the affidavit of Samuel Fortier, an irrigation engineer of high repute, this right is valued at \$25 per acre for the land under complainant's canal system. As the area of this land is 103,980 acres, this valuation would amount to \$2,599,500; but, while this right is undoubtedly of value, it may not be a value upon which ultimately complainant may be given a return under the law. It is therefore not made a part of the valuation of complainant's property for the purpose of the present proceeding, but it is referred to as presenting a question that will require future consideration. For the present, the doubt is resolved against the complainant.

We now proceed to consider the question of income provided for the use of complainant's visible tangible property alone. The number of acres irrigated in the three counties, respectively, in the year 1905, was as follows:

In Fresno county:	
Main canal system.....	28,892
Dos Palos system.....	5,279
Outside system.....	8,257
	<hr/>
	39,028
In Merced county:	
Main canal system.....	33,862
Dos Palos system.....	5,838
Outside system.....	12,879
	<hr/>
	52,579
In Stanislaus county:	
Main canal system.....	11,873
	<hr/>
Total	103,980

The maximum rates fixed by the boards of supervisors to be charged by the complainant to the inhabitants of the counties, respectively, for each and every kind of irrigation, would yield an income amounting to \$137,873.65 per annum. The books of the complainant show that the annual expenses of complainant's canal system, including the cost of repairs, management, and operating expenses, was, for the year 1906, the sum of \$87,669.75, or, omitting the cost of litigation as to water rates, the sum of \$86,437.50. Deducting these latter costs and expenses from the estimated income of the complainant for the same period, the result is a net annual income of \$51,436.15. This net income is equivalent to 3.08 per cent. of the total estimated value of complainant's canal system, amounting to \$1,166,904.53. Whether this is a fair and reasonable return on the value of complainant's property, without regard to the minimum rate of 6 per cent. provided by law, is a question the court is not called upon to determine. All the court is called upon to decide is whether the rates established are based upon a reasonable valuation and yield a net income of 6 per cent. But disregarding the provision of the statute, there is no evidence before the court that an income of 4.40 per cent. per annum for this kind of property is reasonable and just.

In the case as presented to the court there does not appear to be any reason why the complainant should be required to accept, on the valuation made by the board of supervisors, a net income of 3.67 per cent. per annum, or why the complainant should be required to receive a net income of 4.40 per cent. per annum on the detailed valuation made by Engineer Goodwin. The value of the water to the consumers in all three counties, as shown by the complaint and supporting affidavits, is much more than the equivalent of an income of 6 per cent. per annum. The facts shown are summed up in the allegations of the complaint:

"That the portions of said three counties through which complainant's said canals run are of an extremely arid nature, and such that agriculture cannot be profitably carried on without artificial irrigation," and the "inhabitants" of the three counties, "paying for said water at rates which would so enable the complainant to receive such annual net income of 6 per cent., could and would realize annual net profits in the cultivation of their lands much exceeding 6 per cent. upon the amount invested by them therein."

It is objected by counsel representing the county of Stanislaus that the complainant has been guilty of laches in not sooner pressing this controversy to a judicial determination, but it appears that complainant has been endeavoring ever since 1896 to have the question at issue settled by the courts. The complainant's predecessor was organized as a corporation under the laws of the state of California in September, 1871. By the act of March 12, 1885 (St. 1885, p. 95, c. 115), the Legislature of the state authorized the several boards of supervisors of the state to fix and regulate the maximum rates at which any person, company, association, or corporation should sell, rent, or distribute water in each of the counties of the state. In 1896 the county of Stanislaus for the first time fixed rates under the act of 1885. These rates were the subject of controversy in *San Joaquin & Kings River C. & I. Co. v. Stanislaus (C. C.)* 113 Fed. 930, decided in 1902, and *Stanislaus County v. San Joaquin C. & I. Co.*, 192 U. S. 201, 24 Sup. Ct. 241, 48 L. Ed. 406, decided January 18, 1904. Consumers of water in Merced and Fresno counties thereupon applied to the boards of supervisors of those counties to fix rates for water, which they did in 1904, and these were the first rates fixed by those counties. It was claimed by complainant's predecessor that those rates, taken in connection with the rates fixed by Stanislaus county in 1896, did not give the complainant 6 per cent. upon its investment as a whole, and thereupon it brought suit in the superior court of Fresno county to have the rates set aside. This suit was decided in August, 1906; the court holding that it could not give relief because the canal company had not applied to the county of Stanislaus for a new ordinance fixing rates which, together with the rates fixed by the counties of Merced and Fresno, would determine the income to which the canal company was entitled for the use of its plant as a whole. The canal company appealed from that decree to the Supreme Court of the state, where the case is now pending. All three counties fixed rates for the second time in the year 1907. It is the latter rates that are here in controversy. That the first suit against the county of Stanislaus failed to accomplish a judicial determination of the controversy was not because complainant did not assert its rights against that county, but because Fresno and Merced counties had not been made parties to the action. It cannot be said therefore that, as against the county of Stanislaus, the complainant is pressing a stale claim, and, besides, with respect to all three counties, it appears that complainant is seeking, with reasonable promptness under all the circumstances, to have its rights determined.

It is objected that the equity jurisdiction of this court should not be extended to this case, on the ground that it will avoid a multiplicity of suits. In support of this objection, it is said that complainant's predecessor had commenced in the state court 140 suits against consumers along the canal in Stanislaus county to recover the difference between \$1.50 per acre and \$2.35 per acre per annum. These suits obviously relate to past transactions wherein complainant claims to have delivered water to consumers for which it has not been paid the amounts to which it was entitled under the law. The suits are against

individuals in one county, and manifestly such actions at law are inadequate to determine this controversy. The present suit relates to the action of the boards of supervisors in all three counties with respect to rates to be charged all consumers for the year commencing July 1, 1908. It has reference to the future alone, and its purpose is to have the whole controversy in that respect determined in one suit. To state these facts is to answer the objection and furnish a sufficient reason for the equity jurisdiction.

It seems to me clear, from the foregoing statement of the main facts presented to the court upon the hearing, that *prima facie* the maximum rates fixed by the boards of supervisors of Fresno, Merced, and Stanislaus counties for the use of complainant's property used and useful in delivering water for irrigation purposes to the inhabitants of these counties, will not, as a whole, yield the minimum income to which complainant is entitled under the law; but as this conclusion is based upon the facts presented by the verified bill and the affidavits in support thereof, and upon a final hearing the facts may appear to be otherwise, I deem it proper to provide for the contingency that upon the final hearing the evidence may not justify a decree in favor of the complainant. It is therefore ordered that a temporary injunction issue, as prayed for in the complaint, upon the complainant filing an undertaking herein with two sufficient sureties (or any surety company approved by the clerk of this court as a single surety), in favor and for the benefit of the defendants, also for the benefit of any person or persons, and all persons who may be injured by reason of this order, in the sum of \$100,000, conditioned that the complainant will pay to the defendants, or any of them, and to any person or to all persons who may be injured by reason of this order, any and all damages which they or any of them may sustain in the premises, if upon the entry of a final decree in this action upon the merits the defendants shall prevail, or if it should be determined and adjudged that this order has been or is improvidently issued.

In re PENNSYLVANIA CONSOL. COAL CO.
(District Court, E. D. Pennsylvania. July 27, 1908.)

No. 3,041.

1. BANKRUPTCY—CORPORATIONS—PRINCIPAL PLACE OF BUSINESS.

The question where a corporation had its principal place of business for the purpose of determining the jurisdiction of proceedings in bankruptcy against it is one of fact, and neither its place of incorporation nor its charter is controlling.

2. SAME—POWERS AND DUTIES OF TRUSTEE.

A trustee in bankruptcy duly elected may properly appear and answer a petition for dismissal of the proceedings for want of jurisdiction.

3. SAME—PRINCIPAL PLACE OF BUSINESS—PROCEEDINGS IN TWO DISTRICTS.

A coal company was incorporated in West Virginia, and its principal place of business, as stated in its charter, was in that state, as were also its coal mines and lands which constituted all of its real estate. From the time of its incorporation, however, its executive office was maintained in Philadelphia, and there all of its financial matters were transacted, its

books kept, and its banking business done. Its letter heads gave that as its location, and it made all of its collections and a large part of its sales from there; but it had not complied with the laws of the state to entitle it to do business therein. For a time it also maintained offices at its mines; but for about a year before the filing of a petition in bankruptcy against it the mines had not been operated, and its only office was in Philadelphia, where it transacted some business relating to financial matters. A petition in bankruptcy was filed against it in the Eastern district of Pennsylvania, on which an adjudication was made, and later a proceeding was instituted in West Virginia, on which a receiver was appointed, but no adjudication made. Some of its creditors resided in one state, and some in the other. *Held* that, during the six months prior to the proceedings, its principal place of business was in the Eastern district of Pennsylvania, and that the court in such district had jurisdiction, and, having first exercised it, should retain the proceedings to the exclusion of the West Virginia court, in the absence of proof that it would be to the greater convenience of the parties in interest that the proceedings should be transferred.

In Bankruptcy. On exceptions to report of special referee on petition to vacate adjudication.

The following is the opinion of Referee Theodore M. Etting:

By order of court made April 3, 1908, there was referred to me, as special referee, with instructions to ascertain and report the facts, together with the testimony and findings of fact and law, a petition filed by Samuel W. Shrader, Abraham W. Burdett, and William F. Harvey on the 6th day of March, 1908, asking, *inter alia*, that an adjudication of bankruptcy made by this honorable court against the above-named Pennsylvania Consolidated Coal Company be vacated and set aside, and that John W. Miller, who had been appointed receiver of said company upon a petition filed in the Northern district of West Virginia, be appointed ancillary receiver of the assets of the said company in this district.

By order of the court, subsequently made, there was also referred to me, as special referee, answers to the above petition, filed by Joseph W. Gross, trustee, by Messrs. Watson, Diehl & Watson, creditors, and by the Pennsylvania Consolidated Coal Company. The last-named pleading, though termed an answer, is, in effect, in the nature of an exception to the petition filed by Shrader.

Before submitting any conclusions of fact or law, some reference should be made to the antecedent history of the case. The Pennsylvania Consolidated Coal Company is a corporation which was incorporated under the laws of West Virginia, by charter issued by the Secretary of State of said commonwealth on the 4th day of February, 1904. The objects and purposes of the corporation, as stated in its charter, are purchasing, acquiring, holding, and owning timber land, coal, iron ore, fire clay, and other mineral lands, in fee simple, when otherwise not prohibited by law, managing, working, and operating the same, mining and shipping coal, manufacturing coke, conducting general merchandise stores, and doing and performing all such other things, not prohibited by law, which may be essential and necessary, or incident, to any of the above named and described objects. The principal place of business of the corporation, as stated in its charter, is located in the city of Grafton, county of Taylor, in the state of West Virginia.

Under the laws of West Virginia, domestic corporations are divided into two classes, resident and nonresident. A resident corporation is one having both its principal place of business and its chief works in West Virginia. A nonresident corporation is one which has either its principal place of business or its chief works, or both, outside of the state of West Virginia.

The Pennsylvania Consolidated Coal Company had no real property in any state other than West Virginia. Its real property in West Virginia consisted of two coal mines, and it maintained thereat certain offices in connection with the operation of said mines. From the time of the formation of the company, and continuously thereafter, for certain purposes hereinafter referred to, the company also maintained an office in the city of Philadelphia.

In consequence of the ill success of the venture, the mines of the company had not been operated for more than a year preceding the bankruptcy, and the offices located in the vicinity of said mines had been discontinued; the Philadelphia office alone being maintained. On February 20, 1908, certain creditors of the company filed in the District Court of the United States for the Eastern District of Pennsylvania a petition praying that the company be adjudged a bankrupt. In that petition it was averred that the principal place of business of the company for the six months preceding was in Philadelphia. Upon this petition, the subpoena issued, service of which was accepted by the secretary of the coal company, and on the 6th day of March, 1908, an adjudication of bankruptcy was entered, and an order of reference made to me, as one of the referees in bankruptcy of this district. It further appears that on the 6th day of March, 1908, an application was made to the judge of the District Court of the United States for the Northern District of West Virginia by Samuel W. Shrader, Abraham W. Burdett, and William F. Harvey, praying for the appointment of a receiver and an adjudication in bankruptcy against said coal company. On the 9th day of March, 1908, pursuant to the prayer of the petition above referred to, the judge of the District Court of the United States for the Northern District of West Virginia appointed John W. Miller receiver. No order has as yet been entered by that court, adjudicating the said coal company bankrupt, and I assume, from correspondence which has been shown me by counsel for Shrader, that this course has been pursued in consequence of the prior adjudication of this court and the proceedings now pending. On March 13, 1908, the bankrupt filed with me, as the referee to whom the cause above mentioned had been referred, the schedules required by law, and, after due notice to all creditors whose names appeared thereon, a first meeting of creditors was called, and said meeting was held at my office, No. 701 Arcade Building, in the city of Philadelphia, on the 3d day of April, 1908. At this meeting eight creditors filed claims, which were allowed. The claims thus allowed amounted, in the aggregate, to \$11,254.86. At said meeting an election was held, at which Joseph W. Gross was duly elected trustee, and was required to enter bond in the sum of \$5,000. The trust has been accepted by Mr. Gross, bond in the above amount has been filed and approved, and Mr. Gross has, from the time of his election and qualification as aforesaid, been acting, and is still acting, as trustee. On the 13th day of April, 1908, after due notice to all the parties in interest, a meeting was called and held at my office, No. 701 Arcade Building, city of Philadelphia, for the purpose of considering, as special referee, the petition filed by Samuel W. Shrader et al. and the other pleadings hereinbefore referred to. At said meeting, and at sundry adjourned meetings held from time to time thereafter, I was attended by Joseph W. Gross, Esq., trustee, Abraham W. Burdett, Esq., and G. H. A. Kunst, Esq., attorneys for Samuel W. Shrader et al., J. Aubrey Anderson, Esq., attorney for the bankrupt, Albert W. Watson, Esq., of counsel for the trustee, Thomas M. Righter and Charles H. Jacobs, president and secretary, respectively, of the bankrupt company, and also by John W. Miller, the receiver appointed by the District Court of the United States for the Northern District of West Virginia. Testimony of the officers of the company and of Mr. Miller and Mr. Burdett was taken stenographically and was afterwards typewritten; their signatures thereto being waived by agreement of counsel. This testimony is returned herewith. There is annexed to the testimony all of the documentary evidence presented at the said meeting, and there is included therein a copy of the docket entries of the District Court of the United States for the Northern District of West Virginia, certified to by the clerk of said court.

In addition to the facts hereinbefore referred to in stating the antecedent history of the case, I find the facts to be as follows:

The real property of the company, which consists of two coal mines and certain land adjacent thereto, with certain houses erected thereon, is situate in Upshur county, W. Va. Work at both mines was discontinued for upward of a year prior to the filing of the petition in bankruptcy, and one mine is at present full of water.

Under the order of the District Court of the United States for the Northern District of West Virginia, Mr. Miller, the receiver of the said coal company,

is now in possession. He has sold some mules; my understanding being they were sold as perishable.

One of the mines owned by the company was conveyed to it by the Irondale Valley Coal Company, and the other by the Pleasant Valley Coal & Coke Company. Vendors' liens are retained in the deeds to secure unpaid purchase money to the amount of \$115,000, \$90,000 of which represents the unpaid purchase money for the property purchased from the Irondale Valley Coal Company, and \$25,000 of which represents the unpaid purchase money for the property purchased from the Pleasant Valley Coal & Coke Company, and for the above amounts notes were executed by the bankrupt company. These notes are held in part by the residents of Pennsylvania, and in part by the residents of West Virginia. The owners of the said notes have not as yet proved their claims before the special referee in bankruptcy, or appeared in these proceedings, and I am unable therefore to state with certainty which of these notes, or which of certain other notes which are said to be in existence, are owned by citizens of West Virginia, and which are owned by citizens of Pennsylvania; but, so far as I am able at present to determine, the Pennsylvania creditors of this class exceed, both in number and amount, the West Virginia creditors. The same condition of affairs may be said to subsist with respect to the unsecured claims of said bankrupt company which, as stated in the schedule, amount to \$11,499.79.

The laws of West Virginia prescribe the method to be adopted in the event of a corporation of this class desiring to change the location of its principal office from the place named in its charter, which, as before stated, was the city of Grafton, in the state of West Virginia. I find that the requirements of law in this respect were not observed by the bankrupt company, and I also find that from the time the company commenced operating its mines, as well as during the six months preceding bankruptcy, the executive offices and principal business office of the company were maintained in the city of Philadelphia and state of Pennsylvania.

I further find that the company failed to comply with the Pennsylvania act of April 22, 1874 (P. L. 73); no statement having been filed in the office of the Secretary of the Commonwealth, as required by that act.

The evidence with respect to the Philadelphia office is substantially as follows:

Sales were made through that office and orders were sent to the mines therefrom; payments for coal sold were received through the Philadelphia office (Righter's testimony, 35, 36); the company had no other office at any other place within the last six months (Righter's testimony, 25; Jacobs', 71); the offices in West Virginia were closed by order of the board of directors (Righter's testimony, 28, 29; Jacobs', 70, 71); the general offices are at present in Philadelphia and have been there since March, 1904 (Jacobs' testimony, 66); the books of account have always been kept in the Philadelphia office (Righter's testimony, 24; Jacobs', 70); the banking was done in Philadelphia (Righter's testimony, 25; Jacobs', 67, 68); Philadelphia was always named in the company's correspondence and on its letter heads (Righter's testimony, 24-26; Jacobs', 69). The testimony further shows that whilst during the last six months the company neither mined nor sold coal, yet, nevertheless, there was certain other business done at its Philadelphia office, as, for example, bills receivable were sent to Philadelphia and collected there (Righter's testimony, 25; Jacobs', 69); that the same is true with respect to bills payable (Righter's testimony, 85; Jacobs', 69); that notice to collect money emanated from Philadelphia (Jacobs' testimony, 72); that notes, as they fell due, were attended to at the Philadelphia office (Righter's testimony, 32-35; Jacobs', 73); that the bookkeeping was done at the Philadelphia office (Righter's testimony, 32); and that directors' meetings were held thereat (Righter's testimony, 33; Jacobs', 373).

In view of this testimony, there is no doubt in my mind as to the fact that the office maintained at Philadelphia for six months prior to the commencement of bankruptcy proceedings, was not only the principal office, but was the only office maintained by the company during this period.

It further appears from the testimony that as a result of an explosion which occurred at one of the mines owned by the bankrupt company, upwards

of a year prior to the adjudication in bankruptcy, 12 men were killed, and it is averred by the petitioners that claims for large amounts of money will doubtless be made by the representatives of said decedents, and suits therefor probably instituted, that these suits, when brought, will require the attendance of a large number of witnesses, residents of the neighborhood, and that convenience and economy will be subserved by the administration of the estate in the state of West Virginia. It appears from the testimony, however, that the coroner's jury exonerated the bankrupt company from negligence, and that no suits by reason of said explosion have as yet been brought. It may therefore be regarded as a matter open to doubt whether such suits will be brought at all.

It is averred in the said petition that suit had been actually commenced in the circuit court of Upshur county by John Shrader, the holder of certain purchase money notes hereinbefore referred to, to enforce the vendor's lien which has been referred to upon the land of the Pennsylvania Consolidated Coal Company, situate in said county. This averment I find to be true, but it further appears that at the instance of Joseph W. Gross, the trustee in bankruptcy, the judge of the District Court of the United States for the Northern District of West Virginia has issued a stay of the proceedings above referred to.

It is averred as a further fact that a deed of trust was executed by the company to Henry Coffield, trustee, to secure debts amounting, in the aggregate, to \$127,000, and it is further averred that said deed of trust, and the notes issued thereunder, is fraudulent and invalid under the laws of West Virginia.

It is contended that it is necessary to the proper, expeditious, and economical administration of the estate as a bankrupt, and for the convenience of its creditors and parties in interest, that the District Court of the United States for the Northern District of West Virginia should have jurisdiction of bankruptcy proceedings. This contention is traversed in the answers filed by Watson, Diehl & Watson, and by the trustee.

Findings of Law.

1. Certain exceptions were filed by Shrader and others to the right of Joseph W. Gross, as trustee, to file an answer to their petition. The exceptions are predicated upon the contention that the trustee is not the proper person to answer the petition, first, because his election was irregular and invalid, inasmuch as it occurred pending the determination of the question of jurisdiction and prior to the report of the special referee thereon.

This contention I regard as without merit, inasmuch as application was made by counsel for the petitioners for a stay of proceedings, and was refused by the district judge. It therefore became the manifest duty of the referee to call the creditors together without further delay, and the election of a trustee followed in accordance with the requirements of the act. Neither am I satisfied that the trustee was not authorized, after his election, to answer the petition; but, in any event, if the proper parties are the creditors themselves, and not the trustee, then, inasmuch as the answer of Watson, Diehl & Watson sets up identically the same defense as that interposed by the trustee, no special benefit could inure to the petitioners by sustaining the exception.

2. I am asked by counsel for the bankrupt company, and by Messrs. Watson, Diehl & Watson, to dismiss the petition filed by Samuel W. Shrader, Abraham W. Burdett, and William F. Harvey, on the ground that the petition is not properly verified, and also because it is denied that the petitioners, other than Burdett, are creditors.

This contention, I think, is without merit. Even if it be conceded that the petition is not sufficiently verified as to Shrader and Harvey, and even if it be conceded that the petitioners have not shown Shrader and Harvey to be creditors, I take it that Burdett alone, by whom it is verified, is entitled to appear and be heard.

3. I am asked to find that the facts and circumstances in this particular case limit and determine the principal place of business of the bankrupt company to have been at Grafton, in the state of West Virginia, for the six months preceding the filing of the petition in involuntary bankruptcy, and in support

of this contention my attention is called to the fact that all the assets of the company were in the state of West Virginia, that its mines were located in said state, that its principal works were located therein, that all of its employes lived in West Virginia, that the statutory requirements of neither West Virginia nor Pennsylvania were observed, and that the business transacted in Philadelphia was merely the business of a selling agency.

I have heretofore expressed my opinion with respect to the facts, and the authorities do not support the contention of the petitioners. *Mathews v. Consolidated Slate Co.* (D. C.) 15 Am. Bankr. Rep. 779, 144 Fed. 724; *Mathews v. Consolidated Slate Co.*, 16 Am. Bankr. Rep. 407, 144 Fed. 737, 75 C. C. A. 603; *Mathews v. Consolidated Slate Co.* (D. C.) 16 Am. Bankr. Rep. 350, 144 Fed. 724; *Matter of Duplex Radiator Co.* (D. C.) 15 Am. Bankr. Rep. 324, 142 Fed. 906; *Dressel v. The Lumber Co.* (D. C.) 5 Am. Bankr. Rep. 744, 107 Fed. 255; *In re Machine & Conveyor Co.* (D. C.) 1 Am. Bankr. Rep. 421, 91 Fed. 630; *Tiffany v. Milk Co.* (D. C.) 15 Am. Bankr. Rep. 413, 141 Fed. 444.

In *Mathews v. Consolidated Slate Co.*, cited supra, the corporation was a New Jersey corporation operating quarries in Vermont and New York, but having its executive offices and selling agency in Boston. The principal banking was done in Boston and supreme direction and control was exercised therefrom. Books of account were kept thereat, and the great bulk of its sales were there negotiated. It was held that Boston was the principal place of business of the company, and that the corporation was subject to the jurisdiction of the bankruptcy court for the district of Massachusetts.

In *Matter of Duplex Radiator Co.*, cited supra, the corporation was a New Jersey corporation which had not obtained its certificate from the Secretary of the state of New York, permitting it to do business there, and was adjudged a bankrupt by the District Court of the United States for the Southern District of New York, upon proof that the principal place of business of the bankrupt was in that district.

In *Tiffany v. Milk Co.*, cited supra, it was held that a company chartered under the law of the state of New Jersey and having a nominal office in that state in order to comply with the laws thereof, but having its principal place of business at Scranton, could be adjudged a bankrupt by the District Court of the United States for the Middle District of Pennsylvania, and this notwithstanding that six months prior to the proceedings in bankruptcy a fire had occurred which had destroyed its plant.

In *Dressel v. Lumber Co.*, cited supra, it was held that notwithstanding the corporation was incorporated in another state, and a provision in the articles of its association named a place within that state as the place for its principal office, the corporation could be adjudged a bankrupt in North Carolina if its principal place of business was situated within that district.

In *Matter of Machine & Conveyor Co.*, cited supra, the corporation was organized under the laws of Rhode Island, and having its plant thereat, but its general office in New York. It was adjudged a bankrupt in the latter district, notwithstanding the fact that during the greater part of the six months prior to the filing of the petition in bankruptcy the corporation did no business in Rhode Island; its works being shut down and its business there stopped, and it having been shown, however, that it did have a place of business in New York and did transact business thereat during the period in question.

I therefore conclude that, for the purpose of this reference, it is immaterial whether or not the company failed to comply with the statutory requirements of either the state of West Virginia or the state of Pennsylvania. Nor is it material that the company should have been mining and selling coal during the six months preceding bankruptcy, if, as has been found, it maintained its principal place of business in Philadelphia during that period, and that it matters not where its mines were located, or where its workmen lived, or whether or not its assets were held within the state of West Virginia.

4. If the finding of law and fact above referred to are correct, there can, of course, be no necessity for the appointment of an ancillary receiver in this district.

5. The general rule undoubtedly is that both courts ought not to proceed with independent hearings, and that, as between the two courts, the court in which

the petition was first filed ought, unless manifest ground of convenience be shown, to be accorded exclusive jurisdiction. In re Bridge & Iron Co. (D. C.) 13 Am. Bankr. Rep. 809, 133 Fed. 568; Matter of United Button Co. (D. C.) 12 Am. Bankr. Rep. 761, 132 Fed. 378.

I am asked to recommend that the order adjudging the coal company bankrupt be vacated on the ground of convenience. The burden of proof that such convenience would result is on the petitioning creditors. They have, I think, established the fact that in the course of the administration of this estate various questions are likely to arise, calling for an interpretation of the laws and decisions of West Virginia; but they have not, I think, established such a state of facts as requires the court which was first appealed to, and which rightfully assumed jurisdiction, to surrender it. The appeal is made in form by three creditors; but inasmuch as it is denied by the respondents that two of the persons named in the petition are creditors, and inasmuch as the only testimony in support of the petition is that of Burdett, it must, for the purposes of this reference, be assumed that the appeal for a change of jurisdiction is made by Burdett alone. It has not been shown that the majority of the creditors, in number or amount, whether secured or unsecured, desire a change of jurisdiction, or that they reside elsewhere than in Pennsylvania, or that they would be inconvenienced if jurisdiction is maintained, or that greater economy or convenience would result from it.

I therefore find as a conclusion of law the petitioners have failed to satisfy me by their proofs that it is my duty to recommend that the best interests of the estate require that the jurisdiction, rightfully assumed, should be vacated.

For the reasons above stated, I respectfully recommend that the petition filed by Samuel W. Shrader, Abraham W. Burdett, and William F. Harvey be dismissed, with costs, and that the costs of this reference shall be as follows:

Theodore M. Etting, special referee.....	\$100 00
Stenographic charges.....	55 50
Total	\$155 50

Supplemental Report.

On behalf of Samuel W. Shrader certain exceptions have been filed with the referee and are appended hereto.

1. The first exception is, I think, immaterial. The endeavor of the petitioners is to effect a transfer of jurisdiction, and thus to necessarily divest the trustee of his title to the bankrupt property. He has executed a bond and assumed the duties devolving upon him as trustee. The trustee is, not like a receiver, a mere caretaker. He is the agent of the creditors. The statute invests him with the title of the bankrupt and makes him, not only quasi owner, but the owner pro hac of all the property and rights of action belonging to the bankrupt. In re Baber (D. C.) 9 Am. Bankr. Rep. 415, 119 Fed. 520.

I can see no reason to change my conclusions which will be found in my report.

2. The petitioners are in error in stating, in their second exception, that I found as a fact that "this corporation did not change its principal place of business." On the contrary, I found that whilst the principal place of business, as named in the company's charter, was situated in the city of Grafton, nevertheless, the executive office and principal place of business of the company had been in Philadelphia not only from the time the company commenced operating its mines, but also during the six months preceding its bankruptcy. And I further found that "during the six months preceding bankruptcy, the Philadelphia office was not only the principal office, but the only office maintained by the company during that period."

3. The petitioners are in error in stating, in their third exception, that I found as a fact that "offices were maintained at each of the company's mines in the state of West Virginia," without adding thereto that I further found that said offices had not been maintained during the six months preceding bankruptcy. The petitioners are also in error in stating, in the above ex-

ception, that I found that "the only business that had been transacted by said corporation was endeavoring to pay off the vendors' lien notes held by citizens of West Virginia, and in endeavoring to prevent litigation by West Virginia creditors." I found, as will appear in my report, that whilst the company never mined or sold coal during the six months preceding bankruptcy, it, nevertheless, transacted at its Philadelphia office certain business, the nature and character of which is recapitulated in the testimony found on the pages above referred to and which was other than that of paying off vendors' lien notes or endeavoring to prevent litigation.

4. With respect to the fourth exception, the cases referred to must speak for themselves. It is proper, however, that I should call attention of the court to the case of *Marine Mach. & Conveyor Co. (D. C.)* 1 Am. Bankr. Rep. 421, 91 Fed. 630, heretofore cited. My understanding is that residence, domicile, or principal place of business is a question of fact, and that the authority conferred by the charter is neither sufficient nor controlling. The cases cited *supra*, as well as the most recent publication on the subject, I think fully sustain this view. *Remington on Bankruptcy*, §§ 33, 35, 87.

5. With respect to the fifth exception, the schedules which were offered in evidence purport to show the residence of the holders of the vendors' lien notes, and their correctness in this respect was not challenged, excepting in the case of Samuel W. Shrader, whose residence, the testimony shows, was incorrectly stated in the schedules, and should have been stated as in Pennsylvania.

6. With respect to the sixth exception, the evidence does not show that all of the unpaid vendors' lien notes are held and owned by West Virginia creditors.

7. With respect to the seventh, eighth, and ninth exceptions, I do not deem it necessary to add anything to the views heretofore expressed in my report.

In conclusion I desire to say that I have carefully considered all of the foregoing exceptions, that I have reconsidered my report in the light of the exceptions, that, after making a careful and patient examination of the exceptions, I am compelled to adhere to the conclusions stated in my report, and I submit the exceptions to the judgment of the court.

I regret very much that counsel for petitioning creditors, after having been requested by me, should not have been willing to appear before me for the purpose of arguing the exceptions. They were requested to file exceptions with me, and were given notice that argument thereon would be heard on June 4, 1908. They filed exceptions, but declined to appear, and, in order that there may be no misunderstanding with respect to their position, I append hereto a letter addressed to me by G. H. A. Kunst, Esq., of counsel for petitioners, under date of June 3, 1908.

Watson, Diehl & Watson, for trustee.

G. H. A. Kunst, for excepting creditors.

J. Aubrey Anderson, for bankrupt.

J. B. McPHERSON, District Judge. From the facts found by the special referee, Theodore M. Etting, Esq., it follows that the principal place of business of the bankrupt was in the Eastern district of Pennsylvania during the six months preceding the filing of the petition, and therefore that this court had jurisdiction to entertain the proceeding, although the bankrupt is a West Virginia corporation. I agree also with the referee that the facts reported by him support the conclusion that the greater convenience of the parties would not be promoted by transferring the cause to the Northern district of West Virginia.

For the reasons given by the learned referee in his two reports, they are now confirmed, and it is hereby ordered that the petition of Abra-

ham W. Burdett et al., filed in this court on April 3, 1908, be refused, and that the petitioners therein pay the costs of the proceedings thereon, including the cost of the special reference.

THE IRA M. HEDGES.

(District Court, S. D. New York. April 3, 1908.)

JUDGMENT—EFFECT OF JUDGMENT OF STATE COURT IN ADMIRALTY—SUIT TO ENFORCE CONTRIBUTION FROM JOINT TORT-FEASOR.

The owner of a vessel, who has been held liable in an action at law in a state court for damages caused by collision, cannot maintain a suit in admiralty to compel contribution from another vessel, alleged to have also been in fault for such collision, especially where he failed to avail himself of a provision of the state statute under which he might have brought in the owner of such other vessel in the state court.

In Admiralty. On exception to libel for want of jurisdiction.

Robinson, Biddle & Benedict, for libellant.

Amos Van Etten, for respondent.

ADAMS, District Judge. This action was brought by the Lehigh Valley Railroad Company against the tug Ira M. Hedges, upon a cause of action stated in the libel as follows:

"Third: On or about the 7th day of June, 1904, at about 6:10 P. M., the tug 'Slatington' left Pier 44, North River, with carfloat 'No. 22' alongside on the port side, bound for the Lehigh Valley Railroad Terminal at Jersey City. The said tug was properly manned and equipped and had a lookout who was attentive to his duties stationed forward on top of the cars.

When about amidstream and headed toward the Jersey Shore, the tug 'Ira M. Hedges' was seen coming up the River well off on the port side. The 'Hedges' had two stone scows in tow, one on each side. In this situation the 'Slatington' blew a signal of one whistle; but this signal was not answered by the 'Hedges,' which continued on her course. The 'Slatington,' receiving no answer, and seeing that the 'Hedges' was not changing her course, was stopped, alarm whistles were blown, and the engines were put in reverse motion; but the starboard corner of the scow 'Helen,' on the starboard side of the 'Hedges,' collided with the port corner of float 'No. 22,' damaging the scow and causing some damage to the guard rail on carfloat 'No. 22.'

The tide at the time was about high water slack, and the wind light from the southwest.

Fourth: Thereafter the Rockland Lake Trap Rock Company, owner of the scow 'Helen,' began an action in the Supreme Court of New York for Rockland County against the libellant, to recover the damages to the scow 'Helen' caused by said collision. The said action came on for trial before Mr. Justice Kelly and a jury; and after hearing the evidence, a verdict was rendered for the Lehigh Valley Railroad Company. The cause was thereafter appealed by the owner of the 'Helen' to the Appellate Division, for the Second Department, and such proceedings were had that the Appellate Division thereafter reversed the order dismissing the complaint, and remanded the cause for a new trial.

Thereafter the cause came on for a new trial before Mr. Justice Morschauser and a jury, and such proceedings were had that a verdict was rendered in favor of the plaintiff and against the libellant herein for the damages sustained by the scow 'Helen,' and thereafter the costs were taxed and judgment entered on June 10, 1907, against the libellant herein for the damages sustained by the scow 'Helen,' with interest and costs, in the sum of Twelve hun-

dred and nine and 81/100 Dollars (\$1209.31), which judgment the libellant thereafter paid.

The libellant expended in defending said action in counsel fees, witness fees and other expenses, the sum of Seven hundred and nineteen Dollars (\$719.00).

Fifth: The said collision and the damages consequent thereon were caused and contributed to by the negligence of the tug 'Ira M. Hedges,' or those in charge of her navigation, in the following, among other particulars which will be pointed out at the trial:

I. In not having any, or any proper, lookout.

II. In not answering the one whistle signal of the 'Slatington.'

III. In that, having the 'Slatington' on her starboard side, and the vessels being on crossing courses, she did not keep out of the way.

IV. In that she did not stop and back in time to avoid a collision.

Sixth: That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and this Honorable Court.

Wherefore the libellant prays that process in due form of law according to the practice of this Honorable Court in cases of admiralty and maritime jurisdiction may issue out of and under the seal of said Court against the steamtug 'Ira M. Hedges,' her engines, boilers, tackle, &c., and that said steamtug, her engines, boilers, tackle, &c., may be seized and sold to pay the amount of the claim set forth in this libel, together with interest and costs, and for such other and further relief as may appear to this Honorable Court to be just and proper."

The Cornell Steamboat Company appeared in the action as claimant of the Hedges, as owner in possession and filed an exception to the libel as follows:

"The Cornell Steamboat Company appears specially in this action and excepts to the libel filed herein in this Court, upon the ground that the same does not state a cause of action, and the matters therein set forth are not within the jurisdiction of this Court.

Wherefore, this claimant prays that the libel herein be dismissed with costs."

While the libel on its face would seem to claim a right to recover what it has been obliged to pay, yet it is urged that it only seeks contribution because the Hedges was in fault as a joint tort-feasor and urges that although the action could not be maintained at common law, the equitable powers of the admiralty are sufficient to give jurisdiction and create a right of recovery should the Hedges be found, upon trial, to have been a participant in the wrong done. Certain authorities have been cited to support the contention, viz.: *The Mariska* (D. C.) 100 Fed. 500; *Id.*, 107 Fed. 989, 47 C. C. A. 115; *Erie Railroad Co. v. Erie and Western Trans. Co.*, 204 U. S. 220, 27 Sup. Ct. 246, 51 L. Ed. 450. Those, however, were admiralty cases and they do not pretend to give admiralty jurisdiction to correct injustice claimed to have arisen through defects in the common law system, to which a party has a constitutional right in marine matters, not actions in rem, as well as in others, to resort.

It is contended that the common law system is so deficient that a party may recover there against a single wrong-doer, where there is another, or others, equally culpable, without any right of contribution. It is true that an injured person may recover from any one of several joint tort-feasors, if no attempt is made to reach the others but it seems too much to say that there is no right to bring in others. On

the contrary, it is provided in the New York Code of Civil Procedure as follows:

"§ 452 (Am'd, 1901.) When court to decide controversy, or to order other parties to be brought in.

The court may determine the controversy, as between the parties before it, where it can do so without prejudice to the rights of others, or by saving their rights; but where a complete determination of the controversy cannot be had without the presence of other parties, the court must direct them to be brought in. And where a person, not a party to the action, has an interest in the subject thereof, or in real property, the title to which may in any manner be affected by the judgment, or in real property for injury to which the complaint demands relief, and makes application to the court to be made a party, it must direct him to be brought in by the proper amendment."

* * * * *

"§ 723. (Am'd, 1877, 1900.) Amendments by the court; disregarding immaterial errors, etc.

The court may; upon the trial, or at any other stage of the action, before or after judgment, in furtherance of justice, and on such terms as it deems just, amend any process, pleading, or other proceeding, by adding or striking out the name of a person as a party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting an allegation material to the case; or, where the amendment does not change substantially the claim or defence, by conforming the pleading or other proceedings to the facts proved. And, in every stage of the action, the court must disregard an error or defect, in the pleadings or other proceedings, which does not affect the substantial rights of the adverse party. When amending a pleading or permitting the service of an amended or supplemental pleading in a case which is on the general calendar of issues of fact, the court may direct that the case retain the place upon such calendar which it occupied before the amendment or new pleading was allowed, and that the proceedings had upon the amended or supplemental pleadings shall not affect the place of the case upon such calendar, or render necessary the service of a new notice of trial."

These sections have recently been before the New York Court of Appeals in *Gittleman v. Feltman*, 191 N. Y. 205, 83 N. E. 969. In an action to recover for personal injuries, an order was made permitting the plaintiff to bring in an additional defendant, which it claimed was a joint tort-feasor with the other defendants. An appeal was taken, by permission, from an order of the Appellate Division of the Supreme Court in the second judicial department, entered November 26, 1907. The court of appeals said (pages 209, 210 of 191 N. Y., page 970 of 83 N. E.):

"The questions certified in this case are:

First. 'Should the motion of the plaintiff to bring in the Surf Amusement Company as a party defendant herein have been granted?'

Second. 'Has the Supreme Court, upon the motion of the plaintiff, in an action to recover damages for personal injuries resulting from negligence, the power to bring in as defendant a party not named as a defendant at the time of the commencement of the action, against the objections of the defendants originally named and of the proposed new defendant?'

The granting of a motion of this character rests in the sound discretion of the court. It may grant in the furtherance of justice, on such terms as it deems just. The jurisdiction of this court is limited to the review of questions of law, and it, therefore, cannot review the discretion of the Special Term of Appellate Division. We, therefore, have no power to answer the first question certified. The second question, however, is as to the power of the Supreme Court to grant the motion, which calls for an interpretation of the provisions of the Code referred to. With reference to this question we have the power to determine the same, and we think that it should be answered in the affirmative, and the order appealed from affirmed, with costs."

It would appear, therefore, that in this state at least, the common law courts are not so deficient in power that it is necessary for parties to resort to a court of admiralty to secure justice in a case of this kind.

But suppose that justice can be better reached in a court of admiralty, does that give a litigant a right to resort to it in all events? It is doubtless true, that an admiralty judge is better qualified to determine controverted questions of fact and law in a complicated collision case, for example, but that does not prevent the common law courts from finally deciding questions of that nature, according to their methods, by actions in personam.

In *Schoonmaker v. Gilmore*, 102 U. S. 118, 119, 26 L. Ed. 95, it was said:

"The single question in this case is, whether the courts of the United States, as courts of admiralty, have exclusive jurisdiction of suits in personam, growing out of collisions between vessels while navigating the Ohio River. This is a Federal question, and gives us jurisdiction; but we cannot consider it as any longer open to argument, as it was decided substantially in *The Moses Taylor*, 4 Wall. 411, 18 L. Ed. 397; *The Hine v. Trevor*, 4 Wall. 555, 18 L. Ed. 451; *The Belfast*, 7 Wall. 624, 19 L. Ed. 260; *Leon v. Galceran*, 11 Wall. 185, 20 L. Ed. 74; and *Steamboat Company v. Chace*, 16 Wall. 522, 21 L. Ed. 369. Judiciary Act Sept. 24, 1789, c. 20, § 9, 1 Stat. 76, reproduced in section 563, Rev. St. par. 8 (U. S. Comp. St. 1901, p. 457), which confers admiralty jurisdiction on the courts of the United States, expressly saves to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it. That there always has been a remedy at common law for damages by collision at sea cannot be denied."

The principle is well established that where a court obtains jurisdiction of a cause of action, it retains it, to the exclusion of all other courts, to the end. The libellant here seeks to create a right, which apparently does not exist and never has existed. The respondent had a right to invoke the common law remedy. In the trial of the action therein, the defendant was justified in contending, as it (now the libellant here) seeks to establish, that the negligence was partly imputable to the tug *Hedges*. In order to recover in the state court, it was necessary to show some negligence on the part of the *Slatington*. Evidently the jury was finally convinced of the latter's fault, hence the verdict, which is made the basis of the claim here. It seems to be an injustice that the *Hedges*, or her owner, if she was in fault as alleged, should not respond for a part of the loss but the libellant failed to resort to means which the state law provided for bringing in the other defendant and I do not think it is now in a position to invoke the jurisdiction of this court to enforce contribution. If that was not attainable in the common law proceeding, it was an incident of the methods prevailing there and cannot be made the basis for a resort to admiralty.

The exception is sustained.

THE SENECA.

(District Court, S. D. New York. April 7, 1908.)

1. SHIPPING—SHORT DELIVERY OF CARGO—LIABILITY OF VESSEL.

Where it appeared that a certain number of cases of bristles were laden on board of a steamship in good order, they were thereafter until delivery, at the ship's risk with respect to contents, and she is liable for a deficiency, in the absence of a valid exception in the bill of lading.

2. SAME—EXEMPTION IN BILL OF LADING.

Robbery or theft of cargo by those on board cannot be made a ground of exemption from liability of a vessel under the Harter act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946]).

3. SAME—EVIDENCE OF WEIGHT—BOAT NOTE.

A receipt called a "boat note" given when goods are received on board from lighters, reciting the number of packages, that they were in good order, and their weight may be received in evidence as to such matters as complementary to the bill of lading, and where the packages were apparently of uniform weight when received, and those delivered intact were of the stated weight, but others which had apparently been tampered with were of less weight, it may be assumed that their weight was the same when they were received.

In Admiralty. Suit for short delivery of cargo.

Beard & Paret and James T. Kilbreth, for libellants.
Convers & Kirilin and John M. Woolsey, for claimant.

ADAMS, District Judge. This action was brought by Henry W. Peabody & Company against the steamship Seneca to recover the value of a claimed short delivery of bristles shipped by Ilbert & Company at Shanghai on the 15th day of September, 1905. The shipment was of 50 cases of bristles, deliverable to order in New York. The bill of lading was assigned by the shippers to the libellants, who claimed the goods upon arrival of the vessel, but it is alleged that they did not come in the same good order and condition as when shipped, a number of the cases having been tampered with and the contents thereof having in part been extracted while the goods were on the steamship, to the loss of the libellants of \$873.92. The claimant admits the shipment and the issuance of a bill of lading, denies many of the other allegations and alleges that the bill of lading only recited that the goods were in apparent good order and condition, and further:

"Eighth: Further answering and as a further and separate defence herein, the claimant alleges that the goods in question were carried subject to a contract of carriage contained in the bill of lading referred to in the fourth article of the libel and alleges that the bill of lading did not recite that the goods were received in good order and condition, but only that they were received in apparent good order and condition. It further provided that they were to be carried and delivered subject to the exceptions and conditions mentioned in the bill of lading, among which were the following:

'Weight, measurement, quality, quantity, contents and value (except for the purposes of estimating freight) unknown.'

'The act of God * * * robbers or thieves, by land or sea, on board, in craft or on shore, whether in the service of the ship owners or not, * * * or loss and/or damage of any description arising from * * * and circumstances beyond the control of the ship owners * * * barratry by master or crew, misfeasance * * * loss or damage caused by * * * all and every dangers and accidents of the seas, rivers and canals and of navigation

of whatever nature or kind, and the consequences of all the above mentioned risks and accidents.'

'The steamer is not liable for insufficient packing or wear and tear of packages, for inaccuracies, obliterations, insufficiency or absence of marks, numbers or descriptions of goods shipped, breakage, loss or damage arising directly or indirectly, before, during or after loading, or until delivery is completed * * * inherent quality or vice of the goods shipped.'

'Shipowners will not be accountable * * * beyond the amount of \$100. U. S. gold currency, for any one package unless bills of lading are signed for such goods and the value declared therein and freight paid ad valorem.'

The bill of lading sustains the claimant's allegation of "apparent good order and condition" and the further allegations pleaded.

The solution of the controversy of fact depends upon the answer to the question was the shipment made in good order, or whether a deficiency in the contents of some six of the packages, which was found at the time of delivery, existed at the time of the shipment or was in consequence of an abstraction of the contents while on board the vessel.

On the 15th of September the bill of lading was issued for the 50 cases, in apparent good order but with a provision that the weight was unknown. On the next day, the 16th, according to the dates in the instruments, the bristles were brought alongside and delivered to the steamer. A receipt, called a boat note, was thereupon issued by the chief officer of the ship, containing an acknowledgment of the receipt of 50 cases. The goods were tallied on the vessel by a clerk in the employ of the ship. A warning had been given to the officers that they must be very careful about bristles. Special injunctions were given, as testified by the second officer, for the officers to watch the shipment of the bristles themselves. Having these instructions in view, the cases were received and the note was issued. This note recited that the goods were "in good order and condition" and contained an instruction as follows:

"Any package not in good order must be left in boat. Nothing but a clean receipt will be accepted. Shanghai Tug and Lighter Co. Limited."

The boat note also contained a memorandum "pls 50.00" which it has been testified, meant 50 piculs, a weight of $133\frac{1}{3}$ pounds each, and it is contended therefrom that there was a definite loss of weight from that which was loaded on the steamer, as the turn out of six cases showed only 550 pounds gross, instead of 800 pounds. It does not appear that the packages were weighed at the time, which impairs the value of the entry on the note in this respect but still it is some evidence of the quantity of bristles shipped, and it is fortified by the fact that the intact packages conformed to this standard of weight, 130 to 133 pounds, and is persuasive of the defective packages having contained the same amount. I think it is proper to use this note as evidence, complementary to the bill of lading. In *The Euripides*, 71 Fed. 728, 18 C. C. A. 226, where there was a question of weights, it was said by the Circuit Court of Appeals (page 732 of 71 Fed., page 230 of 18 C. C. A.):

"While there is no sufficient proof to show what those bags weighed when sound, we concur with the district judge in the conclusion that the average weight of the damaged bags, which is shown by the summary above, may prop-

erly be taken as the least measure of the contents of a sound bag, and approve his calculation that the loss of sugar from the empty bags was 23,664 pounds."

The cases containing the bristles were wooden boxes, about $2\frac{1}{2}$ or 3 feet x $2\frac{1}{2}$ feet x $2\frac{1}{2}$ feet, entirely covered with paper, which was found subsequent to delivery to be bruised as well as the wood, which also had nails drawn out from burst wood; also iron bands around the ends of the packages were broken. When the packages were opened, one was found to contain 2 bags of beans but no bristles, another contained partly beans and partly matting, with 24 pounds net of bristles, another contained 25 pounds net of bristles; another contained 62 pounds net of bristles; another contained 67 pounds net of bristles; another contained 92 pounds net of bristles. Some of the other cases were found to be slightly broken but with no deficiency of contents. When the cases were delivered to the ship they were examined carefully by the second officer and he saw nothing to indicate any deficiency in the contents, but as soon as a discharge was commenced it was immediately noticed that some of the cases were light and the attention of the officers was at once called to the fact. The actual deficiencies were not known till after the cases were put in store and an examination made there, two to four weeks later, in which the actual weights were ascertained.

Considerable stress is laid by the claimant upon the fact just mentioned, but it has not been attempted to deny that the weights were apparently uniform and correct when delivered to the vessel and that the cases were light when they reached New York. The testimony shows that great care was taken in the warehouse to protect the goods and it does not in any way appear that the contents were interfered with there. Under these circumstances a criticism of a late detailed examination of the contents and the weights is not entitled to very much consideration.

The conclusion to be derived from the facts is not seriously affected by the claim that the boxes were so stored and surrounded by other goods that access to them was practically impossible. I find that the vessel is in fault for a short delivery of the contents of several cases and should respond therefor unless a valid exemption exists to the claim. The pertinent parts of the exceptions, correctly extracted from the bill of lading, are stated in the answer, quoted above.

The rule governing matters of the kind is stated in the recent case of *The Patria*, 132 Fed. 971, 68 C. C. A. 397, where it in effect appears that where the evidence shows that a ship received goods on board in good condition, and delivered them damaged, it has the burden of proving that the damage was due to a risk excepted in the bill of lading, although if it is manifestly so, as from breakage or decay, which are excepted generally, the ship need not show the cause of the breakage or decay, but it is incumbent upon the cargo-owner to adduce proof of negligence. There can be no question that if these goods were stolen by the servants of the ship, she is liable therefor. *The Minnetonka* (D. C.) 132 Fed. 52; affirmed 146 Fed. 509, 77 C. C. A. 217. It was incumbent on the ship to show that the robbery was consummated by some one not belonging to the ship, if that was the fact,

then the burden would have been upon the libellants to show negligence in the care of the goods. The *Saratoga* (D. C.) 20 Fed. 869, 871. There is no direct proof, however, of the robbery, and in its absence, and under the circumstances shown here, that the vessel was generally in the stream, without access to the cargo by outsiders, it must be assumed that the deficient bristles were abstracted by those belonging to her and relief from liability therefor can not be obtained, under the provisions of the Harter act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946]).

The exception pleaded of non-accountability beyond \$100 per package has not been urged and therefore has not been considered.

There will be a decree for the libellants, with an order of reference.

THE VUELTAJO.

(District Court, S. D. Alabama. August 8, 1908.)

No. 1,187.

1. SHIPPING—LIABILITY OF VESSEL—RIGHT OF ACTION OF PASSENGER.

A passenger on a vessel may maintain a suit in rem against her in admiralty to recover damages for a failure to furnish him with proper accommodations, but not for an assault and battery committed upon him by the master, for which his remedy is in personam only either in admiralty or at common law.

[Ed. Note.—Accommodations to passengers on vessels, see note to *The Oregon*, 68 C. C. A. 630.]

2. SAME—RELATION OF "PASSENGER"—EMPLOYÉ OF OWNERS CARRIED FREE.

Libelant was employed by the owners of a steamer to go with her from Mobile to Cuba, and there operate a gasoline launch under directions of the master. He was to perform no service until he reached the Cuban port, but was to receive pay from the time he started until his return, and to be furnished transportation on the vessel. *Held*, that he was not a passenger in a legal sense, nor entitled to demand accommodations as such, and could not recover in admiralty against the vessel for a failure to furnish him with such accommodations.

[Ed. Note.—For other definitions, see *Words and Phrases*, vol. 6, pp. 5218-5227; vol. 8, p. 7748.]

In Admiralty.

J. I. Clemmons and Fred Bacho, for libelant.

Pillans, Hanaw & Pillans, for claimant.

TOULMIN, District Judge. The libelant in his libel alleges, in substance, that he was employed in the city of Mobile to go to the island of Cuba to operate while there a gasoline launch, and that he took passage to Cuba on board said steamship in company with a party of excursionists and prospectors who had hired him to go there. He alleges: That he was not permitted by the master of the vessel to go to certain parts of the vessel where the other passengers were permitted to go, but was ordered by him to go to the foredeck of said vessel, and was told that that was his place and to keep it; that he was given no sleeping apartments as a passenger, but was made to sleep in the forecabin of the vessel with her sailors or crew and with-

out proper sleeping accommodations; that when the vessel arrived at the harbor of Cienfuegos, Cuba, he took charge of said launch and operated it to and from the vessel and shore about and around said harbor as he was bidden, but returned to the vessel at night; that about three days after arriving at Cienfuegos, coming on board from shore one night, the master called him to the bridge, and a conversation ensued between them, in which a dispute arose as to whether libelant was a passenger with the rights and privileges of a passenger on the vessel or was a member of her crew and "under" the master; that in this controversy the master flew into a rage, and struck libelant violently on the face and ear, inflicting a gash and knocking him down; that he continued the assault upon him and succeeded in getting his hands and arms tied behind him and in placing him in a small room wherein he was kept in solitary confinement for five or six days with everything removed from the room except a single mattress, and was so confined until the vessel was two days out on her return trip to Mobile; and that during his imprisonment he was not furnished with reasonably sufficient food. Libelant claims that, by reason of the premises and the breach of contract of carriage as a passenger, he is entitled to demand of the said vessel, her owners and master, damages, and prays that said vessel be condemned and sold to pay the same.

Respondent, answering, says: That libelant was hired to go as a member of the crew of said vessel, but with no duty than as operator of said launch when and as she should be needed, which launch was carried on board of said vessel to be used as alleged in the libel; that libelant was to receive \$1 a day besides his board on the ship; and that he signed articles upon said vessel and became and was a member of the crew. Respondent further says: That on one night while returning from the shore to the vessel libelant was insulting to the master, and on arriving at the ship he was called by the master to the bridge, and was informed that he was not a passenger, as he asserted, but a member of the crew; that libelant became very insulting and offensive and used threatening language to the master, refusing to obey his orders to go to his quarters; that libelant struck the master in the face, who thereupon threw libelant on the deck and there held him until his hands were bound by the chief officer of the ship, and the master then caused libelant to be locked up in a stateroom of the vessel, where he was confined about five days and then ordered released. Respondent further says that libelant was so confined on account of his conduct, and during such confinement was furnished an abundance of food of decent character and description and with water, and says that the master used no more violence than was necessary to meet the uncalled for assault of the libelant made upon him upon his own ship and while he had a crew aboard. Respondent says, in short, that the libelant was a servant of the ship and in no sense a passenger on her, and respondent excepts to the libel on the ground that the acts for which the libelant seeks to recover damages can be sued for in this court only in personam, and not in rem. He therefore prays to be dismissed.

From the evidence, I find the facts of this case to be substantially these: The libelant was employed by the owners of the steamship Vueltabajo to go to Cuba to operate a gasoline launch which had been provided by such owners to be taken on said steamer to Cuba to be used there in carrying the officers and members of the crew of the steamer and other persons to and from the shore, as might be required. There were aboard the steamer friends and guests of her owners, who were carried from Mobile as visitors to the island of Cuba. At the time of the engagement of libelant's services, it was agreed that they were to begin when the steamer reached her port of destination, Cienfuegos, Cuba; but compensation for such services was to commence on the day he left Mobile and to end on the day of his return there, and was to be at the rate of \$1 per day. That transportation would be furnished him by the owners; their representative who made the agreement with him telling him that he would be taken down to Cuba on their vessel. That he inquired of the owner's manager of the steamer on board the steamer, on the day she left, as to where he was to be quartered, and that he was told to "see the captain about that," that "the captain would take care of that matter." Nothing was then said about his being a passenger or a member of the crew. He was told that he was subject to the orders of the master in the navigation of the launch. Libelant signed no shipping articles, and performed no services on board the steamer, and was required to perform none. It was stated that his name was on the articles, but admittedly without his consent or knowledge. It was probably put there because the steamer was not a common carrier of passengers. However, no passage was paid by libelant, and he was not furnished the accommodations or allowed the privileges of a first-class passenger. That libelant was assaulted, struck, had his arms tied behind his back, and confined in a stateroom under lock and key for several days while in the harbor of Cienfuegos and on the voyage back to Mobile is undisputed.

If the libelant was a first-class passenger on the steamer, as he claimed to be and asserted, then the failure to give him such accommodations was a marine tort, for which he might proceed in admiralty against the vessel and would be entitled to damages for such annoyance, discomfort, and public humiliation as he may have suffered. *The Williamette Valley* (D. C.) 71 Fed. 712. But he cannot proceed in rem against the vessel for the assault and battery committed on him, which includes the striking, the binding of his arms behind him, and the confinement in the stateroom. For these his remedy is in personam in a court of admiralty, or by suit in a common-law court. Admiralty Rule No. 16; *Hughes on Admiralty*, p. 187; *Leathers v. Blessing*, 105 U. S. 629, 26 L. Ed. 1192.

A "passenger" is one who travels in a public conveyance by virtue of a contract, express or implied, with the carrier, as a payment of fare or something accepted as an equivalent therefor. *Black's Law Dict.* title "Passenger"; 5 *Am. & Eng. Encyc. of Law* (2d Ed.) 486; *Thomp. on Car.* p. 26; *Pa. R. Co. v. Price*, 96 Pa. 267. While libelant was a passenger in the sense that he was a traveler being carried from one place to another, he was not a passenger, in the legal

sense of the term, and entitled to all the accommodations, rights, and privileges as such. He was not being carried by the steamer by any contractual relations with her as a common carrier. Moreover, when he went aboard of the vessel he understood that the master was to provide him with such quarters and accommodations as the master might designate. He was also informed that he was subject to the master's orders in the performance of the service for which he was employed, to neither of which did he object. I find therefore that libellant is not entitled to recover damages for the failure of the master to furnish him with the accommodations of a first-class passenger as claimed. I also find that he cannot recover in this proceeding in rem against the vessel for the wrongful and unjustifiable assault and battery committed on him by the master, complained of, for want of jurisdiction of this court.

My opinion on the evidence is that libellant was not a member of the crew of the steamer, but was employed by her owners to perform specific services as navigator of the launch when the steamer arrived at Cienfuegos. At all events, he was a person rightfully on the vessel. He was there for a proper purpose in itself, and was entitled to demand the exercise of ordinary care towards him on the part of the vessel, and to be exempt from cruel and improper treatment by the officers of the vessel. He at least was entitled to the consideration of a person there under the doctrine of implied invitation. But whether libellant was a member of the crew, or rightfully on the vessel as an employé of her owners, being there by their direction or permission, he would be entitled to recover for any injury cruelly, unnecessarily, and improperly inflicted on him by the master. The owners and the master would be liable by a suit in personam in a court of admiralty or by the proper action in a court of common law. *The Guiding Star* (D. C.) 1 Fed. 347; *Spencer v. Kelley* (C. C.) 32 Fed. 838; *The General Rucker* (D. C.) 35 Fed. 152; *Leathers v. Blessing*, 105 U. S. 629, 26 L. Ed. 1192.

I am therefore constrained to dismiss the libel for the want of jurisdiction of the case.

QUEEN CITY SAVINGS BANK & TRUST CO. V. REYBURN

(Circuit Court, E. D. Pennsylvania. July 31, 1908.)

No. 6.

1. **BILLS AND NOTES—BONA FIDE PURCHASER—ACCOMMODATION PAPER.**

The discount of an accommodation note by a bank and the credit of the proceeds to the account of the payee are not equivalent to parting with value, and the maker may cancel his obligation by proper notice to the purchaser at any time before it has actually parted with the money.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 908.]

2. **EVIDENCE—BOOKS OF ACCOUNT—BANK BOOKS.**

A loose leaf of a bank ledger, containing entries of transactions between the bank and a customer, is competent evidence in its behalf to prove such transactions, when properly proved by testimony of the bank's employés.

8. BILLS AND NOTES—ACTION BY INDORSEER—DEFENSES.

Plaintiff bank discounted for a customer certain accommodation notes made by defendant under such circumstances as made it a bona fide holder thereof and entitled to recover thereon to the extent of the value it had parted with before being notified by defendant. A part of the proceeds of the discount had been paid into a fund owned by a third party, but against which, by an arrangement between them, plaintiff was authorized to charge back such paper discounted for the customer as should not be paid. *Held*, that such arrangement, to which he was not a party, was not available to defendant as a defense to the notes either to the extent of the entire fund or that portion of it arising from that particular discount.

Burton B. Tuttle and Bamberger, Levi & Mandel, for plaintiff.

Wm. N. Trinkle, John C. Bell, and J. Howard Gendell, for defendant.

J. B. McPHERSON, District Judge. This is an action brought by the plaintiff as indorsee, against the defendant as maker, of two promissory notes for \$5,000 each, due at four months from October 20 and 25, 1906, respectively. The case having been submitted to the court without a jury, I find the facts to be as follows:

1. In the fall of 1906, the defendant was in need of money to carry on a business enterprise in which he had an interest, and in order to raise the needed funds he agreed with the Union Potteries Company, an Ohio corporation, through the agency of a broker in New York City, to make five promissory notes of \$5,000 each. These notes were to be indorsed by the potteries company and negotiated wherever the money could be obtained, and the proceeds were to be divided equally between the potteries company and the defendant, by whom also the liability upon the notes was to be equally borne. The notes were duly executed toward the end of October and were placed in the broker's hands to be negotiated. Certain circumstances, which it is not necessary to detail, aroused the defendant's suspicions concerning the fairness and good faith of the transaction to which he had thus committed himself, and he took steps which resulted in the return to him of three of the notes. This action relates to the remaining two.

2. The notes in suit were offered to the plaintiff for discount by the potteries company about October 30th, and on that day the plaintiff addressed the following letter to the defendant:

"Mr. John E. Reyburn, Phila., Pa.—Dear sir: We have this day been offered some 4 mos. paper of yours by the Union Potteries Co., for discount, they claiming that this paper was given by you in payment of stock sold to you in their company. Would you be kind enough to telegraph us at our expense whether this is the situation? And confirm same by letter.

"Hoping that you will give us the desired information, we remain,

"Resp. yours,

The Queen City Savings Bank & Trust Co.

"Ernest Von Bargen, Sec'y."

The defendant replied under date of November 2d:

"Dear Sir: I have your favor of the 30th ult., and in reply beg to say that there must be some misunderstanding about the transaction in Union Potteries Company, as I have no understanding about taking shares of stock in that company. I did not wire because I thought it was better to communicate in writing with you.

"Yours very truly,

John E. Reyburn."

Thereupon the plaintiff, on November 5th, addressed a second letter to the defendant:

"Dear Sir: We are in receipt of your favor of the 2d inst. and in reply will say that we do not understand your letter.

"We were offered two notes, one of October 20, 1906, and the other of October 25, 1906, for four months each at five thousand (\$5,000) dollars each, signed by you, by Mr. Hart, vice president of the Union Potteries Co., who claims that these notes were given in payment of stock in either the Union Potteries Co., Pittsburgh, or the Huntington China Co., Huntington, W. Va., or both.

"In your letter you say you have no understanding about taking stock in the company. We wish you would let us know if you gave these notes for some other reason, and whether they are your bona fide notes, and will be paid at maturity.

"We are sorry that we are putting you to all this inconvenience, but we would like to be on the safe side before we discount these notes for the Union Potteries Company.

"Thanking you in advance, we remain

"Yours very truly,

Ernest Von Bargen, Secretary."

This communication the defendant answered as follows, on November 8th:

"Dear Sirs: I beg leave to acknowledge receipt of your letter of the 5th inst. regarding my two notes, dated October 20th and October 25th, for \$5,000 each.

"I desire to state, in reply thereto, that since writing you in answer to your letter of October 3d, the difference between the Union Potteries Company and myself regarding stock has been satisfactorily adjusted.

"The notes in question will be paid at maturity.

"Very truly yours,

John E. Reyburn."

In reliance upon this correspondence, the plaintiff discounted the two notes on November 12th and placed the proceeds, namely, \$4,885 on each note, to the credit of the potteries company.

3. In consequence of the defendant's suspicions, to which reference has been made in paragraph 1, he determined to stop the negotiation of the remaining two notes of the series, if possible, and on the evening of November 14th he sent the following night telegram to the plaintiff:

"Have discovered fraud since writing. Do not discount notes bearing my signature."

This telegram was received by the plaintiff before banking hours on November 15th, and was replied to as follows:

"Notes already discounted on strength of your letter November 8."

This reply was confirmed by a letter of the same date.

4. On November 12th the balance to the credit of the potteries company on deposit with the plaintiff was \$1,778.14. This balance was increased by the discount of the notes to \$11,548.14. On November 12th the potteries company drew a check for \$2,500 upon this balance, on November 13th a check for \$1,000, and on November 14th two checks for \$1,250 and \$4,000, respectively. These checks were duly honored by the plaintiff.

5. There is no evidence of fraud or bad faith on the part of the plaintiff, or of any knowledge on its part of fraud or bad faith on the part of the New York broker or of the potteries company. The

defendant received no consideration for the notes, either at the time of their execution or afterwards, and received no part of the proceeds of the discount; but there is no evidence, if the fact were important, that the plaintiff knew of the want of consideration or of the agreement that the defendant was to have one-half the proceeds of the discount.

6. Before suit was brought, the defendant refused to pay the notes either in whole or in part.

Upon these facts it seems to me that the law is settled, and that the following propositions govern the case:

1. The notes in suit are accommodation paper, and the defendant is the accommodation maker thereof.

2. The plaintiff is the bona fide holder thereof for value and before maturity.

3. Being accommodation paper, however, the mere discount of the notes, and the credit of the proceeds to the account of the potteries company, were not equivalent to parting with value.

4. The defendant was entitled to cancel his obligation by proper notice given to the plaintiff before it actually parted with value by honoring the checks of the potteries company.

5. As a result, the plaintiff is entitled to recover \$6,971.86, with interest from, say, February 22, 1907.

In finding these facts, I have taken into consideration the depositions of the plaintiff's employes and the loose leaf of the ledger that was produced at the trial, believing the depositions and the loose leaf to be competent evidence. The numerous decisions in favor of its competency seem to me to be founded on excellent reason. The business of a bank is dealing in money, and the same reasons that have been found sufficient to warrant the admission of a merchant's books in evidence to prove a sale and delivery of goods apply in the case of a banker's books to prove his transactions in money with a customer. Moreover, the necessity of the situation furnishes another reason for admitting such entries as competent, but of course not conclusive, evidence of the dealings to which they relate. In the multiplicity of transactions in a banking institution, it is practically impossible to have better evidence, and the admissibility of the entries may therefore stand also upon the ground that they are ordinarily the best evidence of which the case admits. To the admission of the depositions and the entries referred to the defendant is granted an exception.

One word more may be said concerning the payment by the plaintiff of \$2,500 on November 12th. The potteries company and the Huntington China Company were closely allied corporations, being, indeed, practically identical. The plaintiff was the holder of certain bonds of the china company. As partial security for their payment, it was agreed by the potteries company, on October 26, 1906, as follows:

"Cincinnati, O., Oct. 26, 1906.

"The Queen City Savings Bank & Trust Co., Cincinnati, Ohio—Gentlemen: For valuable consideration received, we hereby agree and bind ourselves to deposit twenty-five (25%) per cent. of all the commercial business paper discounted by you, for the account of the Union Potteries Co., to a special fund to be called Huntington China Company, Huntington, W. Va., sinking fund

account, and it is hereby agreed the same shall not be subject to check; but shall be held to apply on the forty thousand (\$40,000) dollars Huntington China Company, Huntington, W. Va., bonds held by you, it being understood that upon this sinking fund balance, you are to pay us interest at the rate of three (3%) per cent. per annum.

"Yours very truly,

Union Potteries Company,
"F. W. Fowler, President,
"Max Hart, Vice President."

To this the china company agreed:

"Cincinnati, O., Nov. 12, 1906.

"Mr. F. W. Fowler, Pres't Huntington China Co., Pittsburgh, Pa.—Dear Sir: Inclosed we hand you authority signed by the Union Potteries Co., Max Hart, vice president, authorizing us to charge back any paper discounted for the Union Potteries Co., which, when due, would fall to be paid, either to the account of the Union Potteries Co. or the Huntington China Company Sinking Fund.

"We would be pleased to have you sign this authority, as the Huntington China Company, per yourself as president."

To this the china company replied on the same date:

"The Queen City Savings Bank & Trust Co., Cincinnati, Ohio—Gentlemen: In regard to the sinking fund account which you have credited to the Huntington China Co., would state that, in the matter of discounting our paper, in case any of it is not paid at maturity, and it is necessary to charge same to our account, and should our account not have sufficient balance to justify such charge, that you are authorized to charge such balance to the sinking fund account of the Huntington China Co.

"Yours very truly."

It was suggested upon the argument, although I did not understand the position to be much insisted upon, that the plaintiff was bound by this agreement to apply the \$2,500, at all events—if not the whole \$4,700, which it appears was in the sinking fund account—in relief of the defendant's obligation upon these notes. In my opinion the suggestion does not need an elaborate reply. The defendant was not a party to the agreement, whatever its scope may be, and has no right to avail himself of its terms. In the view most favorable to his interest, the best that can be said about the agreement is that it furnished the plaintiff with an additional security for the payment of such commercial paper as might be discounted for the potteries company, and that the defendant may have a valid claim to subrogation against this sinking fund after he has discharged his obligation to the plaintiff upon the notes in suit. In coming to this conclusion, I have not considered at all the letter of June 3, 1907.

The clerk is directed to enter a finding in favor of the plaintiff, in accordance herewith, upon which judgment may be entered in due course.

In re GHAZAL

(District Court, E. D. New York. July 14, 1908.)

BANKRUPTCY—JURISDICTION OF COURT—CLAIMS AGAINST GOVERNMENT FOR REWARDS:

In a proceeding in involuntary bankruptcy, issue was joined on the question of insolvency. A receiver was appointed, and the usual order made restraining all persons from turning over property of the estate to any one, except the receiver. The alleged bankrupt claimed rewards from the Treasury Department, under Act June 22, 1874, c. 391, § 4, 18 Stat. 186 (U. S. Comp. St. 1901, p. 2019), for information given relating to smuggled goods, one of which claims had been allowed by the Secretary, and the amount was in the hands of the collector, to be paid to the claimant. The other claims had not been passed on. The alleged bankrupt filed a motion for an order excepting the Secretary and collector from the restraining order, and directing them to pay such claims to him. *Held*, that the court had no jurisdiction to make such an order; the allowance of the claims and the amount allowed being wholly discretionary with the Secretary, and neither he nor the collector being before the court, and especially while the issue of bankruptcy was pending and undetermined.

[Ed. Note.—Jurisdiction of federal courts in suits relating to bankruptcy, see note to *Balley v. Mosher*, 11 C. C. A. 313.]

In Bankruptcy.

Arthur M. King, for alleged bankrupt.

Joseph H. Buhler, for temporary receiver.

CHATFIELD, District Judge. The alleged bankrupt has furnished certain information to the Treasury Department of the United States, in different matters, for which he claims a reward, under the provisions of Act June 22, 1874, c. 391, §§ 3 and 4, 18 Stat. 186 (U. S. Comp. St. 1901, pp. 2018, 2019). Four sales of seized property have been had, with reference to which the alleged bankrupt makes claim for reward, and with relation to one of these sales the Secretary of the Treasury did, previous to the filing of the petition in bankruptcy, fix the amount of the reward to be allowed at \$428.93. This sum is now on deposit with the collector of the port of New York and ready for payment. The other three claimed rewards are what may be termed inchoate, and from the language of the statute it is apparent are entirely dependent upon the opinion of the Secretary of the Treasury and within his discretion. *U. S. v. Queen* (D. C.) 105 Fed. 269; 24 Opin. Atty. Gen. 61.

A petition in bankruptcy was filed against Ghazal, who claims to be entitled to these rewards, on the 29th day of April, 1908, and an answer denying insolvency, as well as disputing the claims of two petitioning creditors, has been interposed. A receiver was appointed, and the usual restraining order made, by which all persons were forbidden to turn over to any person, except to the receiver any property belonging to the alleged bankrupt. The alleged bankrupt has now made a motion to have the Secretary of the Treasury and the collector of the port exempted from the operation of the injunction above referred to, and for an order restraining the receiver from attaching the moneys now in the hands of the collector of the port,

for an order restraining the receiver from receiving the same sum or interfering therewith if paid to Ghazal, and for an order directing the collector of the port to pay over the amount to the bankrupt. The affidavits submitted, and the record of this court, show the facts recited above, and both the receiver and the bankrupt have referred the court to various cases in support of their contention.

In *Williams v. Heard*, 140 U. S. 529, 11 Sup. Ct. 885, 35 L. Ed. 550, a valid claim under the decision of the Commissioners of Alabama Claims, established under the statutes of the United States, was held to be property, and to pass to the assignee of a bankrupt under an assignment made prior to the award. This case was expressly based upon the doctrine that the government did not create the right, but that under the law of nations, and as recognized by the act of Congress, the claim for damages was vested in the individual wronged, and that the United States, as distributing agent, and as the party to pass upon the various amounts to be allowed, did not, by the judgment of the Commissioners, create the obligation or property right of the claimant. In other words, the claim was a property right existing before an adjudication was had as to the extent or amount to be paid.

In the case of *U. S. v. Borchertling*, 185 U. S. 223, 22 Sup. Ct. 607, 46 L. Ed. 884, the same principles are recognized, and several cases cited. The court holds that an award of the United States Court of Claims of the amount due a claimant under an act of Congress providing for the relief of certain individuals is a property right, such that payment to a receiver would protect the Treasurer of the United States.

In the case of *Milnor v. Metz*, 41 U. S. 221, 10 L. Ed. 943, a gauger in the service of the United States Treasury Department was held to have property, passing under insolvency laws, in a claim for extra services performed in connection with his regular duties, and allowed by an act of Congress passed subsequent to the insolvency assignment. The decision in this case was based upon the theory that the services performed were at the instance of the government, and a part of the duties lawfully required of the gauger, but that no law was in existence at the time of the rendering of these services providing for payment therefor. The opposite situation is shown by the case of *Emerson v. Hall*, 38 U. S. 409, 10 L. Ed. 223, in which a claim to the proceeds of the seizure of a slave vessel was held to be no asset of the estate of the claimant; the court saying:

"A claim having no foundation in law, but depending entirely on the generosity of the government, constitutes no basis for the action of any legal principle. It cannot be assigned. It does not go to the administrator as assets. It does not descend to the heir."

Congress in this particular instance had passed a law allowing proceeds of the seizure to the heirs of one of the claimants, some years after his death, and an attempt was made to have this sum applied to pay the debts of the deceased claimant, and to prevent the payment of the money to their heirs.

These cases above set forth illustrate the limits of both contentions; but neither line of cases is entirely conclusive upon the ques-

tion of within which category the present claim must fall. If the right to a reward should be considered an asset, one result would follow; while, if the reward should be considered in the light of a gift, the opposite decision would be necessary. And in connection with the question section 6 of the same statute must be considered. By this it is provided:

"That no payment shall be made to any person furnishing information in any case wherein judicial proceedings shall have been instituted, unless his claim to compensation shall have been established to the satisfaction of the court or judge having cognizance of such proceedings, and the value of his services duly certified by said court or judge for the information of the Secretary of the Treasury."

The District Court for the Southern District of New York considered these statutes in *Re Jayne*, 28 Fed. 419, and there held that sections 3 and 6, above quoted—

"give no specific interest in the fund to the informer, even after payment of the money into the treasury. As the petitioner's right must be derived wholly through the act of 1874, there is nothing remaining to the informer analogous to a right in rem, but only a personal claim against the government to a reasonable compensation."

In that case, however, the claim under discussion was decided to be governed by section 3090 of the Revised Statutes, which was repealed by the act of 1874, above referred to. And it will be noticed that Judge Brown, in this decision, says that the petitioner has "no specific interest in the fund" but merely a "personal claim against the government." This language, again, is not conclusive upon the question as to whether such "a personal claim against the government" is to be considered property, and one of the assets of the insolvent.

But the statement of these propositions is sufficient to show that this court has no jurisdiction upon this present motion to decide the question raised. The Secretary of the Treasury is not a party hereto, nor can this court, upon this record, determine what the ruling of the Secretary of the Treasury should be, if the alleged bankrupt claims the reward as a gratuity.

The restraining order was directed to any individual having property of the bankrupt, and the Secretary of the Treasury and the collector of the port have seen fit to withhold payment because of the existence of this order. If the Secretary of the Treasury decides, if so advised by the proper legal officers, that the claim for reward should be treated as an asset of the estate of the alleged bankrupt, no action on the part of the receiver would be necessary. If either the receiver or the alleged bankrupt should attempt to enforce a claim to the reward, against the Secretary of the Treasury, that claim must necessarily be determined by a forum having jurisdiction, and not academically by this court upon an application for the decision of a question in negative form, to wit, that the alleged bankrupt's estate is not entitled to keep property which it has not in its possession.

If the collector of the port should pay the sum in question to the alleged bankrupt, action on the part of the receiver or trustee, to obtain possession of the fund or to restrain the collector, might bring

the parties before this court in such a manner as to involve a determination of the question indicated. In the same way, if the collector of the port should pay the money to the receiver, a claim on behalf of the alleged bankrupt could be litigated in the bankruptcy proceeding, even if the collateral issue arising under the provisions of the act of 1874 might be necessarily involved. But so long as the collector of the port retains in his hands the fund in question, even though he may be nominally respecting the restraining order in so doing, the right to that fund cannot be decided as between two claimants in this court and on this motion.

Further, the interposition of an answer denying insolvency and acts of bankruptcy raises an issue pending the determination of which the custody of the fund is immaterial, so long as its present status is maintained. Especially would this be true if the issue of insolvency should be determined in favor of the alleged bankrupt.

The motion as made must be denied.

LEYNER ENGINEERING WORKS v. KEMPNER.

(Circuit Court, S. D. Texas. July 3, 1908.)

No. 2,029.

1. COURTS—FEDERAL COURTS—EFFECT OF DECISION OF STATE COURT—PENAL OR REMEDIAL STATUTE.

Whether or not a state statute is penal and cannot therefore be enforced outside of the state is to be determined by the court of another jurisdiction in which it is attempted to enforce it as a question of general jurisprudence uncontrolled by the decisions of the courts of the state.

[Ed. Note.—State laws as rules of decisions in federal courts, see notes to *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553.]

2. CORPORATIONS—LIABILITY OF STOCKHOLDERS—COLORADO STATUTE RELATING TO FOREIGN CORPORATIONS.

Mills' Ann. St. Colo. § 501, which provides that every officer, agent, and stockholder of a foreign corporation doing business in the state without having complied with the requirements of the preceding sections shall be jointly and severally liable on all contracts made by the company within the state while so in default, gives a civil remedy to individuals, and is not a penal statute in such sense that it cannot be enforced in another jurisdiction.

3. SAME—LAW GOVERNING.

The liability of a stockholder in a corporation for corporate debts, and the manner in which it may be enforced are governed solely by the statutes of the state of incorporation, and such liability cannot be increased nor a different remedy given by the statutes of any other state in which the corporation may do business.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 830-834.]

At Law. On demurrer and special exceptions to petition.

John C. Walker and Toney, Johnson & Toney, for plaintiff.
Kleberg, Davidson & Neethe, for defendant.

BURNS, District Judge. A Colorado corporation brings this action against defendant, a citizen of Texas, and seeks to recover \$13,-

000, evidenced by five promissory notes, upon the ground that said defendant was a stockholder in the Taylor-Moore Construction Company, a Texas corporation of which the plaintiff is a creditor in the above sum. Petitioner alleges: That said construction company entered into a contract with the United States, by which it engaged to build the Gunnison Tunnel in the state of Colorado; that while so engaged the plaintiff extended its credit for machinery and supplies to the amount sued for; that under the law of Colorado the Texas company was required to file a copy of its articles of incorporation, designate its principal place of business, and name an agent upon whom service could be had; and that failure to do so renders defendant liable for all debts of the company, which abandoned its contract and is now insolvent. To the allegations of the petition defendant interposes a general demurrer and the following special exceptions:

"Second. And specially excepting to said petition this defendant says that the same is insufficient in law, and plaintiff is not entitled to recover thereon, because it appears therefrom that the Taylor-Moore Construction Company, as a stockholder of which company this defendant is sought to be held liable, is a corporation created under the laws of the state of Texas, and that therefore this defendant's liability as a stockholder of said company and the manner, method, and procedure of the enforcement of such liability are fixed and to be determined by the statute and law of the state of Texas, and not by the statute or law of the state of Colorado.

"Third. And further excepting to said petition, defendant says plaintiff ought not to recover thereon against him as a stockholder of the Taylor-Moore Construction Company, a corporation created under the laws of the state of Texas, and by the laws of which state defendant's liability as a stockholder of said company and the manner, method, and procedure of its enforcement are fixed and regulated, because the laws of the state of Texas provide that defendant's liability as such stockholder shall be only to an extent equal to the amount of the stock unpaid, and that no suit shall be instituted against any stockholder until judgment shall have been obtained against the corporation of which he is a stockholder, and an execution issued against such corporation and returned unsatisfied.

"Fourth. And further specially excepting to plaintiff's said petition, this defendant says that said plaintiff should not be permitted to recover thereon, because it appears therefrom that the statute of the state of Colorado, under the provisions of which this defendant is sought to be held liable as a stockholder of the Taylor-Moore Construction Company, a Texas corporation, and in which state of Colorado plaintiff's cause of action accrued, is inconsistent with the statutes and public policy of the state of Texas with respect to the liability of stockholders.

"Fifth. And further excepting to plaintiff's said petition, this defendant says that plaintiff should not be allowed to recover thereon against him, because it appears therefrom that plaintiff sues for a recovery of a penalty against this defendant arising under a statute of the state of Colorado, which said statute is not enforceable beyond the limits of the state of Colorado, and because plaintiff's claim upon which he sues is in the nature of a penalty under the laws of the state of Colorado, and therefore not recoverable beyond the limits of said state.

"Sixth. And defendant further excepts to plaintiff's said petition, and says he should not be permitted to recover thereon because plaintiff's claim arises under a statute of the state of Colorado, by which statute a greater and heavier liability is imposed upon stockholders in corporations created in other states of the United States than is imposed by the laws of the state of Colorado upon stockholders in corporations created by or under the laws of said state, and said statute of said state of Colorado, by virtue of which said plaintiff seeks to recover from this defendant, denies to this defendant the equal

protection of the laws as provided in the fourteenth amendment to the Constitution of the United States, and is therefore in conflict with said amendment and wholly void and invalid, and said statute of the state of Colorado is further void and invalid because it is in conflict with section 2 of article 4 of the Constitution of the United States.

"Seventh. And this defendant further excepts to plaintiff's said petition because he says it appears therefrom that plaintiff's cause of action, if any it ever had, is barred by the statute of limitation of the state of Colorado, where plaintiff's said cause of action arose, by which statute plaintiff's said cause of action is barred within one year from the accrual thereof, and defendant here now asserts said statute of limitation."

The statute relied upon relates to foreign corporations, and provides as follows:

"Section 499. Foreign corporations shall, before they are authorized or permitted to do any business in this state, make and file a certificate signed by the president and secretary of such corporation, duly acknowledged with the secretary of state, and in the office of the recorder of deeds of the county in which such business is carried on, designating the principal place where the business of such corporation shall be carried on in this state, and an authorized agent or agents in this state residing at its principal place of business upon whom process may be served.

"Sec. 500. Every company incorporated under the laws of any foreign state or kingdom or of any state or territory of the United States beyond the limits of this state, shall file in the office of the Secretary of State a copy of their charter of incorporation; or in case such company is incorporated by certificate under any general incorporation law, a copy of such certificate and of such general incorporation law duly certified and authenticated by the proper authority of such foreign state, kingdom or territory.

"Sec. 501. A failure to comply with the provisions of sections 499 and 500 of this act shall render each and every officer, agent and stockholder of any such corporation so failing herein, jointly and severally personally liable on any and all contracts of such company made within this state during the time that such corporation is in default." Mills' Ann. St. See Gen. Laws Colo. 1877, p. 215.

It is contended by defendant that the Colorado act is a penal statute, and counsel for plaintiff concedes that, if this is the correct interpretation, the end of the action has been reached. Plaintiff bases its right to recover upon the proposition that the statute is remedial, and insists that under the doctrine announced in the case of *Huntington v. Attrill*, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123, the right of the creditor (plaintiff) is sustained.

It is well settled in this country and in England that a penal statute cannot be enforced in any jurisdiction other than in the territorial limits of the enacting sovereignty, and this holding has been so uniformly announced as to render citations unnecessary. The pertinent question in this connection for consideration is the determination of the act in its relation to penal enactments. Whether a statute of one state, which in some aspects may be called penal, is a penal law in the international sense, so that it cannot be enforced in the courts of another state, depends upon the question whether its purpose is to punish an offense against the public justice of the state, or to afford a private remedy to a person injured by the wrongful act. The test is not by what name the statute is designated by the Legislature, or the courts of the state in which it was enacted, but whether it appears to the tribunal which is called upon to enforce it to be, in its

character and effect, a punishment of an offense against the public or the granting of a civil right to a private person. The question therefore becomes one of general jurisprudence, which this court must determine, uncontrolled by local decisions, and inasmuch as the statute gives to the plaintiff a civil right in aid of his demand, and the wrong, if any, being to the individual, and not to the public, it follows that the statute, while of a penal nature, is not in itself to be held a penal law in this jurisdiction, though the Supreme Court of Colorado holds to the contrary. *Huntington v. Attrill*, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123. It follows that the contention of the defendant cannot be sustained, upon the ground that the act under discussion is penal and therefore not the subject of enforcement beyond the territorial limits of the enacting state.

Without regard to the essential elements of the Colorado statute relating to the liability of stockholders in foreign corporations, the controlling question for determination is: What law fixes the liability of stockholders; that is, does the statute law of the state of incorporation fix and determine the liability of the shareholder, or is the liability to be determined and the stockholder charged by the enactments of every state in the Union in which the corporation may transact business? If the latter were true, it would invite immediate dissolution, for no sane person would become a purchaser of stock with the legal assurance that, in the event the corporation did business in a sister state—Colorado, for instance—and loss and disaster attended the venture, and it should develop that a failure to comply with some statutory provision in regard to filing a copy of its articles of incorporation, a stockholder of Vermont, having subscribed and paid for a single share of the value of \$100, would be called upon to make good the loss of every creditor, who elected to extend a line of credit to the insolvent corporation. The subscriber, looking for modest dividends as the result of his investment, would be called upon to separate himself from his earnings and stand forth a commercial pauper, having wronged no creditor, yet powerless to prevent his own destruction. The doctrine is monstrous and finds no support in the decisions of any court, state or federal, and is hostile to the declared and recognized policy of this state. That the law of the state in which the corporation is created, either in its constitutional provisions or legislative enactments, alone fixes and determines the liability of the shareholder, is beyond controversy.

The case of *Huntington v. Attrill* does not support the cause of action here sued upon. In that case the director of the corporation was held liable to the creditor by reason of his false certificate that the capital stock of the company was fully paid, and by reason thereof the company obtained a loan of \$100,000 from Huntington. The statute of New York made the officers and directors liable for all the debts of the company in the event the affidavit was false, and the act only applies to the individual who perpetrates the wrong—who engages for the moment to practice false swearing—and does not undertake to punish the innocent, even though a shareholder. But this authority only goes to support the views announced that the liability is determined by the *lex loci domicilii*. In the *Huntington Case*, the company

was chartered under the laws of the state of New York, and had its principal place of business and residence therein. The defendant At-trill was also a citizen of said state, and suit and judgment followed there.

The law of Texas (article 686, Rev. St. 1895) provides that:

"No stockholder shall be liable to pay debts of the corporation beyond the amount unpaid on his stock."

The defendant, Kempner, being a stockholder in the Taylor-Moore Construction Company, organized under the laws of Texas, is not liable for any act, debt, or contract of said company within or without the state of Texas, and the Colorado creditor, like the Texas creditor, can only pursue the stockholder to the amount of his unpaid stock, and not then until after suit and judgment against the company and return of execution with no property found; the statute with reference to insolvent corporation being as follows:

"Art. 671. If any execution shall have been issued against property or effects of a corporation, except a railway or a religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then the execution may be issued against any of the stockholders to an extent equal to the amount of the stock unpaid; but no execution shall issue against any stockholder, except upon an order of the court in which the action, suit or other proceeding shall have been brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged; and upon such motion, such court may order execution to issue accordingly; or the plaintiff in execution may proceed by action to charge the stockholders with the amount of his judgment, in accordance with the liability of the stockholders."

The procedure by which the debt is sought to be collected must follow the terms and provisions governing suits of like character in the state in which the corporation was created. Where the statutes of the state which creates a corporation, making the stockholders liable for the corporate debts, provide a special remedy, the liability of the stockholder can be enforced in no other manner in a court of the United States. *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747, 7 Sup. Ct. 757, 30 L. Ed. 825. The individual liability of stockholders in a corporation for the payment of its debts is always a creature of statute. At common law it does not exist. A statute which creates a corporation may also declare the purpose of its creation and provide for the manner in which the liability against the stockholder shall be enforced. Where the liability of the stockholder and the remedy to the creditor are created by the same statute, the particular remedy is exclusive of all others. A general liability created by statute with a remedy may be enforced by appropriate common-law action; but, where the provision for the liability is coupled with the provision for a special remedy, that remedy, and that alone, must be employed. *Pollard v. Bailey*, 87 U. S. 527, 22 L. Ed. 376.

It is a settled doctrine that the liability of stockholders of existing corporations cannot be increased by the subsequent adoption of a new constitution, or legislative enactment, unless the right to repeal or amend is reserved in the original instrument. If the contention of plaintiff is sound, other states, without let or hindrance, can increase the liability of the shareholder. The liability of a subscriber to stock

in a foreign corporation is governed by the law of the domicile of the corporation. The rights of the creditor and stockholder are adjudicated by the law of the state creating the concern. *Glenn v. Liggett*, 135 U. S. 548, 10 Sup. Ct. 867, 34 L. Ed. 262.

Where a person becomes a stockholder in a corporation organized under the laws of a foreign state, he must be held to contract with reference to all of the laws of the state under which the corporation is organized, and which enters into its constitution, and the extent of his individual liability as a shareholder to the creditors of the company must be determined by the laws of that state, not because such laws are in force in the other state, but because he has voluntarily agreed to the terms of the company's constitution. The decisions of the state under which the corporation was created will determine the liability of the stockholders for the corporate debts, and those decisions will be followed by the courts of the state where the liability is sought to be enforced against a nonresident stockholder. *Purdy's Beach*, par. 582. If the constitution to which a corporator has agreed does not provide for individual liability to creditors, he cannot be charged with individual liability anywhere. 2 *Morawetz*, par. 874. The cases are uniform in holding that the extent of the stockholder's statutory liability and the character of that liability depend upon and are determined by the charter of the corporation or the statute of the state which created it. *Cook on Stockholders* (3d Ed.) par. 223.

In the opinion of the court, plaintiff's petition states no cause of action, and the general demurrer thereto is sustained upon the grounds specifically set forth in the second, third, and fourth special exceptions, which exceptions reach every material allegation in plaintiff's petition.

MORRIS & CUMINGS DREDGING CO. v. MORAN TOWING & TRANSPORTATION CO.

(District Court, E. D. New York. August 4, 1906.)

TOWAGE—LOSS OF TOW—LIABILITY OF TUG.

A tug held not liable for the injury to a scow which turned turtle while being towed to the dumping grounds and was found with a large hole in her bottom, on the ground that the tug was negligent in going out under the weather conditions, which were stormy, but not sufficiently so to sustain the charge of negligence, in the absence of evidence to sustain the burden resting on libellant to show that the injury was due to the weather or sea, rather than to some unexplained cause, such as striking an obstruction or the breaking loose of one of the pocketdoors of the scow, which seemed to be indicated by her condition.

In Admiralty.

Armstrong, Brown & Boland (Pierre M. Brown, of counsel), for libellant.

James J. Macklin, for respondent.

CHATFIELD, District Judge. Upon the 13th day of January, 1906, the Moran Transportation Company, the libellant herein, sent two of its tugs to sea towing scows loaded with mud. One of these

tugs, the Eugene F. Moran, started from Pier 58, North river, at about 11 o'clock in the morning of that day, having in tow the scow 42-M, an ordinary six-pocket dump scow, and scow 40-M, a four-pocket scow of the same sort. Going down through the Narrows the hawsers were lengthened, so that about 200 fathoms separated the tug and scow 42. Scow 40 was about 80 fathoms behind scow 42. The tug Catherine Moran was some little distance in advance of the Eugene F. Moran, and had also in tow two scows, between which the hawsers parted when outside of Sandy Hook. The Catherine Moran succeeded in dumping the other scow, but did not get entirely out to the dumping grounds, and on her return picked up the scow which had gone adrift, and towed the two scows, side by side, back to New York. When off the point of Sandy Hook, in the neighborhood of the outer fairway buoy, at about 4:30 in the afternoon, something happened to the rear scow, 40-M, in tow of the Eugene F. Moran, as a result of which she turned turtle, the scowman disappeared and has never been heard from, and shortly thereafter the scowman upon scow 42-M disappeared from the deck of his scow, and has likewise never been heard from to the present time.

The attention of the tug was called to the fact that something was wrong with scow 40 by the appearance of the scow and by the scowman waving his hat, and the tug, having cut its hawser, turned around under a port helm and was within a short distance of scow 42, when it turned over and the scowman was lost. By that time it had become dark, the sea was rough, and the tug Eugene F. Moran returned up the bay, but later went back and cruised around, seeking the scows, which were ultimately found, when day broke, on the beach upon the Jersey shore, near the Conover Beacon, not far from the point where Sandy Hook joins the mainland; scow 42 being some distance from scow 40, and having its pockets still partially filled with mud, while scow 40 was bottom up, and with a hole extending across four of the bottom planks of the scow, each of these planks being 12 inches in width. This hole was about in the middle of the bottom of the scow, and penetrated the bulkhead or air chamber running across the scow. Two of the pockets were forward of this bulkhead and two aft, and one of the doors from one of the pockets next to this air chamber or bulkhead was broken loose from its chain hinges or fastenings; also the long chain running to the gear by which the doors were opened and closed was missing from the end of the door furthest from this air chamber. These chains are some 28 feet long, and are at least 8 feet longer than the distance between the shaft and the lower corner of the door when the doors are open, and the door in question, still fastened by the chain nearest to the air chamber, was entirely out of the pocket where it belonged and over in the pocket beyond the air chamber, in such position that the corner of the door projected above the bottom of the scow, as she lay overturned on the beach, some 3 or 4 feet. It may be stated for the sake of clearness that each of the four pockets has two doors, about 20 feet long, 8 or 9 feet wide, and 8 inches thick, made of oak, bound with several hundred pounds of iron, and of such weight that they will speedily sink unless supported. These doors run fore and aft, and open from the

center downward; the chain hinges being upon the outside of each door, while the long chains running to the shaft are attached to the inside edges of the doors, which close on a line approximately corresponding to what would be the keel of the scow.

The libellant has offered testimony to show that the day was stormy and the wind strong. The government observer in New York testified that the wind increased from about 12 miles an hour in the forenoon to 28 miles for the hour between 4 and 5 o'clock p. m., and the highest velocity for five minutes at 7:52 p. m. was 40 miles an hour. Conditions of weather prevailed which the observer characterized as stormy, with a brisk wind, not severe enough to be called a hurricane or gale, coming from the northeast, and the general direction of the wind was northeast. Storm signals were displayed at Governor's Island and at Sandy Hook at 3 o'clock in the afternoon of that day. The barometer was falling during the day; but when the scows passed Governor's Island, around noon, no storm signals were flying, and the condition of the barometer was not such as to indicate a dangerous weather condition in the near future. The captains of the government patrol boats stationed off Sandy Hook to watch the movements of dumping scows estimated the wind in that neighborhood during the afternoon at about 15 miles an hour. The tide was low during the forenoon, and flood tide occurred about 9:45 p. m., so that during all the time in question the tide was running out, and the northeast wind in that locality would blow upon the port bow of a boat proceeding in the direction of the ebb tide. The captain of the government patrol boat testifies that this would cause a bad sea, and that the sea and the general weather conditions that afternoon were such that in his opinion it would not be good seamanship to attempt to go to the dumping grounds southeast of the lightship with loaded scows.

The testimony in the case shows that several other tows turned back at various points, while one or two tows succeeded in getting out, but dumped short—that is, turned around and dumped before reaching Scotland Lightship; and the Catherine Moran, which has been mentioned before, as has been said, after losing one scow through the parting of the hawser, succeeded in getting out approximately near the Scotland Lightship, where the remaining scow was dumped. Capt. Keyes testified that while some distance away he saw the rear scow, that is 40-M, in tow of the Eugene F. Moran, laboring in the sea, and that she suddenly foundered and went out of sight, while the tug proceeded with the other scow some half a mile before turning around and going back to the scow. The captain, mate, and two deckhands upon the Moran testify that the first they saw of the occurrence was that scow 40 was keeled over to port, and that the scowman was waving his hat, upon which the captain finding out that the tug could not be brought around quickly, ordered the hawser cut and proceeded back to the scow, and just before reaching her, as has been said, the scow turned turtle to port, and the scowman was lost.

The witnesses agree that the scowman upon scow 42 was on the deck of his scow as they passed that scow on the way back to scow 40; but when they returned to scow 42 the scowman was gone. Peterson, one of the deckhands upon the Eugene F. Moran, testifies that

scow 40 turned turtle, that then the hawser was cut, and the Moran went back. The captain of the Moran submitted a report, upon the 17th day of January, four days after the accident, to the United States local inspectors, and made a second statement under oath upon the 23d day of January, 1906, to the same board, both of which statements were placed in evidence, to the effect that when the tug and tow had reached the outer fairway buoy in the South Channel, at about 4:15 p. m.—

"scow 40-M turned over without any previous warning and for some reason unknown to the undersigned. Whereupon the hawser was cut between the leading scow and the tug, and said tug proceeded so as to pick up the captain of the scow which had turned over, if possible."

The libelant relies strongly upon these statements of the captain, and upon the testimony of the deckhand, Peterson, to show that the scow had overturned before the accident was noticed by the tug; and the libelant claims that the testimony of Peterson is worthy of more credence than that of the other witnesses from the Eugene F. Moran as given upon the trial. But it is a significant fact that Peterson (as well as all of the other witnesses upon the Moran) testifies positively to seeing the hole in the bottom of the scow, and also that one of the doors of the scow was broken loose and was sticking up out of one of the pockets, while the scow was floating around overturned immediately after the tug reached the neighborhood of this scow when looking for the scowman. This would seem to indicate conclusively that an accident of some nature had occurred of a sufficient character to cause the sinking and overturning of the scow prior to the time of that overturning, and places upon the libelant the burden of showing, not only that the accident was due to the weather, but also of showing that the hole in the bottom of the scow was not a sufficient cause, at least in the absence of any direct testimony that the sinking was due to the rough weather alone.

The respondent produced a number of witnesses, who testified that, while the conditions were rough, no particular danger existed, and that the scow could proceed safely, although the turning back of other tows, and the difficulties experienced by all tows which went down the bay that day, would certainly indicate that prudence might have been shown by turning around and not going to sea until the storm abated. The burden, however, is on the libelant to show that the storm, even if it were imprudent to take the chance, was the cause of the accident. It is not enough to prove that an accident is possible under certain conditions; but the libelant must satisfy the court that the men in charge of the tug were negligent in proceeding, and it is believed that, apart from the other explanation of the accident, this burden has not been sustained. If it were clearly shown that scow 40 was overturned by the force of the wind and waves, or by the shifting of the scow's load, or loss of its equilibrium through action of the wind and waves alone, the only issue would be whether a prudent man would be guilty of negligence in attempting to proceed under such circumstances. It would not be sufficient merely to prove that care and a proper degree of prudence would suggest that it would be better to wait; but the tes-

timony must go further and satisfy the court that such a prudent man would not have taken the risk, and should have reasonably anticipated that an accident would happen.

But, on the contrary, not only is it doubtful whether the conditions were such that it could be held to have been negligence in proceeding under the circumstances, but also an independent and sufficient cause has been indicated in the hole in the bottom of the scow. Upon the trial the proctors for the libellant and respondent, as well as the court, went into a long examination as to the construction of the scow, and as to the parts which were missing, and the injuries which were shown at the time of repairs immediately after the accident. These repairs included recalking and the restoration of some of the parts of the dumping apparatus, and the testimony shows that the pawl, or casting of which the pawl was a part, was missing from the apparatus connected with the door which had broken loose. It is impossible to determine whether this was due to the action of the scowman, or to a break under some strain to which the shaft and chain had been subjected. But there is nothing to satisfactorily prove that the weather conditions, or any occurrence which should have been reasonably anticipated by the tug, were the proximate cause of the loss of this pawl casting, or of the overturning of the scow itself.

The respondent contends in its answer that the scow struck an obstruction, while upon the trial the explanation was suggested that, inasmuch as the depth of water at the point where the accident occurred was from 23 to 28 feet, the heavy door, weighing about two tons, hanging in a vertical position by the after chain, below the scow, might have been itself the obstruction which punched a hole in the bottom of the scow, as the scow, which drew at least 8 or 9 feet, surged up and down under the action of the waves; the length of the door being amply sufficient, if one end should strike the bottom, to cause the other end to strike the bottom of the scow as the scow came down between waves.

But, be this as it may, the burden of proof upon the libellant of showing that the condition of the weather was such as to impute negligence to the officers of the tug in proceeding does not seem to have been sustained, and the libel must be dismissed.

In re LESAIUS.

(District Court, M. D. Pennsylvania. August 18, 1908.)

No. 849.

1. BANKRUPTCY—ORDER ON BANKRUPT TO SURRENDER PROPERTY—EVIDENCE TO WARRANT.

In determining whether or not a bankrupt merchant has property which he conceals and should be required to turn over to his trustee, where he did not keep books showing his business transactions, the court may properly take into account goods which he is shown to have had on hand at a date shortly prior to his bankruptcy and such as he afterward bought, and charge him with such as are not reasonably accounted for.

2. SAME—NATURE OF ORDER.

Proceedings to require a bankrupt to turn over property to his trustee are directed to the recovery of specific property, and, where it is found that he has withheld property from his estate, the order should require him to return such property, describing it is particularly as practicable; a general description being sufficient in the case of merchandise.

3. SAME.

A bankrupt merchant kept or produced no books from which his business transactions could be ascertained, but he made a statement, six months prior to his bankruptcy, giving the value of his stock, which he testified was based on an inventory then taken; and he was shown to have purchased goods afterward, which made the value of his stock so on hand and purchased before the bankruptcy about \$15,500, more than \$4,000 worth of which was wholly unaccounted for. He was shown to have stated to a creditor that he had the money in his pocket, and shortly after his bankruptcy he started a new store in the name of his father which he conducted as manager; his father being a foreigner ignorant of the English language and working for a dollar a day, in which store goods were found which had been sold to him prior to his bankruptcy. *Held*, that such evidence was sufficient to show that he had fraudulently concealed goods to the value of at least \$4,000 or their proceeds, and to justify an order requiring him to turn the same over to his trustee.

In Bankruptcy. On certificate of W. L. Hill, referee, sur rule on bankrupt to turn over certain property.

C. A. Van Wormer and M. S. Kaufman, for trustee.
Ralph L. Levy, for bankrupt.

ARCHBALD, District Judge. On petition of the trustee, a rule was entered on the bankrupt to show cause why he should not turn over certain property which was charged to be in his possession, and which he refused to account for. This rule has been pending nearly two years, a delay which is not creditable to those who are responsible for it; certain books and papers also to complicate the matter having disappeared meantime. The referee discharged the rule, being of opinion that, while there was strong suspicion that the bankrupt had property which he withheld, there was not enough evidence to warrant an order. There is no discussion, however—nothing, indeed, but the bare ruling—and the case is therefore to be disposed of without reference to it.

On June 30, 1906, the time the proceedings in bankruptcy were instituted, Frank P. Lesaius, the bankrupt, was conducting a gentlemen's furnishing and clothing store at Providence, in the North End of Scranton, Pa. Until some time in the preceding April, he had had a second store at Pittston, some 10 miles distant, but a fire had occurred there April 5th, and, after adjusting the loss and having a so-called "fire sale" there for a couple of weeks, he moved what little was left of the stock to Scranton. In neither store did the bankrupt keep the usual store books, or, at least, if he did, except one or two they have not come into the hands of the trustee, and we are therefore left without the light which they would throw on the business, for which if any injustice results to the bankrupt therefrom, he will have no one but himself to blame for it. According to the schedules filed by the bankrupt, the stock in the Scranton store turned over to the

trustee was worth approximately \$3,200 and the fixtures \$300, making \$3,500. The appraisers put a valuation of \$2,721.12 upon both together, and they realized only \$1,460 at public sale, after allowing the bankrupt his \$300 state exemption. He also told the trustee that the stock was made up of odds and ends, and that he would not give \$700 for it, all of which throws serious doubt upon the estimate given in the schedules. He further claimed to have \$3,000 of outstanding accounts due from customers, divided about equally between the Pittston and Scranton stores. But except as to \$588.60, appearing on memorandum slips kept by the bankrupt, there is nothing but his say-so to verify it. This, with two life insurance policies of \$2,000 each in favor of his family, constitutes the whole of the bankrupt's available property.

In a statement made by the bankrupt to R. G. Dun & Co.'s Mercantile Agency six months previously he valued his stock on January 1, 1906, in the Scranton store at \$6,397.29, and in the Pittston store at \$2,987.90, or a total of \$9,385.19, not a large amount for two stores, nor beyond that which he is shown to have regularly carried. Taking out his liabilities, which were some \$5,900, he made out that he was worth the difference, \$3,400. It is said that statements to mercantile agencies for the purpose of securing a financial rating are usually inflated, and are not to be relied on in consequence. This is not the view taken in *Re Greenberg* (D. C.) 8 Am. Bankr. Rep. 94, 114 Fed. 773, but quite the contrary. But, whatever grace of this kind is ordinarily to be extended to such statements, it is testified by the bankrupt in the present instance that, before sending in the one in question, he took an inventory, and, upon his attention being directed to the figures given in the statement, he reaffirmed their accuracy. It is also urged that they included bills due from customers; but he distinctly swears that they represent stock on hand. And as his total assets are stated at \$10,010.19, which is \$725 more than they aggregated, the accounts which he considered good—with regard to which he says that he endeavored to be conservative—may be taken to make up the difference. Since January 1, 1906, it is clearly established that his stock was augmented by merchandise to the extent of \$6,111.95; this being proved by the invoices on file in his store, which were also submitted to him and their authenticity acknowledged. Putting together the amounts so shown, it makes a total of \$15,497.14, which thus represents the merchandise which was in the bankrupt's hands at one time or another, from January 1, 1906, to the date of his bankruptcy, to say nothing of the \$200 or \$300 worth which he says that he bought for cash at the close when he no longer had any credit. The question is how far it has been accounted for.

To get at how much by right should have been left at the last to be turned over to the trustee, the sales meanwhile are, of course, to be credited; which, had the usual books been kept, would appear by the merchandise account; but, in the absence of it, may be taken to be fairly represented by the cash received and paid out on trade accounts and for business and personal expenses, and the bills due for goods sold on credit. It is true that there was a fire in the Pittston

store in April, but the damage was not much, being mainly from smoke and water, and was no doubt covered by the insurance money received—some \$940—especially as this was followed by a “fire sale” for several days, which proved so successful that goods were carted down from the Scranton store to get the benefit of it, and, according to Goodman, resulted in nearly the whole of the Pittston stock being disposed of. Corroborative of this, it may be added that while just before the fire Lesaius declared to Goodman that he was in difficulty, and would have to fail, and wanted the name of an attorney who would help him through, after it had occurred he came to Goodman again and said that he would not need an attorney, as he was going to get through on his insurance money. This money also in part at least was used to buy goods again, and to the extent that it was it got back into the business. The alleged loss by fire would therefore seem to be negligible.

An account may therefore be stated against the bankrupt, as follows:
He is to be charged with:

Goods on hand January 1, 1906, as per statement to R. G. Dun & Co.	\$ 9,385 19
Merchandise received from Jan. 1, 1906, to June 30, as per invoices on file.....	6,111 95
	<hr/> \$15,497 14

And he is to be credited with:

Payments on trade accounts as per checks and notes..	\$5,137 61
Business expenses, including rent of Pittston and Scranton stores, clerk hire, insurance, and gas bills.....	1,387 25
Goods sold on credit as per memorandum slips on file..	588 60
Drawn out or paid on personal account.....	790 17
Goods sold after bankruptcy proceedings had been instituted	300 00
	<hr/> \$ 8,203 63
Balance	\$ 7,293 51

Or, in other words, allowing every proper item of credit to which the bankrupt is entitled, he should, according to this, have had stock and merchandise to turn over to his trustee of the value of \$7,293.51, where at his own figures he had only \$3,200, or on a more correct estimate probably not to exceed \$3,000, a discrepancy of from \$4,100 to \$4,300.

There is no escape from the inexorable logic of these figures; and that we have a right to resort to them there can be no question. In *re Salkey*, 9 N. B. R. 107, Fed. Cas. No. 12,252; In *re Schlesinger* (D. C.) 3 Am. Bankr. Rep. 342, 97 Fed. 930; In *re Deuell* (D. C.) 4 Am. Bankr. Rep. 60, 100 Fed. 633; In *re Greenberg* (D. C.) 8 Am. Bankr. Rep. 94, 114 Fed. 772; *Boyd v. Glucklich*, 8 Am. Bankr. Rep. 393, 408, 116 Fed. 131, 53 C. C. A. 451; In *re Gerstel* (D. C.) 10 Am. Bankr. Rep. 411, 123 Fed. 166; In *re Dry Goods Co.*, 13 Am. Bankr. Rep. 266, 133 Fed. 100; In *re Cotton Co.* (D. C.) 14 Am. Bankr. Rep. 194, 134 Fed. 477; In *re Weinreb*, 16 Am. Bankr. Rep. 702, 146 Fed. 243, 76 C. C. A. 609; In *re Leverton* (D. C.) 19 Am. Bankr. Rep. 426, 155 Fed. 925. Otherwise, indeed, in many cases

we should be without remedy. In some respects, moreover, they are more favorable to the bankrupt than perhaps he is entitled to. For instance, while charging him with goods at wholesale or cost prices, he is credited with sales at retail without taking into account the supposed profits which were no doubt considerable. Also he is allowed credit for the forced sales made after the bankruptcy proceedings had been instituted, amounting to some \$300, instead of being charged with these, together with \$100 drawn out of bank immediately preceding that, as so much money received and unaccounted for, the only explanation of where it all went to being the contemptuous one that he had "spent it nicely," or that it had gone for "car fares," "shoe shines," or "milk for the baby." And, again, he is not charged, as he well might be, with the goods bought for cash after his credit was gone, to which allusion has already been made, amounting to some \$200, this having at the same time been allowed on the other side as a deduction. On the other hand, no credit has been given for the fixtures, estimated at \$300; but there is reason for this, the fixtures not being merchandise nor paid for out of it, and this being a purely merchandise accounting.

It is urged on behalf of the bankrupt that there were \$3,500 of book accounts—\$1,500 at Pittston and \$2,000 at Scranton—which, if allowed, would be almost enough of themselves to overcome the deficiency shown by the figures. But except to the extent of the memorandum slips which have been considered and allowed—\$588.60—the existence of any such accounts is exceedingly doubtful. And, even if this were not so, there is nothing to show how long they had been accumulating, and it is only as they represented sales made since January 1, 1906, from which everything runs in this accounting, that they would be of any relevance. It is also said that the stock which the bankrupt had on hand in January, 1906, included old and shelf-worn goods, on which a deduction should be made of at least 20 per cent. in order to make the estimate a fair one. This may be possible, but unfortunately there is nothing to substantiate it, and, on the contrary, it appears, as already pointed out, that the statement to R. G. Dun & Co., against which this is directed was based on an actual inventory, where the condition of the goods is supposed to have been taken into consideration. It is also to be noted in this connection, as it already has been in another, that, while the bankrupt is charged with the goods traced into his hands at cost, he is credited with what he got for them, thus giving him the benefit of the profits made, which on \$6,000 or \$7,000 of stock disposed of may well be taken to offset any depreciation on the rest of it, if, indeed, this is not too liberal. A point is also sought to be made as to the running expenses, which amounted as it is said to \$135 a month for four months at Pittston, and \$275 a month for six months at Scranton. But into the Scranton estimate \$75 a month is figured for the bankrupt himself, which is, of course, unwarranted; and the rent of the Scranton store, which was \$50 a month, is also included, which the checks show was fully paid, as were the gas bills and a large part of the clerk hire, all of which the bankrupt relies upon as part of the expenses which he would

have deducted, but have already been taken into consideration in the credits given. The alleged loss by the Pittston fire is also brought forward, but has been disposed of in what is said of it above. And there is finally claimed to be a discrepancy of over \$1,200 in the amount at which the goods traced into the bankrupt's hands during the six months immediately preceding his failure are figured by the trustee beyond what they should be according to the evidence. But I have carefully gone over the items relied on by the trustee, and the amount is to be increased rather than lessened.

Where, then, has the stock disappeared to which is not accounted for? Nothing, of course, is to be made out of the dray load of goods which the policemen saw being carted away from the Scranton store in the nighttime. This was in April, and is explained by the bankrupt as having been taken to Pittston after the fire to mix with the other goods and be disposed of to customers eager for supposed bargains, according to the practice which is sometimes indulged in. Neither is there anything that can be laid hold of in the evidence of overcoats and clothing being taken to the house of the bankrupt's father where they were seen by boarders, which was also in April. Nor is any stress in my judgment to be put on the checks given from time to time by the bankrupt to his brother, R. A. Lesaius, a prosperous retail butcher, in the same section of the city. The giving of these checks extends several months back of the period which is under surveillance, and is explained as a custom adopted by the brother for taking care of his bills without having to do any banking; the money being given to the bankrupt in exchange for his checks and the checks being used to pay with. This was certainly a peculiar practice, but, independent of the bankrupt or his brother, there is evidence to corroborate it, and there is no occasion, therefore, to call it in question. Much more significant is it that the bankrupt, after a few months interval, started up again in the same business ostensibly as manager for his father—a foreigner ignorant of our language and customs, working for a dollar a day in a coal breaker—on money said to have been borrowed from different members of the family. No doubt the business is carried on in the father's name, in which goods are bought and sold, and checks given. But the bankrupt dominates and controls it, and the father is evidently a mere figure-head, with whom in all this time there has been no accounting. As the bankrupt significantly says, it was not necessary. Into this store, moreover, are traced goods which were sold to the bankrupt before his failure. Goodman, for instance, saw some of his shirts there and a couple of boxes of balbriggan underwear, and Ackerman discovered several of his watches; all these articles being identified by unmistakable marks, and being handled solely by these parties, who have sold him nothing of the kind except what they did originally. It is true that these things do not amount to much, either in number or value, but the significance of finding them is that in no way could they have got into the new store except as they were a part of the stock of the old one, and it is fair to surmise from this circumstance that there may be others. It is suggested that they might have been bought from other retail-

ers, but this is altogether unlikely, nor does the bankrupt venture to say so. Soon after his failure, also, when Goodman was trying to persuade him to settle with his Scranton creditors, Lesaius said that he had the money in his pocket, but that he was going to beat the Jews and would not pay them a cent. And at another time, talking with Goodman, with whom he used to be quite friendly, referring to an offer of settlement which he had made him, he said that, if he (Goodman) had kept his mouth shut, he would have paid him, but that he had the "boodle" in his pocket, and after what the creditors had done in starting bankruptcy proceedings they could all go to the devil. Again, also, when Goodman was talking with him about how the stock had run down and inquiring what had become of it, pointing out that no bills had been paid, he said that his lawyer advised him to sell all the goods that he could and put the money in his pocket, intimating that he had done so. These circumstances of themselves, of course, amount to but little, and too much stress is not to be put upon what after all may have been only idle boasting, but, taken in conjunction with the other facts in evidence which they confirm, the fraudulent character of the failure is disclosed and the wide discrepancy in the stock explained, dispelling any fear of doing the bankrupt injustice by misconstruing innocent transactions or holding him liable as intended for that which was merely fortuitous. No doubt in cases of this kind an order is not to be made except with caution and upon convincing evidence lest a commitment for disobedience on contempt proceedings to follow should in effect be nothing more than imprisonment for debt which would not be justified. It is also to be kept in mind that the object is to recover tangible property, and not to punish as on indictment for a fraudulent concealment or abstraction. *Samel v. Dodd*, 16 Am. Bankr. Rep. 167, 142 Fed. 68, 73 C. C. A. 254. But, allowing for all this, I am constrained to find that the bankrupt has in his possession and conceals from his trustee goods and merchandise, part of his former store stock, of the value of at least \$4,000, which he should be required to turn over. Whether he has the goods now which is not likely, or has converted them into money which is very probable, is not material. He is not relieved from the exigency of the rule or the obligation to produce them, because of having disposed of them, perchance, while the proceedings were pending. He could not get rid in this way of the process of the law, once it had been duly started. The order it may be should be to turn over the goods, and not in the alternative to pay the value, the proceedings, as just stated, being supposed to be directed to the recovery of specific property. *Samel v. Dodd*, 16 Am. Bankr. Rep. 163, 142 Fed. 68, 73 C. C. A. 254. But that does not prevent its being measured by its value; that being the only way to indicate the extent of it. Neither is it necessary to do more than describe the property generally, as consisting for instance in the present case of gentlemen's furnishings and clothing, such as the bankrupt was carrying. To require greater particularity would make such proceedings practically nugatory. *Ripon Knitting Works v. Schreiber*

(D. C.) 4 Am. Bankr. Rep. 299, 303, 101 Fed. 810. This would not be necessary even to convict upon indictment.

The referee is reversed and the rule to show cause is made absolute, a formal order to be prepared by counsel.

IN re MONTELLO BRICK WORKS.

(District Court, E. D. Pennsylvania. July 18, 1908.)

No. 2,922.

BANKRUPTCY—PROVABLE CLAIMS—CONTRACTS BY FOREIGN CORPORATIONS—FAILURE TO COMPLY WITH STATE LAW.

A Delaware corporation, whose principal business, which was authorized by its charter, was the acquiring of stock in other corporations and lending them money, which maintained its principal business in Pennsylvania, and there lent money to another corporation in which it owned a controlling interest, taking duebills therefor, was doing business in Pennsylvania, and where it failed to comply with the requirements of the state statute to entitle it to do business therein, such duebills are not legally enforceable and cannot be proved against the estate of the borrowing corporation in bankruptcy either by the lender or its assignee.

In Bankruptcy. On certificate from referee concerning claim of Colonial Trust Company, trustee.

Richmond L. Jones and Charles Henry Jones for Colonial Trust Company.

Wellington M. Bertolet, J. Howard Reber, and Duane, Morris, Heckscher & Roberts, for objecting creditors.

J. B. McPHERSON, District Judge. The question presented by this certificate is whether the referee erred in permitting the Colonial Trust Company of Reading to prove its claim against the bankrupt, and to vote upon it in the election for trustee. The claim rests upon certain duebills given by the bankrupt to the United States Brick Company, a Delaware corporation, for money loaned; these duebills having been assigned by the brick company to the trust company as collateral security for the bonds of the Delaware corporation, of which the trust company is the trustee under a formal indenture. Objection was made to the claim on two grounds, of which the first is that the right of the trust company is no better than the right of its assignor, the brick company, and that the latter corporation could not have had a valid claim upon the duebills because the money was loaned in violation of the Pennsylvania statutes, which forbid a foreign corporation to do business in the state until it has complied with certain definite requirements. It is conceded that the brick company did not comply with these statutes, and the question therefore is whether it was "doing business" in Pennsylvania when it loaned the money to the bankrupt. The following excerpts from the report of the referee will give the facts upon which his decision was based:

"The United States Brick Company was incorporated in Delaware about the middle of November, 1904.

"A certified copy under seal of the Secretary of State of Delaware of the certificate of incorporation of the United States Brick Company, which was

offered in evidence, shows the nature of its business and its objects and purposes. In brief, these purposes were: (a) To manufacture and sell brick tiles, etc., and all other articles of commerce made in whole or in part of clay, shale, silica, or other kindred substances; to purchase or acquire patents or licenses, and issue stock therefor; to purchase mines, manufactories, and other property necessary for its business, or the stock of any companies owning mines, etc., and any other property necessary for its business, and issue stock therefor; to issue bonds, certificates of indebtedness, notes, etc., and to sell the same; to guarantee payment of fixed charges or dividends of any corporation; to buy and hold, pledge, sell, or otherwise dispose of shares, bonds, certificates, notes, or other securities, obligations, or contracts of any corporation, etc., and to exercise the rights of stockholders as to stock purchased; to contract for the acquisition of real estate, stock, or securities either for money or for capital stock of the company; to leave, buy sell, mortgage, etc., real and personal property; to do all these things in any part of the world; (b) to manufacture, purchase, or otherwise acquire, to hold, own, mortgage, pledge, sell, assign and transfer, or otherwise dispose of, to invest, trade, deal in, and deal with goods, wares, merchandise, and property of every class and description; (c, d, e) to enter into, etc., contracts of every kind with any person, firm, or corporation, and take, make, accept, indorse, discount, execute, and issue promissory notes, bills of exchange, warrants, bonds, and other negotiable or transferable instruments.

"The United States Brick Company was composed almost entirely of residents of Berks and surrounding counties in Pennsylvania, and the greater part of its stock was held by these persons.

"It has an office in Wilmington, Del., which is used, together with a large number of other Delaware corporations, only for the purpose of holding annual meetings of stockholders.

"Under its charter it purchased nearly all of the stock of the Montello Brick Works, bankrupt, and a controlling interest in the stock of several other corporations in Pennsylvania and New York.

"This was practically all of its corporate purposes that it exercised either in this state or in any other, unless loans of money, to be referred to later, were an exercise of its corporate objects and purposes.

"It never engaged actively in the manufacture of brick or other clay products.

"It exercised its corporate objects chiefly in the acquisition of controlling interests in various companies actively engaged in the manufacture of brick and kindred products.

"Its meetings of directors were held in Philadelphia and Reading at the offices of the Montello Brick Works, the offices of the bankrupt.

"Its books were in the custody of its executive officers and clerks at said offices in Reading, Pa., and all the clerical work on these books was done there.

"It deposited its moneys in the First National and Penn National Banks and the Colonial Trust Company, all Reading banks.

"The United States Brick Company, by a deed of trust executed December 21, 1904, conveyed to the Colonial Trust Company of Reading, trustee for bondholders of the said United States Brick Company, all the stock of the Montello Brick Works that it held in order to secure the bonds issued. It also agreed in said deed of trust with the trustee to assign any evidences of indebtedness which it might receive from time to time from the Montello Brick Works for moneys advanced to it, also as collateral security for the bonds issued.

"The United States Brick Company at various times loaned money to the Montello Brick Works, for which it received duebills, 14 in number, all dated Reading, Pa., beginning with March 31, 1905, and ending with April 14, 1906, the total face value of which is \$266,500, and the interest to December 10, 1907, is \$37,724.67, making a total of \$304,224.67. These duebills the United States Brick Company assigned by a series of assignments, each covering one or more of said duebills, to the Colonial Trust Company of Reading, Pa., as trustee for the brick company bondholders. These assignments covered a period from the 28th of August, 1905, to the 30th of April,

1906, and include all the duebills. The money advanced was deposited in Reading banks and drawn on by check, which were written and signed at the office of the company in Reading. Checks were delivered to the bankrupt in Reading and the duebills were received in Reading. In fact, each loan or advance of money was made in Reading, and the duebill received for each one was a Pennsylvania contract. I find, in short, that, excepting the incorporation of the United States Brick Company, and the signing of the deed of trust by the company at Wilmington, Del., nearly all the things that the United States Brick Company did were done in Pennsylvania, and these things no more than have been hereinbefore found.

"I do not find that the United States Brick Company did anything in Pennsylvania, excepting to obtain and exercise control of certain Pennsylvania corporations, including the bankrupt, and to lend money to the corporation whose stock it owned largely or in part.

"I further find as a fact, and it is admitted by the claimant, that the United States Brick Company never complied with the act of April 22, 1874, regulating certain duties of foreign corporations."

These facts are not disputed, and upon them the referee rested the conclusion that the brick company was not "doing business" in Pennsylvania, relying upon *Construction Co. v. Winston*, 208 Pa. 469, 57 Atl. 955, and holding that lending money was not the business of the brick company, and therefore that, as it did not exercise its corporate power in the state of Pennsylvania by making the loans in question, it did not fall within the provisions of the statutes. With this conclusion I am unable to agree. The brick company has an omnibus charter, under which it can do many things; but for present purposes it is enough to note that it was undoubtedly organized for the principal object of doing just what it proceeded to do, namely, to acquire the stock of the bankrupt, and to lend it money to carry on the operation of brickmaking under certain patents. This, in a few words, is the essential fact of the present controversy, and to state it is equivalent to drawing the conclusion. The Supreme Court of Pennsylvania and the Court of Appeals of the Third Circuit unite in deciding that, when a foreign corporation exercises its charter powers in the state, it is "doing business" therein, and that it cannot recover upon contracts made in the exercise of such powers, unless it has complied with the provisions of the Pennsylvania statutes concerning registration and other matters. As these duebills are the evidence of contracts made by the brick company in furtherance of the principal object for which it was incorporated, it follows inevitably (as I think) that it could not have recovered upon them in a suit against the bankrupt, and, as they are not negotiable instruments, it could not escape the consequence of its violation of the Pennsylvania law by the device of assigning them to the present claimant.

The decision of the referee is reversed.

In re MONTELLO BRICK WORKS.

(District Court, E. D. Pennsylvania. July 20, 1908.)

No. 2,922.

1. LANDLORD AND TENANT—FORFEITURE OF LEASE—WAIVER BY RECEIPT OF RENT.

A lessor, who receives rent after a forfeiture of the lease, thereby waives the forfeiture, and the lease is restored to its original force and effect.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, § 345.]

2. SAME—LEASE CONSTRUED—RIGHT TO REMOVE TRADE FIXTURES.

A lease for a long term of years, which provided that at the expiration of the term, or its earlier termination as therein provided, the lessee should surrender the premises "in good order and condition, with all improvements, additions and extensions without any compensation to be paid for said improvements, additions and extensions," did not vest title to such improvements, etc., in the lessor, when they were made, but only to such as remained when the lease was terminated, and such provision did not affect the right of the lessee to remove trade fixtures during the term or while the lease remained in force.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, §§ 577-584.]

3. FIXTURES—BUILDINGS—"TRADE FIXTURES."

In the absence of an agreement to the contrary, a lessee may remove fixtures which it places on the leased premises for trade purposes while the lease is in force, and such fixtures include not only machinery, but buildings erected for trade purposes. Under a lease of premises for a long term of years to be used for manufacturing purposes, a building erected for a manufacturing plant is a trade fixture, which the lessee may remove during the term, regardless of its size or the materials of which it is made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fixtures, § 62.

For other definitions, see Words and Phrases, vol. 8, p. 7042.]

In Bankruptcy. On certificate of review.

Harry F. Kantner, for trustee.

Richmond L. Jones and Charles Henry Jones, for landlord.

Arthur G. Dickson, for Fourth St. Nat. Bank of Philadelphia,
a creditor.

Wellington M. Bertolet and Duane, Morris, Heckscher & Roberts,
for other creditors.

J. B. McPHERSON, District Judge. The motion to quash the appeal or certificate of review allowed by the referee on May 9, 1908, from his decision entered on March 20th, is refused. This appeal, however, has in effect been superseded by the subsequent proceedings before the referee. The forfeiture of the lease, upon which the decision appealed from was rested, was afterwards waived by the lessor, and the status quo was thereupon restored by its voluntary action. For this reason the technical objections raised by the motion to quash scarcely merit consideration. Moreover, the question sought to be raised is involved in the certificate granted to review the order entered on May 16th, and one ruling will dispose of both appeals.

The facts upon which the present controversy turns are thus stated in the report of the learned referee (Samuel E. Bertolet, Esq.):

"On April 21, 1908, Edward D. Trexler, trustee of the bankrupt, filed a petition praying for leave to sell buildings, machines, engines, boilers, etc., known as trade fixtures, which were erected upon and attached to the leasehold premises of the bankrupt during the term of the lease entered into between the Montello Brick Company and the Montello Brick Works, dated January 1, 1903.' A full list of said fixtures, improvements, additions, and extensions, excepting the buildings, appears in the inventory and appraisal filed in this case. It was ordered that April 23, 1908, at 10 o'clock a. m., should be fixed for a hearing on the trustee's petition. On April 28th, the trustee and certain creditors appeared before the referee. There also appeared the Montello Brick Co., lessor, and filed objections to the granting of an order of sale to the trustee. The petition and objections were heard at the same time.

"It is my belief that all the facts which have appeared in this case, whether admitted by all the parties or shown by testimony, may be taken into consideration, together with such additional facts which were submitted to the referee at the hearing on the petition. I believe this, because the whole matter is, after all, only one case, and a court of equity has authority to take a general birds-eye view of all the facts brought out in a case. Most of the facts which I am about to find were either admitted or practically uncontradicted. No facts will be found, however, which were not testified to in the presence of the Montello Brick Company, the principal party appearing against the trustee's application, or admitted by it.

"I find the facts to be as follows:

"On January 1, 1903, Montello Brick Company leased to Montello Brick Works, the bankrupt, a number of tracts of land in Berks and Montgomery counties, on some of which were located brick manufacturing plants. Those in Berks county were called Vinemont, Montello, and Wyomissing, and that in Montgomery county was called Perkiomen.

"The lease also demised certain tracts of land on which no buildings whatever were erected. One was a tract of farm land containing about 30 acres.

"The lease also demised the machinery, tools, and other personal property then in and about the various plants named, with the real estate, and an inventory of the machinery, tools, and other personal property was attached to the lease and made part thereof. This inventory shows such property as having been located at Vinemont, Montello, Wyomissing, and Perkiomen plants.

"The lease provided, among other things, that the lessee should keep the demised premises in good order and repair, and should replace all machinery and buildings worn out or destroyed.

"The term was for 990 years.

"The lessee agreed to pay an annual rental of \$63,000. The intent was that each stockholder of the lessor company—there being \$1,050,000 worth of stock outstanding—should receive a net sum equal to 6 per cent. upon the capital stock, and to that end the rental aforesaid was to be divided, and payment made by the lessee as follows (quoting from page 14 of the lease): 'On the 1st days of January and July of each and every year \$15,000 shall be paid to the holders of the preferred capital stock (10,000 shares, at \$50 each), being at the rate of 3 per cent. on \$500,000, or \$1.50 on each share thereof; and, on the 1st days of April and October of each and every year \$18,500 shall be paid to the holders of the common capital stock (11,000 shares, at \$50 each), being at the rate of 3 per cent. on \$550,000, or \$1.50 on each share thereof, excepting the first payment on the 1st day of April, A. D. 1903, which, being but three months after the commencement of the lease, only one-half of the semiannual payment provided for the common capital stock will be due and payable. Montello Brick Company shall furnish a list of its stockholders, with the post office address of each of them, to Montello Brick Works 15 days before every quarterly dividend period, and Montello Brick Works shall pay such dividend directly to the stockholders by mailing a check to each of them to the address given on said list.'

"On page 16 of the lease between the parties, it was provided that: 'In case of the bankruptcy or insolvency of Montello Brick Works resulting in the appointment of a receiver of the demised premises, or in case the control of Montello Brick Works in the demised premises shall be vested by judicial sale in an assignee, then this lease and the term thereof shall, at the option of Montello Brick Company, cease and determine, and Montello Brick Company shall immediately, at this option, be entitled to take possession of the demised premises, and, if Montello Brick Company shall elect to take possession of the premises, the same shall not pass into the possession of such receiver or assignee.'

"On page 17 of said lease, covenant 2 provided that: 'If Montello Brick Works shall make default of the payment of any installment of rent hereby reserved for a period of 30 days after the same becomes due and payable, or in the performance of any of its covenants herein contained, then and in any such case, Montello Brick Company may at its option forthwith declare this lease forfeited and at an end, any law or custom to the contrary notwithstanding, and thereupon all the rights of Montello Brick Works, under this indenture or otherwise howsoever, as well to the hereby demised premises as to all improvements, additions, and extensions made or to be made by Montello Brick Works, shall absolutely cease and determine, and the same, together with all the rights, privileges, and franchises of Montello Brick Works and all the property, real and personal, of Montello Brick Works, in Upper Providence township, Montgomery county, and in Spring township, Berks county, Pa., shall absolutely vest in Montello Brick Company, free and clear of all claims and demands whatsoever, without any further action or acts of transfer or other compensation to be paid therefor, and Montello Brick Company may recover possession of the premises with all the improvements, additions, and extensions, as though the same had been originally constructed by and belonged to it,' etc.

"On page 19 of the said lease, it was provided in covenant 3 that: 'At the expiration of the term hereby created, or earlier termination in the way herein provided, Montello Brick Works shall return and surrender to Montello Brick Company the demised premises in good order and condition, with all improvements, additions, and extensions without any compensation to be paid for said improvements, additions, and extensions by Montello Brick Company.'

"Under this lease the lessee, now bankrupt, took possession of the premises described therein and all the brick manufacturing plants with the machinery and other property mentioned in the inventory attached thereto.

"The lessee in the period between January 1, 1903, and the date of its bankruptcy, at various times, expended large sums of money for construction of buildings and for machinery.

"This money was expended as follows:

"A fire partially destroyed the Perkiomen plant, and \$26,726.65 was spent in replacing the same. A fire also destroyed the Wyomissing factory, and \$91,187.56 was spent in replacing the same. The sum of \$27,477.96 was spent in additions upon the Montello plant, which cannot be separated from the original demised property without completely destroying the same. No improvements were made at the Vinemont plant. The lessee also purchased a Thew automatic steam shovel, costing \$3,600, which is put on the Wyomissing premises, and which is still there. This steam shovel was not purchased to replace property leased, but was purchased for use in the brick-making business.

"The bankrupt lessee, some time after January 1, 1903, erected on the 30-acre tract above mentioned, located a short distance from the Perkiomen plant in Montgomery county, which it had leased to the Montello Brick Company, a large factory, built of brick foundations and a superstructure of wood and iron girders and corrugated iron sides, and roof made of the usual roofing materials, and other buildings annexed thereto built on brick or stone foundations with a frame superstructure. Into this factory building were placed brick burning kilns, railroad tracks, and machinery pertaining thereto, and into the buildings adjoining were placed brick-making machinery and a complete power plant consisting of engines, boilers, etc. As a whole, this structure was a brick-manufacturing plant, and was intended and used

by the lessee for the carrying on of the lessee's business, which was the manufacturing of brick and other clay products. The buildings, kilns, and certain machinery belonging thereto were put up at a cost to the lessee of \$618,813.79. The brick-making machinery, power plant, consisting of engines, boilers, trackage, etc., and all other machinery appurtenant to the plant proper, were purchased and put in place by the lessee at a cost to it of \$156,784.31, a total expenditure of \$770,598.10. This plant was called the Oaks plant.

"In connection with the Oaks plant, and to be used therewith, the lessee bought on or about December 31, 1903, a steam shovel, at a cost of \$5,300, and on or about December 31, 1904, another steam shovel at a cost of \$5,300. Both these steam shovels were purchased by the lessee and used in lessee's business. Both remained on the premises.

"On or about October 31, 1907, creditors of the Montello Brick Works, lessee, filed a petition praying that it be adjudged a bankrupt. A receiver was appointed the same day. On December 10, 1907, the said lessee was adjudged a bankrupt.

"On January 1, 1908, an installment of rent, amounting to \$21,000, for the period from October 1, 1907, to January 1st, 1908, fell due. The Montello Brick Company, lessor, did not at any time make demand for this rent, in any way; nor did it furnish lessee a list of lessor's stockholders within ten days of said January 1, 1908, as provided in the lease. On January 4, 1908, the lessor's board of directors passed a resolution directing its president to notify the bankrupt lessee that if default in the payment of the January 1st rent continued for 30 days, the lessor would declare the lease forfeited and proceed to exercise all its rights, etc., under section 2 of said lease. This notice, with a copy of the resolution, the president of the lessor company sent by mail to the bankrupt lessee, and the latter received it on the same day. The lessee did not pay the rent, and on February 29, 1908, the lessor's board of directors passed a resolution exercising the option agreed on in section 2 of the lease, and declared the January 1, 1903, lease forfeited and at an end, and directed the president to forthwith recover possession of the demised premises with improvements, additions, and extensions, as provided by the lease. A copy of this resolution was served on the president of the bankrupt's lessee on February 29, 1908. A trustee of the lessee having been appointed on February 13th, a copy of the resolution was also served on him. The lessor did not enter the demised premises at any time to take possession, nor take steps to recover possession.

"Up to this time the trustee did not assume the January 1, 1903, lease as an asset of the bankrupt's estate, declaring that he would not do so unless directed by the creditors. Pending the appointment of the trustee, an inventory and appraisal of all the machinery, tools, and other personal property of all kinds in possession of the bankrupt, whether demised by the 1903 lease or not, was made by the receiver and filed with the referee. The trustee when appointed assumed this inventory and appraisal as correct and took it for his own. It has been offered in evidence and shows in detail the various items of machinery which go to make up and are located at the various plants operated by the bankrupt. It does not, however, contain an inventory and appraisal of any of the buildings. On February 19, 1908, the trustee presented his petition for leave to sell all the property of the bankrupt. He alleges that all the machinery and other personal property purchased by the bankrupt lessee after January 1, 1903, and used in its business of manufacturing brick, and that all the buildings erected on land demised by the 1903 lease, excepting replacements of property demised by the aforesaid lease, belonged to the lessee and could be removed and sold by the lessee or its trustee, as trade fixtures. This petition was heard on March 6, 1908. The Montello Brick Company, lessor, then appeared and objected to the granting of the order of sale. It alleged that it had legally forfeited the lease between it and the lessee, and, showing the facts relating thereto as hereinbefore found, it claimed that the lease was at an end, and that the lessee had no title to the property sought to be sold. Believing that the forfeiture had been legally effected, the referee decided that the trustee could not sell any of the property demised by the 1903 lease, with the im-

provements, additions, and extensions thereto, and found all such to belong to the lessor. The trustee was permitted to sell property not on the leased premises at the date of the forfeiture, and such personal property on the demised premises which was not a necessary part thereto, or such as could not be included under the term 'improvements,' etc. An order to this effect was entered March 18th, permitting the trustee to sell property therein referred to on April 2d to 8th.

"An examination of the bankrupt was held on March 27, 1908, and at this time the fact first appeared that the lessor had not made demand for the rent, that it had not furnished the lessee with the list of the lessor's stockholders 10 days prior to January 1, 1908, as required by the lease. The fact also then appeared that the trustee had not re-entered upon or taken possession of the premises after the forfeiture, had been declared. A motion made on that day on behalf of the trustee, asking for a rehearing of the trustee's petition to sell and for an amendment to the order, so as to include permission to sell trade fixtures, was denied by the referee; he at the time believing that the additional facts found were not sufficient to warrant changing the order of March 18th.

"At the meeting of creditors held April 2, 1908, the creditors moved that the referee call a special meeting to determine whether the trustee should tender payment of the rent due to April 1st by the bankrupt lessee to the Montello Brick Company and assume the lease. This motion was carried by an almost unanimous vote of the creditors present and voting, and April 16th, at 10 o'clock a. m., was fixed for the special meeting. Of this meeting due notice was given to all creditors and parties interested. On April 16th, the special meeting of creditors was held, and the bankrupt, the trustee, sundry creditors, and the Montello Brick Company appeared. The resolution was made and passed by creditors present and voting, directing the trustee to tender to the Montello Brick Company, whose president and counsel were present at the meeting, the rent due to date under the lease between the parties, and also that the trustee assume the lease. The trustee, in pursuance of this resolution, assumed the lease, and tendered \$38,000, the amount of rent due, to the president of the Montello Brick Company, lessor, who declined to accept the same before conferring with the directors of his company and receiving their authority. On April 18, 1908, there appeared voluntarily before the referee the trustee and his counsel and the Montello Brick Company, by A. J. Brumbach, president and acting treasurer, with its counsel. The Montello Brick Company, lessor, expressed its willingness to accept the tender of rent made by the trustee on April 16, 1908, the lessor by its president and acting treasurer agreed to accept the certified check in accordance with the tender made on April 16th and the trustee thereupon delivered the check for \$38,000, and said A. J. Brumbach, president and acting treasurer, received the same for the Montello Brick Company and signed a voucher therefor. This was done in the presence of, and witnessed by, the referee.

"On April 21st, as stated before, the trustee renewed his application for authority to sell the improvements, additions, extensions, etc., as trade fixtures belonging to the lessee, stating that he had assumed the lease, that the lessor had waived the forfeiture of February 29th, if there had been one, and that he was legally entitled to sell or remove the trade fixtures belonging to the lessee. He, accordingly, filed this petition. The petition was heard on April 28th, when the trustee, creditors, and the Montello Brick Company, lessor, appeared. The lessor filed objections in writing to the petition of the trustee, and the objections were heard with the petition. The additional testimony then introduced has been included in the foregoing findings."

Upon the foregoing facts, the referee decided that the order asked for by the trustee should be made, and gave the following reasons for his decision:

"1. The forfeiture of the lease effected by the Montello Brick Company, lessor, on February 29, 1908, if valid, which is very doubtful in the light of the new facts submitted on March 27th, was waived by the acceptance of rent

which accrued after the forfeiture. The lease is therefore not forfeited, but is in force as from the beginning.

"2. A lessee may remove fixtures which it places on leased premises for the purpose of carrying on its trade and business, during the term of the lease, unless the parties, to wit, the lessor and lessee, agree in their lease to the contrary.

"3. The Montello Brick Company, lessor, and the Montello Brick Works, lessee, did not in their lease of January 1, 1903, agree that the lessee might not remove trade fixtures, and said lease does not prevent the removal of trade fixtures by the lessee.

"4. The trustee in bankruptcy, having assumed the lease which the bankrupt entered into with the Montello Brick Company, has all the rights, as well as the obligations, which the bankrupt had under the lease.

"5. The property purchased by the lessee and installed in or about the Montello, Wyomissing, and Perkiomen plants was replacements and additions, and was not trade fixtures. Therefore it belongs to the lessor, excepting the Thew automatic steam shovel located on the Wyomissing premises, in Spring township, Berks county, which is a trade fixture, if not absolute personal property, and is the property of the lessee or its trustee.

"6. The factory building and the appurtenances thereto, with the kilns, brick manufacturing machinery, and power plant, including engines, boilers, and all other machinery appurtenant to the plant called the Oaks plant, is a trade fixture, and is the property of the Montello Brick Works, lessee, and might have been removed by it during the term, and may therefore be removed and sold by its trustee.

"The two steam shovels purchased on December 31, 1903, and on December 31, 1904, at a cost of \$5,300 each, and located on or about the Oaks premises, are trade fixtures, if not absolute personal property, and belong to the lessee, and can be removed during the term of its lease, and therefore can be removed and sold by its trustee.

"Owing to the important results likely to follow from the foregoing conclusions, I consider it proper to give my reasons and authorities for them.

"The first conclusion is based upon the law laid down in *Johnson v. Lehigh Traction Co.*, 130 Fed. 943. This case was decided in 1904 in the United States Circuit Court, Third Circuit. Judge McPherson there agreed with the conclusions of the master in that case, the important facts of which are similar to those in this case, was illegal and invalid, and it was especially held there that, if the lessor receives rent accruing after the forfeiture, the forfeiture, although valid in itself, is therefore waived. The consequence must be that a forfeited lease in which the forfeiture has been waived is restored to its original force and effect.

"In an opinion and order filed March 18, 1908, the referee, with the facts as then before him, and on the authority of *Isman v. Hanscom*, 217 Pa. 133, 66 Atl. 329, decided that the forfeiture of the lease by the lessor of February 29th was valid and legal, and the results following from that decision were embodied in the order filed. Whether the referee erred then, and subsequently when with additional facts on March 27th he refused to amend the order, does not matter now. It may be that error was committed when a rehearing and amendment was refused on March 27th. Leave was, however, given to renew the motion later, if the facts warranted. The trustee in the present petition has, in effect, renewed his motion, and the question of forfeiture being out of the case, under the facts as now existing, an entirely new situation is presented.

"The second conclusion is so axiomatic in its nature, and has become such an elementary principle of the law of landlord and tenant, that it is unnecessary to cite authorities to sustain it.

"The third conclusion, on account of the results likely to follow it, is the most important as affecting the rights of the lessor and the lessee in this particular case. The Montello Brick Company, lessor, and the objector here, relies upon the authority of *Isman v. Hanscom*, 217 Pa. 133, 66 Atl. 329, to sustain its objections. I believe, however, that that case is clearly distinguishable from this. The objector depends upon the third section of its lease, found on page 19, for its right to invoke the authority of the case of

Isman v. Hanscom. Let us compare the language of the lease in the *Isman* Case with the language upon which the objector relies in its lease, and discuss each in turn. In the former the lease provided as follows:

"And the said lessees shall not make any alterations, additions or improvements to the hereby demised premises without first having the consent in writing of the lessor, and after such consent having been given all alterations, additions and improvements made by either of the parties hereto upon the premises, except movable furniture put in at the expense of the lessees, shall at the option of the lessor remain upon the premises at the expiration or sooner determination of the lease, and be surrendered with the premises, without molestation or injury, and become the property of the lessor," etc.

"With this contract before it, the court held, and very rightly so, that the question of trade or tenant fixtures need not be considered, because the contract between the parties had determined the ownership of all the property in question excepting only movable furniture put in at the expense of the lessees. It held, and the case means, that as soon as any alterations, additions, or improvements were made upon the premises, they were, at the option of the lessor, to remain there at the expiration of the lease and become the property of the lessor. It is difficult to see how the court could have arrived at a different conclusion with this language before it. Its opinion makes no new law, but confirms what the cases for 50 years and more had decided, viz., that where the lessee agrees that improvements which he may make upon leased premises shall remain there and become the property of the lessor, that contract is binding upon him and is the law between the parties. In the *Isman* Case, the lessee in so many words gave the lessor an option upon the improvements, etc., made upon the premises, and that option was that the lessor might elect at any time during the term of the lease whether or not he desired that the improvements made on the premises by the lessee should remain and be irremovable by the lessee, and he gave the lessor the option to say at any time during the term of the lease whether or not the lessor desired to take property in the improvements, etc. It is striking to notice that the court in its opinion lays particular stress upon the words 'at his option,' in connection with the words 'shall remain upon the premises at the expiration of the lease and become the property of the lessor.' If I give an option upon property or upon the title to property with or without consideration, which option may be exercised at any time during a certain period, it must, of course, follow that I have fixed my own and the other party's rights to such property, and it would be impossible for me to take it away and sell it before the time had expired within which the option given could be exercised. As said before, it is difficult to see how the court could have decided otherwise from what it did in the *Isman* Case, and the law there stated is a well-recognized principle of the law of landlord and tenant.

"It must further be noticed that the court says the important and controlling question arising out of the construction of the lease between the parties is that the lease determined the ownership of the property, and that the rights of the parties thereto depend entirely upon the proper interpretation of the instrument. We thus see that every case must be decided by the interpretation of its own lease, and that the words in the opinion, 'if the lease had been silent as to the ownership of the various items of property in dispute,' cannot mean that the mere reference in any lease to improvements, additions, and alterations is a breaking silence on that subject, and, with no further words, prevents the lessee from claiming title to any property falling within that description. These words as quoted could only have been intended to apply to the particular lease under inspection, which, undoubtedly, in the terms quoted therefrom, disposed of the right to remove from the leased premises, and the ownership of, the various items of property in dispute. The court means and says no more than that, if the parties did not dispose of the right of removal and the ownership of property in their lease, it becomes necessary to determine whether the property claimed is trade fixtures, and, if so, to whom does it belong.

"Turning to the lease between the Montello Brick Company and the Montello Brick Works, we find the lease reads: 'At the expiration of the term hereby created or earlier termination in the way herein provided, Mon-

tello Brick Works shall return and surrender to Montello Brick Company the demised premises in good order and condition, with all improvements, additions, and extensions, without any compensation to be paid for said improvements, additions, and extensions by Montello Brick Company.' A comparison of this language with that used in the lease construed in the Isman Case shows a vast difference. There the lessor obtained an option upon the improvements then made, to say what should become of them. The parties agreed that the improvements should remain upon the premises at the expiration of the lease, if the lessor should request it, and the lessor was to have any time during the term within which to exercise his option or right to request, whereupon the property became the lessor's. In this case the lessee agrees to return and surrender to the lessor the demised premises in good order and condition, with all improvements, additions, and extensions, without compensation, at the expiration of the term. It is first to be noted that the lessee gives no option on property or right of property in improvements, additions, and extensions to the lessor during the term, but a contingency must first arise before they can be claimed by the lessor, viz., the term must expire. There is no immediate property or right of property granted by the lessee to the lessor. It must, secondly, be noticed that this clause gives the lessor no more rights than it would have had and no more property in improvements, additions, and extensions than it would have had under the law without the insertion of this covenant. The cases are uniform in saying that all improvements, additions, and extensions, whether trade fixtures or other fixtures, become the property of the owner of leased premises at the expiration of the term and must be turned over to the lessor with the demised premises. No words to this effect need be inserted in a lease. The law gives the lessor the property without any agreement whatever to that effect, and it is not even necessary for the lessor to compensate the lessee therefor. It might be urged that this third covenant must mean something different, or else it would not have been inserted; but I will not read into a lease what the parties have not agreed to, and the mere insertion of covenants that are unnecessary and give the lessor no more than we have found they would have without their insertion cannot give the lessor greater rights. "It must, thirdly, be noticed that the parties do not agree that all improvements, etc., when made, must remain on the premises from that time on without right of removal or property in the lessee, but that the demised premises must be returned to the lessor at the end of the term with improvements, etc., then on them without charge by the lessee for the latter. As just said, this is simply a declaration of law as it is without the insertion of the third covenant.

"I am fortified in the foregoing reasoning by the case of *Hey v. Bruner*, 61 Pa. 87, decided in 1869. In that case the lessor leased a factory for 10 years. The lessees covenanted: 'And at the expiration of the said term shall and will quietly and peaceably yield up and surrender the possession of the said premises demised, together with all and every the improvements and additions which they the said lessees, shall construct and make thereon unto the lessor, in good order and condition, reasonable wear and tear, etc., excepted.' It was further covenanted: 'Lessees shall forthwith take possession, and shall with all convenient dispatch make alterations, additions and improvements of a permanent character to consist of items agreeably to a specification and plan to be approved by the lessor, and to introduce machinery necessary to the purpose of their business, hosiery manufacturing, permanent additions and improvements to remain on the property at the expiration of this lease and to belong to the owners of the fee to said premises.' The language first quoted is in essence like that in covenant 3 of the lease before us. It was held that, although the lessor by this lease, no doubt, intended that the machinery installed should belong to him at the expiration of the lease, yet he did not so provide, and therefore there was no doubt under the lease that lessee had a right to remove the fixtures, consisting of engine, boiler, shafting, hosiery machinery, etc., as trade fixtures from the freehold during the term of the lease. The court held that a plea of property must be supported by proof of a superior title on the part of the lessor.

"If the first quotation of the lease in *Hey v. Bruner* had in that case per-

mitted the lessee to remove his trade fixtures, and if it was in that case held that such language had not put out of it the question of trade fixtures, then the language in the lease before us, being almost identical, must mean that the lessee in this case must have title to and the right to remove and sell trade fixtures.

"The fourth conclusion is practically admitted by the objecting lessor here: his brief of argument assuming that a trustee in bankruptcy, who assumed the lease, has the same rights and obligations as his lessee had. There is no question in my mind that this is true.

"The fifth conclusion is a necessary result of findings of fact, the referee having found that the lessee was bound to replace all destroyed or worn out portions of the demised property, and, having found that the property installed by the lessee at or about the Montello, Wyomissing, and Perkiomen plants was necessary replacements or inseparable additions, it must follow that the lessee can have no right to remove anything from said plants excepting, however, the steam shovel located on the Wyomissing premises, which is a trade fixture and belongs to the lessee.

"The sixth conclusion brings up the question: what is included in the term 'trade fixtures'? It having been found that the law of trade fixtures applies to this case, and that the Montello Brick Works, lessee, or its trustee in bankruptcy, may remove and sell them during the term of the lease, that the lease has not expired, and it having been found that the rule applies in this case only to the trade fixtures located at what is known as the Oaks plant, excepting the steam shovel mentioned in the fifth conclusion, some explanation or authority for the sixth conclusion is necessary.

"In *Van Ness v. Pacard*, 2 Pet. 137, 7 L. Ed. 374, the United States Supreme Court, in deciding a case coming before it from the District of Columbia, Judge Storey, delivering the opinion, said that a lessee may, during the term of his lease, remove from the leased premises any fixtures erected thereon for the purposes of trade, and they included in the term 'fixtures' not only machinery, but buildings as well. The court there said that the question whether fixtures erected for the purposes of trade are, or are not, removable, does not depend on the form or size of the building to be removed, whether it has brick foundations or stone, or is one or two stories high, or has a brick or other chimney. The sole question is whether it is designed for the purposes of trade. The court said that a trade fixture might mean any building, whether wood, stone, or brick, of any size or form, as well as engines, boilers, machinery, or similar fixtures necessary for the lessee's business. This case has been followed in the United States courts in the following cases: *Steers v. Daniel* (C. C.) 4 Fed. 587; *Freeman v. Dawson*, 110 U. S. 264, 270, 4 Sup. Ct. 94, 28 L. Ed. 141; *Searl v. School District*, 133 U. S. 561, 10 Sup. Ct. 374, 33 L. Ed. 740; *Brown v. Reno, etc., Co.* (C. C.) 55 Fed. 229; *Wiggins Ferry Co. v. Railway Co.*, 142 U. S. 396, 12 Sup. Ct. 188, 35 L. Ed. 1055; *Sampson et al. v. Camperdown Cotton Mills* (C. C.) 64 Fed. 939; *Mercantile Co. v. Railway Co.* (C. C.) 109 Fed. 3; *Western Union Tel. Co. v. Penna. Co.* (C. C.) 125 Fed. 67.

"The same case was cited in *Lemar v. Miles*, 4 Watts (Pa.) 330, where a steam engine, boiler, and machinery were set up, walled in with stone and covered with a wooden building, and held by the Supreme Court of this state to be trade fixtures removable under the authority in that case.

"The *Van Ness* Case was also cited with apparent approval in the case of *White v. Arndt*, 1 Whart. (Pa.) 91, where it was said that a frame stable, two frame shops, and other improvements erected upon a lot of ground leased by one of the parties under the authority in this case, might have been removed as trade fixtures before the expiration of the lease. It was again cited in the case of *White's App.*, 10 Pa. 252, where the court said that a one-story boiler and engine house built partly of stone and partly of wood, and the engine, boilers, chimney, etc., were personal property and trade fixtures. The remarkable part about *White's App.* is that the lessor and the lessee agreed that all the steam engines, fixtures, and improvements erected by the lessee on the premises might be removed and taken away at the expiration of the lease or other determination thereof, unless the lessors or assigns elected to retain the same.

"The case of *Van Ness v. Pacard* was again cited with approval in *Hill v. Sewald*, 53 Pa. 271, 91 Am. Dec. 209, and in that case *White's App.* was also cited, and the language of Judge Rogers, saying that the building being attached to the freehold makes no difference, is quoted.

"In *Church v. Griffith*, 9 Pa. 117, 49 Am. Dec. 548, a building used as a shovel factory, furnaces, chimneys, machinery, and tools were held to belong to the tenant and removable by him during the term of his lease as trade fixtures.

"It will thus be seen that the building, brick kilns, brick-making machinery, engines, boilers, and all the appurtenances to the Oaks plant, having been erected by the lessee for the purpose of its trade and business, must be included in the term 'trade fixtures,' and the trustee must be permitted to remove and dispose of the same. There can, of course, be no question about the two steam shovels referred to in the sixth conclusion falling under the same denomination and going with the rest to the same end.

"The inventory and appraisalment filed in this case shows that on December 18, 1907, the Oaks factory, excepting the buildings, was made up of a complete power plant with fire pumps, clay pulverizing machinery, drying machinery, brick molding and pressing machinery, brick cars, kilns, trackage, with all the necessary shafting, tools, etc., for the running of the plant. This inventory and appraisalment was made by the receiver of the bankrupt lessee and has been adopted by the trustee. It will save endless detail here to say that all the items checked off in black ink on said inventory under the heading 'Oaks factory inventory,' are trade fixtures made upon the demised premises by the lessee and removable by it or by its trustee, including in said category the buildings within and under which the said machinery, etc., are placed, together with the two steam shovels herein referred to, and we then have a complete schedule of the property which the trustee may sell, and for the sale of which an order is granted."

In view of this full and satisfactory report, further discussion seems to me superfluous.

The order of the referee dated May 16, 1908, is therefore affirmed, and the order of March 20th is modified, so far as may be necessary to harmonize it with this opinion.

THE AURORA.

(District Court, D. Oregon. July 13, 1908.)

No. 4,891.

1. ADMIRALTY—ACTION FOR DEATH—LIBEL IN REM.

In the absence of an act of Congress or a state statute giving a right of action therefor and a lien on a vessel, a libel in rem cannot be maintained in admiralty to recover for the death of a human being on the high seas, or on waters navigable from the seas, resulting from negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Admiralty, § 218.]

2. SAME—STATUTES.

B. & C. Comp. Laws, § 381, declares that, when the death of a person is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action at law against the latter, if the former might have maintained an action, had he lived, against the latter for the injury done by the same act or omission. Section 5706, subd. 4, declares that every boat or vessel used in navigating the waters of the state shall be subject to a lien for all demands for damages for injuries done to persons or property by such boat or vessel; section 5707 provides for the priority of liens; and section 5708 declares that

any person, instead of proceeding against the master, owner, or agent, may sue the boat or vessel by name. *Held* that, where a longshoreman employed by a vessel was killed while assisting in loading her by an alleged defect in the gang plank, his administratrix was entitled to maintain a libel in rem in the admiralty courts of the United States to recover damages for his death.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Admiralty, § 219.]

Giltner & Sewall, for libellant.

Ralph W. Wilbur and William C. Bristol, for respondent and claimant.

WOLVERTON, District Judge. The libellant is the administratrix of the estate of William Boyce, deceased, and seeks by this libel against the Aurora to recover damages for the death of her husband, which, it is alleged, was caused by the negligent acts of the libelee in not providing a safe and suitable gangway of plank as a means of ingress and egress to and from the vessel. The deceased was a longshoreman in the employ of the vessel and assisting in loading her. Exceptions are interposed to the libel, challenging the jurisdiction of the court of admiralty to entertain the cause in rem and the right of the libellant to maintain the libel in that form.

It is contended that admiralty is without jurisdiction in rem, because (1) the subject-matter of the libel is not maritime by nature; (2) that no maritime lien can be predicated thereon; (3) that without a lien a court of admiralty will not entertain cognizance in rem; and (4) that libellant cannot maintain the libel, for the reason that the cause in rem does not survive the death of the person injured.

It has been adjudged by the Supreme Court, in *The Harrisburg*, 119 U. S. 199, 7 Sup. Ct. 140, 30 L. Ed. 358, that:

"In the absence of an act of Congress or a statute of a state giving a right of action therefor, a suit in admiralty cannot be maintained in the courts of the United States to recover damages for the death of a human being on the high seas, or on waters navigable from the sea, which is caused by negligence."

The reasoning of the court is that, since "no action at law can be maintained for such a wrong in the absence of a statute giving the right, and it has not been shown that the maritime law, as accepted and received by maritime nations generally, has established a different rule for the government of the courts of admiralty from those which govern courts of law in matters of this kind," such an action will not lie in the courts of the United States under the general maritime law. The doctrine of this case is reaffirmed in *The Corsair*, 145 U. S. 335, 12 Sup. Ct. 949, 36 L. Ed. 727, which was also a suit in rem, where it was held that:

"A District Court sitting in admiralty cannot entertain a libel in rem for damages incurred by loss of life, where by the local law a right of action survives to the administrator or relatives of the deceased, but no lien, is expressly created by the act."

That case involved a Louisiana statute, which provides in substance that the right of action for every act of negligence which causes dam-

ages to another shall survive in case of death in favor of the minor children or widow of the deceased, etc.; and the court says that:

"Evidently nothing more is here contemplated than an ordinary action according to the course of the law as it is administered in Louisiana," there being "no intimation of a lien or privilege upon the offending thing."

And so it was held that the suit in rem would not lie. The adjudications seem to be in accord that, where there is a municipal or local statute authorizing the survivor to sue in the right of the deceased, the action being founded upon negligence causing death, libel in personam will lie in admiralty, and this whether the title to the chose in action survives, or a new right to sue is given for damages resulting in a tort. In *re Long Island, etc., Transportation Co.* (D. C.) 5 Fed. 599, 608. The jurisdiction is upheld by the English courts, and has the tacit approval of the Supreme Court. *The Corsair*, 145 U. S. 347, 12 Sup. Ct. 949, 36 L. Ed. 727. See, also, *In re Humboldt Lumber Manuf'rs' Ass'n* (D. C.) 60 Fed. 428, and *The Transfer No. 4 and The Car Float No. 16*, 61 Fed. 364, 9 C. C. A. 521.

From a reading of the case of *The Corsair*, there can remain no doubt that if there was a local law competent to impose a lien, and one was in fact and legal effect imposed, then the suit in rem would be proper, and that admiralty jurisdiction would attach. There is room for doubt as to whether, measured by the strict rules of logic in the application of marine law and practice as formerly understood, any municipal law is adequate to impress a lien for a tort arising from negligence resulting in death. *The Manhasset* (D. C.) 18 Fed. 918; *Welsh v. The North Cambria* (D. C.) 40 Fed. 655. Numerous adjudications, however, have determined the question otherwise. The adjudications are not uniform, it is true; but a strong current tends unmistakably in that direction. The Supreme Court has not as yet given direct expression of its views upon the precise point. Still there is room for strong inference that it will so hold when the opportunity is ripe. In *The Corsair Case*, which was in rem, the court says:

"As we are to look, then, to the local law in this instance for the right to take cognizance of this class of cases, we are bound to inquire whether the local law gives a lien upon the offending thing."

And in *The Albert Dumois*, 177 U. S. 240, 257, 20 Sup. Ct. 595, 602, 44 L. Ed. 751, the court uses this language:

"The case under consideration [*The Chattahoochee*] is distinguishable from this only in the fact that the intervening libels are for loss of life, for which no lien is given upon the vessel in the absence of a local law to that effect"

—thus leaving a positive impression that what was needed for the libelants to prevail in those cases was a local law giving the lien.

The following cases, determined in the District Courts and federal courts of appeal, have given effect to local statutes impressing a lien in such and like causes: *Holmes v. O. & C. Railway Co.* (D. C.) 5 Fed. 75; *In re Long Island, etc., Transportation Co.*, supra; *The Clatsop Chief* (D. C.) 8 Fed. 163; *The Oregon* (D. C.) 45 Fed. 62 (this case was reversed by the Supreme Court—158 U. S. 186, 15 Sup. Ct.

804, 39 L. Ed. 943—but not on the point here involved); *The City of Norwalk* (D. C.) 55 Fed. 98 (affirmed on appeal, so far as the point in question is concerned, 61 Fed. 364, 9 C. C. A. 521); *The St. Nicholas* (D. C.) 49 Fed. 671; *Felty v. Steamship Co.* (D. C.) 29 Fed. 332 (affirmed on appeal *Id.*, 32 Fed. 112); *The H. E. Willard* (C. C.) 52 Fed. 387; *The Willamette*, 70 Fed. 874, 18 C. C. A. 366, 31 L. R. A. 715.

Especially have the local statutes been given full force in admiralty in this jurisdiction. In *The Oregon*, *supra*, Judge Deady brings the revival statute and the statute giving a lien upon boats and vessels for damages or injuries to persons or property by such boats or vessels (see sections 381 and 5706–5708, B. & C. Comp.) in juxtaposition, and upholds a libel in rem in favor of the personal representatives based upon a tort resulting in death. The principle having been so clearly and uniformly applied and enforced in this jurisdiction, I am constrained, without reserve, to give it effect in this controversy. It does not seem to me that the fact that this is not a case of collision can alter the result. The deceased was injured by a fall upon the deck of the vessel. Hence the injury was sustained upon water, not upon land. The cause is therefore within maritime jurisdiction.

The exceptions should be overruled, and it is so ordered.

In re ROSEL

(District Court, W. D. Pennsylvania. February, 1907.)

BANKRUPTCY—EXAMINATION OF BANKRUPT—CREDITORS ENTITLED TO EXAMINE.

A creditor, named as such in a bankrupt's schedule, is entitled to examine the bankrupt under Bankr. Act July 1, 1898, c. 541, § 21a, 30 Stat. 552 (U. S. Comp. St. 1901, p. 3430), upon any matter properly relevant to the proceedings, and it is not necessary that he should first prove his claim.

In Bankruptcy. On certificate from referee.

Cassidy & Richardson, for petitioners.

Chantler & McClung, for creditor.

EWING, District Judge. The question certified here is whether, without proving his claim, an alleged creditor is entitled to examine the bankrupt. It appears from the report of the referee that on the 5th of September, 1906, the bankrupt appeared and was duly sworn, and William A. Jordan, Esq., counsel for J. D. Bernd Company, the only creditor named in the bankrupt's schedule, started to examine the bankrupt, when objection was interposed on the ground that said party, the J. D. Bernd Company—

"has proven no claim in this case, as disclosed by the record, and does not now offer to prove any claim, but has expressly stated through his counsel that they do not propose to prove any claim, because in the opinion of the counsel the indebtedness of J. D. Bernd Company against this bankrupt is not dischargeable by the bankruptcy proceedings, and therefore the said J. D. Bernd Company has no standing at the present time in this proceeding by the referee."

The referee ruled that:

"It appearing that the examination of this bankrupt has been adjourned from August 17, 1906, until this date, for the purpose of enabling the J. D. Bernd Company to prove its claim in this case, and it further appearing that no claim has been filed on behalf of said company, and that said company is the only person named in the schedules filed by the bankrupt, the referee is of opinion that the said J. D. Bernd Company is not at the present time entitled to examine the bankrupt, and the objection is sustained."

While it is alleged in the objection that the counsel for the J. D. Bernd Company stated that they do not propose to prove any claim, because in his opinion the indebtedness is not dischargeable by the bankruptcy proceedings, yet that is not stated as a fact by the referee, nor is his ruling based on that, but solely on the ground of the failure first to prove the claim.

In *Brandenburg on Bankruptcy*, § 519, it is said that:

"Any person who shows that he is actually a creditor of the bankrupt, as by being so named in the schedule, or by any other satisfactory evidence, is entitled to an order for the examination of the bankrupt, although he has not formally proved his claim."

In *Re Walker* (D. C.) 3 Am. Bankr. Rep. 35, 96 Fed. 550, a similar question is considered, and it is there held that it is not necessary for any one who appears to be a creditor to prove his claim before he is entitled to an examination of the bankrupt; and it is said:

"Was there sufficient evidence before the referee to show that the creditor had a provable claim against the estate? I think there was. The claim was listed by the bankrupt as a debt which he was owing, and he was required by section 7 of the act (Bankr. Act July 1, 1898, c. 541, 30 Stat. 548 [U. S. Comp. St. 1901, p. 3425]) to state under oath the amount of the claim, and the consideration out of which it arose. This, of course, would not establish the claim, nor the right of the creditor to share in dividends; but as to such matters as the examination of the bankrupt, and as against him, it certainly makes out at least a *prima facie* case that the claim exists and is provable against the estate."

The same case rules that a creditor who has not proved his claim is entitled to oppose the discharge of the bankrupt, and, if he is entitled to oppose a discharge without proving his claim, he ought likewise to be allowed to examine the bankrupt for the purpose of establishing the grounds of his objections.

So, also, in *Re Jehu* (D. C.) 2 Am. Bankr. Rep. 498, 94 Fed. 638, Judge Shiras states:

"I know of no provision of the bankrupt act which requires that a creditor must file and prove up his claim before he is entitled to an order for the examination of the bankrupt."

From these authorities it would appear that it is wholly unnecessary to require one who appears to be a creditor of the bankrupt to prove his claim before being entitled to examine the bankrupt, and I therefore conclude that the referee was in error in refusing to permit the examination in this case, and it is directed that such examination, if the creditor so desires, be now allowed. Of course, the referee will see that the examination is conducted along proper lines and for legitimate purposes with reference to the bankruptcy proceeding, either

to show the condition of the estate of the bankrupt, its whereabouts, amount, etc., or to elicit such matters as might be available in opposition to his discharge, or some other relevant testimony.

CAMORS-McCONNELL CO. v. McCONNELL.

(Circuit Court, S. D. Alabama. July 15, 1908.)

No. 238.

INJUNCTION—EVIDENCE—WEIGHT AND SUFFICIENCY.

Evidence *held* to establish the allegations of the answer, in a suit to enjoin defendant from engaging in business in competition with complainant in violation of a contract, that the contract set up in the bill was only a part of the actual contract between the parties, and that, as supplemented by other writings and agreements constituting the entire contract, it was in restraint of trade and commerce, and in violation of public policy, and would not sustain a suit in a court of justice.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Injunction, § 278.]

In Equity.

See 152 Fed. 321, 81 C. C. A. 429.

Howe, Fenner, Spencer & Cocke and Inge & Armbrecht, for complainants.

Gregory L. & H. T. Smith, for defendant.

TOULMIN, District Judge. When this case was heretofore on appeal in the Circuit Court of Appeals, that court in its opinion said:

"If the contract be as averred in the answer, and the complainant does not prove the whole of it, the defendant could prove it, as well the part lying in parol as that which was reduced to writing, so that the court might, upon an inspection of the whole contract, determine therefrom its character. The unity of the contract is not severed, or its meaning or effect in any degree altered, by putting part of it in writing and leaving the rest in parol. It would seem therefore that, in such case, to grant the complainant the relief which it here seeks would be, in substance, to enforce an illegal contract and one which is illegal because it is against public policy to permit it to stand."

The answer shows how the formation of said corporation of Camors-McConnell Company and the sale of the business and property of Camors, McConnell & Co. to it arose and was brought about. The answer avers: That the United Fruit Company, or persons representing it, entered into negotiations with the copartners composing Camors, McConnell & Co., with a view to forming a combination with it upon such terms as would limit the amount of fruit imported by said firm and prevent competition by it with the United Fruit Company and its combined associates (named in the answer) both in the purchase and sale of fruit; that, after negotiating and agreeing with the representatives of the United Fruit Company as to the method by which such combination should be formed, a certain contract was entered into; and that said United Fruit Company undertook to have said contract reduced to writing. It avers: That Exhibit A to the bill of complaint was one of the forms of the contract so prepared and

presented to those interested in the firm of Camors, McConnell & Co.; that, as so prepared and presented, the name of Andrew W. Preston appeared, instead of that of the United Fruit Company, but all the parties to said transaction always recognized the United Fruit Company as the true party in interest, and dividends on the stock in the Camors-McConnell Company were paid to the United Fruit Company as the owner of said stock. The answer further avers that the United Fruit Company had the remaining terms of said contract reduced to writing in the form of two separate instruments, which were presented and executed by the parties thereto, and which two separate writings, marked "Exhibits I and II," are made a part of the answer, and that said Preston was the president of said United Fruit Company.

There is some evidence submitted in the cause which is illegal and incompetent because hearsay or mere expressions of opinion or belief, and some which is irrelevant and immaterial. It was duly objected to by the respective counsel. This evidence was disregarded by me in the consideration of the case. There is, however, uncontradicted evidence which clearly establishes the averments of the answer to the effect that Exhibit A to the bill and Exhibits I and II to the answer are parts of one transaction and constitute one contract, that the two first mentioned were executed on the same day, December 8, 1899, and that the third was then prepared and agreed to, but was not in fact executed until a subsequent day, January 27, 1900. In such case the Circuit Court of Appeals has said: "The whole contract is none the less one and indivisible." The ruling of the court is, in effect, that, if the contract be proved as averred in the answer, it is an illegal contract and cannot be enforced because it is against public policy to permit it to stand. I find that the contract as averred in the answer has been proved by the evidence, and, as I understand the decision referred to, it construes the contract as averred in the answer as now constituted, holds it to be illegal, and that on grounds of public policy it cannot be enforced in a court of justice.

The court in its opinion said:

"It is uniformly conceded that such a defense as this (set up here) is a very dishonest one, and that it lies ill in the mouth of the defendant to allege it, and that it is only allowed for public considerations and in order the better to secure the public against dishonest transactions."

The rule is that, when such a defense is successfully made, it must prevail on the principle that courts of justice deny their aid for the enforcement of contracts which are illegal or against public policy. If I am in error in my finding on the evidence or in my understanding of the decision of the Court of Appeals cited (152 Fed. 321, 81 C. C. A. 429), such error will be corrected by that court on its judgment being invoked in the cause.

Let the following decree be passed: This cause coming on to be heard is submitted for final decree on the bill and exhibits, the answer and exhibits, the evidence, as noted by the respective parties and objections thereto, and the arguments of counsel, and, the same being duly considered by the court, it is ordered, adjudged, and decreed

that said bill be, and the same is hereby, dismissed, and the complainant is taxed with the costs of the cause for which execution may be issued.

UNITED STATES v. OREGON R. & NAV. CO.

(Circuit Court, D. Oregon. July 13, 1908.)

No. 3,161.

CONSTITUTIONAL LAW—DELEGATION OF LEGISLATIVE POWER—TRANSPORTATION OF LIVE STOCK—28-HOUR LAW.

Act Cong. June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. St. Supp. 1907, p. 918), prohibiting carriers from confining stock in transit for a longer period than 28 consecutive hours without unloading for rest, water, and feed for a period of 5 hours, except that, on written request from the owner or person in custody of the particular shipment, the time of consecutive confinement may be extended to 36 hours, is not unconstitutional as a delegation of legislative power to the owner or custodian of the stock shipped during transit.

James Cole, Asst. U. S. Atty.

W. W. Cotton, A. C. Spencer, and James G. Wilson, for defendant.

WOLVERTON, District Judge. This is an action for the recovery of a penalty for violation of Act June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. St. Supp. 1907, p. 918). The charge is that the defendant company received and loaded upon a car a consignment of 81 hogs, and carried them in continuous transportation, without unloading for feed and rest, for more than 28 hours, all without the written request of the owner, the custodian, or the consignee thereof authorizing an extension of the time of confinement to 36 hours. The complaint is challenged by a demurrer, and there is presented the single question whether the act under which the action is brought is unconstitutional, as a delegation of legislative power to the owner or custodian of stock shipped or in transit.

The act prohibits common carriers from confining stock while in transit in cars, boats, or vessels for a longer period than 28 consecutive hours, without unloading for rest, water, and feed for a period of 5 hours, except that, "upon the written request of the owner or person in custody of that particular shipment," the time of continuous confinement may be extended to 36 hours; a penalty being prescribed for each violation of the act. The act springs from the promptings of humanity to guard against the cruel treatment of animals in their handling and care. It has a twofold purpose, however: On the one hand, to prevent cruelty in the relation indicated, and, on the other, to subserve the interests of the owner. Stock in the course of shipment deteriorates in flesh and weight to an appreciable degree, and, of course, the longer it goes without water, food, and rest, the greater the deterioration. This imposes a loss upon the owner, and the greater the deterioration or depreciation, the greater the loss. So that, for the protection of the owner, the Congress has said to the transportation companies that they may hold the stock in continuous travel or carriage, without rest or food, for a period of 36 hours, with

the consent of the owner; otherwise, that they shall not so hold them for more than 28 hours.

It is unusual treatment to confine animals in close quarters at any time, as in the course of transportation, which subjects them to the rocking and swerving of the vehicles in which they are carried. When so confined for any great length of time without rest, food, or water, it needs no elaboration to convince one that the treatment will be attended with cruelty, and the cruelty will increase in severity the longer the treatment is administered. Now, we may reasonably assume that Congress considered that the most humane provision for animals in transportation is that they be fed, watered, and rested once in every 28 hours, but that it would not be attended with undue severity if they should be so fed and rested once in 36 hours only. But the longer continuous carriage being attended with the greater deterioration in flesh and weight of the animals, and the greater loss to the owner, it has said that the carriage may not be continuous for a longer period than 28 hours unless the owner consents, and then for a period not to exceed 36 hours. I say the owner, for the person in custody must be considered to be the agent of the owner. Thus it is that the law simply subverts the two purposes of its enactment; that is, to insure humane treatment of animals while in transportation, and to subserve the interests of the owner or shipper as far as possible in consonance with such treatment.

This exposition of the purposes of the act suffices to dispose of the present controversy. There is, it seems to me, no delegation of legislative power or authority to the owner of the stock shipped. He cannot say whether the law shall be effective or not as he may determine. The law is effective as a humane declaration, whether he act at all or not. But he may waive a detriment to accrue to himself, if he be so inclined, which is clearly not an act of legislation.

The line of authorities relied upon by counsel for defendant in support of their contention has relation principally to the violation of the rules and regulations prescribed by some executive officer of the government, the perpetrators being proceeded against criminally, and such rules and regulations have generally been held to be void, because of an attempted delegation of legislative authority. *Morrill v. Jones*, 106 U. S. 466, 1 Sup. Ct. 423, 27 L. Ed. 267; *United States v. One Package of Distilled Spirits* (D. C.) 88 Fed. 856; *United States v. Maid* (D. C.) 116 Fed. 650; *United States v. Blasingame* (D. C.) 116 Fed. 654; *United States v. Matthews* (D. C.) 146 Fed. 306; *O'Neil et al. v. Insurance Co.*, 166 Pa. 72, 30 Atl. 943. These authorities do not aid the research. Neither do I now believe the legislation is dealing with a classification. It is none other than a determination of conditions for the guidance and regulation of shippers and carriers as it relates to the treatment of animals in transportation.

The demurrer will therefore be overruled.

UNITED STATES v. OREGON R. & NAV. CO.

(Circuit Court, D. Oregon. July 13, 1908.)

Nos. 3,145, 3,147.

CARRIERS—TRANSPORTATION OF CATTLE—28-HOUR LAW—CONSTRUCTION.

In an action against a carrier to recover a statutory penalty for carrying stock in continuous transportation for more than 28 hours without rest, water, and feed, the shipment, and not the car or train load, is the integer for the imposition of penalties.

William C. Bristol, U. S. Atty.

W. W. Cotton, A. C. Spencer, and James G. Wilson, for defendant.

WOLVERTON, District Judge. This case, with another of the same title (163 Fed. 640), was instituted to recover the statutory penalty for carrying stock in continuous transportation for more than 28 hours without rest, water, and feed. A motion has been directed by the defendant against the complaint in each case for the purpose of determining whether the defendant is liable to a separate penalty for each car carried, or for each shipment forwarded. In each case the consignment was of 53 head of cattle loaded and transported upon two cars.

Since the cases at bar were submitted, the question involved has been in effect determined by the Circuit Court of Appeals for the Sixth Circuit, in *United States v. Baltimore & O. S. W. R. Co.* (two cases) 159 Fed. 33, where it was held that, where several shipments of live stock belonging to different owners are contained on the same train, if the carrier is derelict in observance of the statute, a penalty is recoverable for each shipment, "the shipment, and not the train load, being the integer contemplated as the objective thing to which the offense relates." If the shipment is the integer in that case, it must necessarily be the integer also as it respects the present causes. That case therefore has direct application here, and, being impressed with its soundness, I determine the present controversy upon its authority.

The motion will therefore be allowed, and but one penalty will be assessed in each case.

THE EXMOOR.

(District Court, S. D. Alabama. June 25, 1908.)

No. 1,182.

SHIPPING—CONSTRUCTION OF CHARTER PARTY—LIABILITY FOR CARGO LOST IN LOADING.

A charter of a steamship for the carriage of a cargo of timber to be loaded at the port of Mobile provided in the printed portion that the cargo should be brought alongside at the charterer's risk and expense, and when so brought alongside should be signed for and taken charge of by the vessel. A written stipulation provided that, "should it be necessary to complete the loading in the lower bay at Mobile, same to be at steamer's risk and expense." *Held*, that such stipulation did not render

the vessel absolutely liable for timber lost while being loaded in the lower bay, but that her liability as to such timber was the same as though it had been received alongside or loaded at Mobile, and that exceptions in the charter party of liability for acts of God, perils of the sea, etc., applied thereto.

In Admiralty.

Stevens & Lyons, for libelant.

Pillans, Hanaw & Pillans, for claimant.

TOULMIN, District Judge. The charter party, under which this action is brought, provides that the cargo is to be brought to and taken from alongside the steamer at charterer's risk and expense, any custom of the port to the contrary notwithstanding; that the steamer is to sign for and take charge of cargo when delivered alongside, etc.; that lighterage, if any, at the port of loading is to be at charterer's risk and expense, any custom of the port to the contrary notwithstanding. The loading port was Mobile. The exceptions of liability of the steamer provided in the charter party are, among other things, the act of God, perils of the sea, etc. The foregoing provisions of the charter party are printed. There is written on the charter party a stipulation that:

"Should it be necessary to complete the loading in the lower bay at Mobile, same to be at steamer's risk and expense."

The contention of the libelant is that, notwithstanding the loss of the timber for which this action is brought comes within the exceptions of steamer's liability as provided for in the charter party, the steamer is liable because of the contract contained in the written stipulation referred to. This stipulation, being in writing and inconsistent with the provision that lighterage, if any, was to be at charterer's risk and expense, must be considered as a substitute for, and as taking the place of, said provision relating to lighterage. I so consider it. This being so, the said alleged contract of the steamer should be construed in connection with the other provisions of the charter party.

As I construe the steamer's contract shown by the charter party, it is that so much of the cargo of timber as may be delivered to her and loaded at the loading berth at Mobile she, from the time said timber is loaded, would be responsible for, subject to the exceptions from liability as provided in the charter party, and, should it be necessary to complete loading in lower bay, the steamer would accept delivery of the balance of said cargo of timber, take charge of and sign for it in Mobile, and from that time the same to be at steamer's risk and expense. What risk? Just the same risk incurred by the steamer on the timber loaded in Mobile when loaded there—the same risk that would have been incurred had the timber, which was delivered for lighterage to the lower bay for loading, been loaded in Mobile. Clearly the risk incurred was the risk imposed by the contract construed as a whole, including the exceptions contained therein. The difference in liability on the risks imposed by the contract is not the character and extent of the risks, but in the time the same began. In the one case it attached when the timber was loaded on the vessel;

in the other, when the balance of the timber was delivered to the steamer and taken charge of by her for transportation to the lower bay for loading there. That it was intended to contract for a greater risk and liability as to cargo received at Mobile to be transported to the lower bay for loading there than for cargo received aboard is not to be presumed. *Southerland-Innes Co. v. Thynas* (Fifth Circuit Court of Appeals) 128 Fed. 42, 64 C. C. A. 116, which case I think in point and controls this case.

The expense assumed by the steamship under the contract was clearly the expense attending the lighterage and care of the timber from and after its receipt at Mobile.

As, in my opinion, the contract is not uncertain and ambiguous in its terms, the evidence offered as to custom to explain or interpret the same is inadmissible. However, the evidence offered on the subject of a custom of this port varied from the custom alleged in the libel. The custom proven is in substance what the charter provided for. It provides that:

"The bills of lading shall be prepared by the shippers of the cargo on the form indorsed on the charter and shall be signed by the master, * * * and all conditions, clauses, and exceptions as per the charter."

The captain furnishes a protest showing the cause of loss, if any, on the bills of lading.

My judgment is that the libel must be dismissed, and it is so ordered.

WESTERN SUGAR REFINING CO. v. HELVETIA SWISS FIRE INS. CO.

(Circuit Court, N. D. California. June 8, 1908.)

No. 14,577.

1. PRINCIPAL AND AGENT—UNDISCLOSED PRINCIPAL—WRITTEN INSTRUMENT—SPECIALTY.

The rule permitting a party to sue an undisclosed principal on a written instrument does not apply where the instrument is a specialty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, § 516.]

2. INSURANCE—POLICY—CONSTRUCTION—CAPITAL AND FUNDS—LIABILITY.

An insurance policy provided that the capital stock and funds of insurer specified should be alone answerable to the demands thereon, and that no member or stockholder of the company should be subject or liable to any demands against the company on any act or pretense whatsoever beyond his share of the capital stock or funds of the company; anything contained in the policy to the contrary notwithstanding. *Held*, that such provision not only exonerated the stockholders of the company executing the policy from any and all claims thereunder, but limited the insured to the capital stock and funds of the insurer named for the payment of losses.

3. PRINCIPAL AND AGENT—UNDISCLOSED PRINCIPAL.

Where a policy executed by an insurance company provided that its capital stock and funds should alone be answerable to the demands thereon under the policy, and that no member or stockholder of the company should be liable to any demands against the company beyond the shares of his capital stock, or funds of the company, no recovery could be had by insured on such policy against defendant, another insurance company, under the rule permitting one party to a written contract to sue a third

person whose name does not appear thereon as a party, as an undisclosed principal; that rule being subject to the paramount rule that the express terms of a writing cannot be varied by parol.

Morrison, Cope & Brobeck, for plaintiff.
T. C. Van Ness, for defendant.

VAN FLEET, District Judge (orally). In this case the plaintiff seeks to apply the doctrine of undisclosed principal to a contract of insurance.

The action is based upon three certain policies of fire insurance, issued by the Rhine & Moselle Fire Insurance Company to the plaintiff, and copies of these policies are attached to the complaint and made a part thereof. Although these policies were issued by the Rhine & Moselle Fire Insurance Company, whose name alone appears as the insurer, plaintiff sues the defendant, the Helvetia Swiss Fire Insurance Company, alleging that the latter was the undisclosed principal of the Rhine & Moselle Fire Insurance Company, which company, it is alleged, acted merely as the agent of this defendant in the transaction, and that therefore plaintiff is entitled to proceed directly against this defendant. The defendant has demurred to the complaint on the ground that it does not state facts sufficient to constitute a cause of action, and it is argued, in support of its demurrer, that a policy of fire insurance, while not technically a common-law specialty, is nevertheless a mercantile specialty, and that therefore the plaintiff cannot proceed against this defendant as the undisclosed principal of the Rhine & Moselle Fire Insurance Company, for the reason that the doctrine allowing a party to sue an undisclosed principal to a written instrument, executed in the name of the agent, does not apply in a case where the written instrument is a specialty.

It is, no doubt, true that the rule of law permitting a party to sue the undisclosed principal to a written instrument does not apply where such a written instrument constitutes a specialty, but while it is true, as stated by Mr. Justice Shiras, in *Assur. Co. v. Building Association*, 183 U. S. 308, 325, 22 Sup. Ct. 133, 46 L. Ed. 213 (quoting from *Parker, C. J.*, in *Higginson v. Dall*, 13 Mass. 96), that "policies, though not under seal, have nevertheless ever been deemed instruments of a solemn nature and subject to most of the rules of evidence which govern in the case of specialties," it is doubtful if such a contract is to be regarded as a specialty within the limitation of the rule under consideration. At least no case has been called to my attention which has gone to the extent of giving it that character. It is unnecessary, however, to decide this particular question, as the demurrer must be sustained upon another ground.

The rule of law permitting one party to a written contract to sue a third party whose name does not appear on such contract as a party thereto as the undisclosed principal of the contracting party whose name does appear therein is subject to the paramount rule that the express terms of a writing cannot be varied by parol. *Humble v. Hunter*, 12 Q. B. 10; *Graves v. Insurance Co.*, 2 Cranch, 419, 2 L. Ed. 324.

The policies of insurance which are attached to and made a part of the complaint all contain the following express provision:

"Provided always, and it is hereby expressly agreed and declared and the true intent and meaning thereof is that the capital stock and funds of the said company shall alone be answerable to the demands thereupon under this policy; and that no member or shareholder of the said company shall be subject or liable to any demands against said company upon any account or pretense whatsoever beyond his share of the capital stock or funds of the said company, anything contained in this policy to the contrary notwithstanding."

Plaintiff contends that the effect of this provision is merely to exonerate the stockholders of the Rhine & Moselle Fire Insurance Company from any claim under the policy; but to limit the effect of this provision in this way would be to ignore its plain terms. This provision not only exonerates the stockholders of the Rhine & Moselle Fire Insurance Company from any claims under the policy, but it expressly provides for very much more than this, to wit:

"That the capital stock and funds of the said company shall alone be answerable to the demands thereupon under this policy."

There is therefore an express provision in the written contracts sued on that the Rhine & Moselle Fire Insurance Company, the insurer that issued the policies and whose name alone appears thereon, shall alone be held for any claims arising thereunder. In order, therefore, for the plaintiff to proceed against this defendant as the undisclosed principal of the Rhine & Moselle Fire Insurance Company, the provision of the policies hereinbefore referred to would have to be ignored, and the plaintiff permitted to violate the rule that the express terms of written instruments cannot be varied by parol evidence. This cannot be done, for it is well settled that the rule allowing an undisclosed principal to be sued is subservient to the rule that writings cannot be varied by parol.

Defendant's demurrer must therefore be sustained, and it is so ordered.

Ex parte LEWKOWITZ.

(Circuit Court, S. D. New York. August 14, 1908.)

HABEAS CORPUS—AUTHORITY FOR RESTRAINT—ENLISTMENT OF MINOR.

A minor, who by misrepresenting his age has fraudulently enlisted in the army without the consent of his parents, and thereby subjected himself to punishment under military law, will not be relieved from such punishment by the civil courts by discharging him on a writ of habeas corpus on the application of his parents, even though the military prosecution is not instituted until after the writ was issued.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Habeas Corpus, § 6.]

Habeas Corpus.

Lewkowitz & Schaap (Samuel S. Koenig, of counsel), for petitioner.
Henry L. Stimson, U. S. Atty., and Winfred S. Denison, Asst.
U. S. Atty.

HOLT, District Judge. This is a writ of habeas corpus to obtain a minor's discharge from the army. The petition alleges that the petitioner's son is 18 years old and that he enlisted without his father's consent. The return admits the son's minority and his enlistment without his father's consent. It then alleges that when he enlisted he represented himself to be upwards of 21 years of age; that after enlistment, and before August 1, 1908, the date when the petition for the writ of habeas corpus was verified, he received allowances from the supply department of the United States army; that on August 3, 1908, he was placed in confinement on charges of fraudulent enlistment and receipt of allowances thereunder, brought under the act of July 27, 1892; that such charges had been referred to a court-martial for trial; and that such minor was now held awaiting such trial. It is admitted that the writ of habeas corpus was issued before the charges of fraudulent enlistment were made.

Section 1117, Rev. St. U. S. (U. S. Comp. St. 1901, p. 813) provides as follows:

"No person under the age of twenty-one years shall be enlisted or mustered into the military service of the United States without the written consent of his parents or guardians: Provided, that such minor has such parents or guardians entitled to his custody and control."

Act July 27, 1892, c. 272, § 3, 27 Stat. 277 (U. S. Comp. St. 1901, p. 945), provides as follows:

"That fraudulent enlistment and the receipt of any pay or allowance thereunder is hereby declared a military offense and made punishable by court-martial."

It is well settled that an enlistment in the army by a minor without his parents' consent is valid as to the minor, although voidable, under section 1117 of the U. S. Revised Statutes, on the application of the parent. *Re Morrissey*, 137 U. S. 157, 11 Sup. Ct. 57, 34 L. Ed. 644; *Re Miller*, 114 Fed. 838, 52 C. C. A. 472. As the enlistment is valid as to the minor, any military offense committed by him after or in connection with his enlistment may be punished; and the fact that he enlisted without his parents' consent, or that, after the military authorities have instituted proceedings against him, his parent has instituted legal proceedings for his release, does not deprive the military authorities of the power to punish. *Re Scott*, 144 Fed. 79, 75 C. C. A. 237; *Moore v. U. S.* (C. C. A.) 159 Fed. 701; *Re Dowd* (D. C.) 90 Fed. 718; *Re Carver* (C. C.) 142 Fed. 623.

But the counsel for the petitioner claims that, as the writ of habeas corpus was issued before the charges of fraudulent enlistment were made, this court has a right to discharge the minor, notwithstanding the pendency of the charges before the court-martial, under the general doctrine that a court which first obtains jurisdiction cannot be prevented from exercising its jurisdiction by the pendency of any subsequent proceedings in any other court. This was originally held in construing this statute. *Re Carver* (C. C.) 103 Fed. 624; *Re Houghton* (C. C.) 129 Fed. 239. But in my opinion these cases are substantially overruled by the later cases above cited, and the rule now is that, if a military offense has been committed by an enlisted minor,

a proceeding brought by his parent to procure his discharge will not be permitted to accomplish the result of barring his prosecution and punishment by military law.

It is argued that such a ruling practically nullifies the provision of the Revised Statutes prohibiting the enlistment of minors without their parents' consent, as in such cases the minor habitually represents himself of age, and thereby is guilty of a fraudulent enlistment, and immediately is furnished with his uniform, and thereby receives an allowance from the government. But the recruiting officers of the army ought to be freed from the nuisance of enlistments which may at any time be nullified; and there is no objection to having a boy under age, who, without his parents' consent, and by falsehood, has succeeded in getting admitted to the army, subjected for a reasonable time to such wholesome discipline as he presumably needs. When the petitioner's son has been properly punished for his fraudulent enlistment, he will be entitled to be discharged on his father's application.

The present writ is dismissed. Another writ may be taken out, if the boy is not discharged after the court-martial has passed on his case and he has complied with any sentence it may have rendered.

UNITED STATES v. SCHURR et al.

(District Court, W. D. Michigan, S. D. August 4, 1908.)

ALIENS—NATURALIZATION—TERRITORIAL JURISDICTION OF COURT.

Under Naturalization Act June 29, 1906, c. 3592, § 3, 34 Stat. 596 (U. S. Comp. St. Supp. 1907, p. 420), which provides that "the naturalization jurisdiction of all courts herein specified, state, territorial, and federal, shall extend only to aliens resident within the respective judicial districts of such courts," such jurisdiction extends only to aliens resident within the territorial jurisdiction of the court so admitting; and a circuit court of Michigan, which has jurisdiction only within the county in which it sits, cannot admit to citizenship an alien resident in another county, although within the same judicial circuit, throughout which the same judge presides.

Applications by the United States for cancellation of certificates of citizenship issued, respectively, to Carl Schurr, Leander Englund, Andrew Haggman, Samuel Olson, and Andrew Newman. The five applications were heard together.

J. Herbert Cole, Asst. U. S. Atty.

KNAPPEN, District Judge. Application is made on behalf of the United States, under section 15 of the immigration and naturalization act (Act June 29, 1906, c. 3592, 34 Stat. 601 [U. S. Comp. St. Supp. 1907, p. 427]), to cancel the certificates of citizenship issued to the respondents, respectively, by the Michigan state courts hereafter mentioned, upon the ground that the respondents were not, when so admitted, resident within the naturalization jurisdiction of the court so admitting to citizenship.

The five cases above entitled present the same question. In the first case the respondent was admitted to citizenship by the circuit

court for Osceola county. At the time of his application and admission he was a resident of Mason county. In the four remaining cases the respondents were admitted to citizenship by the circuit court for Mecosta county. Each of them, at the time of application for and admission to citizenship, resided in Newaygo county. Mason and Osceola counties are parts of the Nineteenth judicial circuit. Newaygo and Mecosta counties comprise the Twenty-Seventh judicial circuit. Section 3 of the act in question provides:

"That the naturalization jurisdiction of all courts herein specified, state, territorial, and federal, shall extend only to aliens resident within the respective judicial districts of such courts."

The question presented is whether an alien residing in a given county of a judicial circuit can be admitted to citizenship by the circuit court of another county in that circuit.

It is contended on behalf of the United States that, as applied to the courts of Michigan, jurisdiction under the section quoted extends only to aliens resident within the territorial jurisdiction of the court so admitting. In my opinion this is the correct construction of the statute. Section 6 of article 6 of the Constitution of Michigan provides for dividing the state into judicial circuits, and for the election of one circuit judge in each circuit. The circuit courts within that circuit, however, are not circuit courts for the circuit, but only for the respective counties within the circuit. As said in *Turrill v. Walker*, 4 Mich. 180:

"The circuit court for each county sits within and for the same, and is restricted to its local limits. Though their jurisdiction is general over the subject-matter of suits, yet, in respect to persons and property, it cannot be exercised beyond the limits of the county."

A given judicial circuit is, therefore, not the "judicial district of such court," but is the judicial district of the judge elected as judge of each of the circuit courts within that circuit or district.

It is suggested that the above-quoted language of the naturalization act was employed for the purpose of reaching a situation, said to exist in some of the states, whereby a court sitting in any county of the district could try cases originating in any other county of the same district. Such is not the law or the practice in this state. Whether or not the purpose was as so suggested, I am of the opinion that the statute, as applied to the courts of Michigan, should be construed as if it provided that the naturalization jurisdiction shall extend only to aliens resident "within the territorial jurisdiction of such courts." In the case of each of the respondents, admissions to citizenship were doubtless had in the utmost good faith, and upon the construction that the statute gave jurisdiction to admit to citizenship in the circuit court of any county in the circuit which contained the county of the alien's residence. But, in the view I take of the statute, the proceedings were without jurisdiction, and the respective certificates of citizenship were thus illegally procured within the meaning of the act referred to, and must be canceled.

Orders of cancellation will accordingly be made.

UNITED STATES v. WAYER.

(District Court, W. D. Michigan, S. D. August 7, 1908.)

J. Herbert Cole, Asst. U. S. Atty.

KNAPPEN, District Judge. Application is made on behalf of the United States, under section 15 of the immigration and naturalization act (Act June 29, 1906, c. 3592, 34 Stat. 601 [U. S. Comp. St. 1907, p. 427]), to cancel the certificate of citizenship issued to said respondent by the circuit court for the county of Muskegon, upon the ground that the respondent was not resident within the naturalization jurisdiction of that court. Section 3 of the act in question provides:

"That the naturalization jurisdiction of all courts herein specified, state, territorial, and federal, shall extend only to aliens resident within the respective judicial districts of such courts."

The respondent, at the time of his application for citizenship, and at the time of hearing thereon, was a resident of Allegan county, Mich. There is no room for a claim that he resided within the jurisdiction of the circuit court for the county of Muskegon. The action was doubtless taken in good faith; but the proceedings were without jurisdiction, and the certificate of citizenship was thus illegally procured, within the meaning of the act referred to, and must be canceled.

Order of cancellation will accordingly be made.

UNITED STATES v. VAN DER MOLEN.

(District Court, W. D. Michigan, S. D. August 10, 1908.)

ALIENS—NATURALIZATION—TIME FOR FILING PETITION.

Under Naturalization Act June 29, 1906, c. 3592, § 4, cl. 2, 34 Stat. 596 (U. S. Comp. St. Supp. 1907, p. 421), which requires an alien applicant for citizenship to "make and file" his petition "not less than two years nor more than seven years" after he has made his declaration of intention, the right of an applicant must be complete when his petition is filed, and such provision is mandatory. A petition filed within less than two years after the declaration of intention gives the court no jurisdiction, although the hearing thereon is not until after the two years have expired.

J. Herbert Cole, Asst. U. S. Atty.

KNAPPEN, District Judge. Application is made on behalf of the United States, under section 15 of the immigration and naturalization act (Act June 29, 1906, c. 3592, 34 Stat. 601 [U. S. Comp. St. Supp. 1907, p. 427]), to cancel the certificate of citizenship issued to said respondent by the circuit court for the County of Newaygo, upon the ground that the court was without jurisdiction to admit the applicant to citizenship, from the fact that less than two years had intervened between the date of the declaration of intention and the date of the making and filing of the petition for citizenship. The declaration of intention was made March 28, 1905. The petition for citi-

zanship was filed March 9, 1907, and thus less than two years after the making of the declaration of intention. Hearing was not had, however, until after the expiration of the two years.

The second subdivision of section 4 of the act requires that the alien "shall make and file" his petition for citizenship "not less than two years nor more than seven years after he has made such declaration of intention." It seems to have been the view of the court admitting to citizenship that the two-year limitation applied to the date of admitting to citizenship, and not to the date of making and filing application therefor. I am unable to agree with this construction. The language of the subdivision in question is express and explicit that the petition shall be made and filed not less than two years after the declaration of intention. The act proceeds throughout upon the theory that the right to citizenship must exist at the date of the filing of the petition therefor. The alien's right to citizenship is, by the express terms of the act, made to depend upon his possessing the requisite qualification at the date of the making and filing of such application. To illustrate: By a later provision of the second subdivision of section 4, there is required to be attached to the petition the affidavits of two witnesses as to the continuous residence of the applicant within the United States for at least five years, and of the state, territory, or district of at least one year, "immediately preceding the date of the filing of his petition." Upon the hearing, the proof of residence within the United States and within the state or territory is directed, not to the date of the hearing, but to the date of the application. It must be made to appear to the satisfaction of the court that "immediately preceding the date of his application" the applicant has resided continuously within the United States for at least five years, and within the state or territory at least one year. The recital in the prescribed form of certificate of naturalization (not the order of the court) of finding of fact of the statutory period of residence "immediately preceding the date of the hearing of his petition" (as was required by the former naturalization law) was probably adopted by inadvertence.

If the 2-year limitation is to be construed as applying only to the date of hearing, there is no apparent reason why the application should not be made at any time, and even within a day after the filing of the declaration of intention. A construction which would permit such result is entirely out of harmony with the spirit and express provisions of the act. For example: Sections 5 and 6 require the clerk of the court to give at least 90 days' notice of the petition by public posting, showing, among other things, the date, as nearly as may be, for the final hearing of the petition, and the names of the witnesses whom the applicant expects to summon in his behalf. This notice is required to be given "immediately after filing the petition." The court is required to fix, by rule of court, stated days for hearing such petitions, and final action thereon may be had only on such stated days. Provision is also made for issuing subpoenas for the witnesses to appear upon the day set for final hearing; and by section 11 the United States is given the right to appear before the court for the purpose of cross-examining the petitioner and the witnesses pro-

duced in support of the petition concerning any matter affecting the right to admission to citizenship, together with the right to call witnesses, produce evidence, and be heard in opposition to the granting of citizenship. These provisions are inconsistent with the idea that the petition could be filed nearly two years, if desired, previous to a date when hearing could possibly be permitted.

It is clear, to my mind, that the proceedings for admission to citizenship, involving, as they do, the formal filing of a petition in court, notice to and opportunity to be heard by an opposite party, and a judicial hearing, necessarily contemplate that the applicant is entitled to the decree sought at the time of application therefor. As said by Judge Dallas, in *Re Bodek* (C. C.) 63 Fed. 814 (in construing the previously existing naturalization act):

"An applicant for naturalization then is a suitor, who by his petition institutes a proceeding in a court of justice for the judicial determination of an asserted right. Every such petition must, of course, allege the existence of all facts and the fulfillment of all conditions upon the existence and fulfillment of which the statutes which confer the right asserted have made it dependent."

The petition in the case under consideration showed on its face that two years had not elapsed between the declaration of intention and the making or filing of the petition.

It is true there is at first sight an apparent inconsistency between the requirement in the first subdivision of section 4, that the declaration of intention must be made "two years at least prior to his admission," and the requirement of the second subdivision, that the petition for citizenship be made and filed "not less than two years * * * after he has made such declaration of intention"; but there is no necessary inconsistency, and by the construction I have adopted effect can be given both provisions, while the construction sought by respondent would not give effect to the express provision of the second subdivision.

Is the provision in question mandatory? Section 4 declares that the alien may be admitted to citizenship in the manner provided by the act, "and not otherwise"; and section 15 makes express provision for canceling certificates of citizenship when illegally procured. The respondent does not lose his right of citizenship by making application too early, but is permitted to make new petition therefor, and without a new declaration of intention. I am constrained to hold that the explicit language of the statute, forbidding the filing of petition in less than two years after the making of declaration of intention, is mandatory. Being mandatory, the failure to comply with it is jurisdictional. It follows that the proceedings which resulted in the certificates of citizenship were without jurisdiction, and the certificates must be canceled.

An order for cancellation will accordingly be made.

CHURCH COOPERAGE CO. et al. v. PINKNEY et al.

(District Court, S. D. New York. August 6, 1908.)

1. SHIPPING—CHARTER PARTY—DAMAGE FROM ODOR.

A charter party, reciting that the vessel is carrying creosote on the preliminary voyage, also contained the printed clause that the vessel "shall be tight, staunch, strong, and in every way fitted for the voyage," with a written insertion, "Vessel agrees to have holds as clean as possible." *Held* that, where the vessel had been so cleaned, the charterer could not recover for the impregnation of shooks by the odor of creosote, which rendered them unfit for wine casks.

2. RELEASE—CONSTRUCTION AND OPERATION.

Where some of the discharged cargo came out with stains and external damage, and a compromise was made by deducting \$100 from the freight, which was acknowledged by a receipt "in full settlement of our claim for damage to cargo delivered in bad condition," such receipt did not release a claim for odor or taint that was not discovered until afterward.

In Admiralty. Final hearing. Action for breach of charter party and damage to cargo.

The libelants sued upon a charter party made to the Gulf Cooperage Company to recover \$35,000 alleged damages to a cargo of shooks shipped on the bark *Alexandra* at Galveston for a voyage to Buenos Ayres. The charter party recited that the bark was "reported sailed from Glasgow January 10th, for Port Arthur, Tex., with cargo of creosote." It had also the usual printed provision that the vessel "shall be tight, staunch, strong, and in every way fitted for the voyage." The cargo was "to be not exceeding 40,000 whisky barrel shooks, and heads in bundles, and 265 net tons hoop iron packed flat in bundles." The latter part of the charter party had a written insertion: "Vessel agrees to have holds as clean as possible." Evidence was given that the bark had been cleaned by the master and shore laborers, and that one Thompson, the secretary and treasurer of the Gulf Cooperage Company, then accepted the ship and supervised the loading of the cargo. Afterward he required a portion of the between-deck planking to be removed, which was done, and the loading was then resumed and completed without further objection. The vessel made the voyage, and discharged the cargo in apparent good order, except that a few bundles of shooks came out stained. Upon settlement of the freight, a compromise was made by deducting \$100, which was acknowledged by a receipt "in full settlement of our claim for damage to cargo delivered in bad condition." It was alleged that, after the shooks had been sold and had been made up into wine barrels, the wine showed a flavor of creosote, so that the purchasers returned many of them as unfit for wine casks.

Convers & Kirlin, for libelants.

Wing, Putnam & Burlingham, for respondents.

HOUGH, District Judge (after stating the facts as above). Two legal questions are presented by the pleadings: (1) The effect of the release executed at Buenos Ayres; and (2) the meaning of the phrase of the charter, "Vessel agrees to have holds as clean as possible," taken in conjunction (1) with the recital of the same document, that the *Alexandra* was at the date of hiring en route for Port Arthur with a cargo of creosote, (2) with the warranty that she was in every way fitted for the voyage contracted for, and (3) with the warranty of fitness and seaworthiness implied by law. The release does not, in my opinion, cover the claim in suit, which is not for breakage, rust, or stains even of creosote, but for the loss of practically the entire cargo

of wine casks, as receptacles for wine, because of an impregnation by creosote odor, undiscovered and unsuspected when the claim was advanced for which the release was executed.

As to the second query, it is clear that the charter party warranty adds nothing to the warranty implied by law, even if the former be not always referable to the date of contract or time of sailing for loading port, as suggested by Mr. Carver in his comments on *Stanton v. Richardson*. It is enough for this case that:

"Where there is a contract to carry goods in a ship, there is, in the absence of any stipulation to the contrary, an implied engagement on the part of the person so undertaking to carry that the ship is reasonably fit for the purposes of such carriage." *Tattersall v. Nat. S. S. Co.*, 12 Q. B. D. 300.

That no such stipulation is to be inferred from common knowledge of the fact that on a previous voyage the vessel had carried cargo naturally tending to render her unfit for her next engagement is plainly held by *The Lizzie W. Virden* (C. C.) 11 Fed. 910, and *The Carlotta*, 9 Ben. 1, Fed. Cas. No. 2,413.

The question remains, then, whether the special proviso about cleanliness holds is a limitation of warranty. I am inclined to think it is, because it is only by so construing the phrase that any meaning can be given it. If the ship, after fulfilling her engagement of unusual cleanliness, is still held to a complete absence of creosote odor, then the meaning of the charter party would be exactly the same, with or without a sentence obviously inserted solely on account of the known creosote cargo and its known characteristics. In this discussion it is assumed that a warranty of "reasonable fitness" is broken by giving to barrel staves a creosote flavor only discoverable by chemical analysis, or by filling the barrels with a delicate alcoholic fluid, viz., wine, although the wine drinker can only discover the taint by taste, not by smell. I do not assent to this assumption, but it is not necessary to pursue the subject.

Whether, however, the construction of the charter and its warranties to which I incline be right or not, it is to me entirely clear that libelants are estopped from asserting the claim in suit. The more important witnesses on this point were examined before me. Both in open court and by deposition libelants have sought to minimize the powers, importance, and authority of one Thompson, who offered the cargo to the *Alexandra* at Galveston. This insistence has not increased faith in the witnesses who so unanimously hold that Thompson had nothing to do with the loading of the ship; for, if anything can be proven by human evidence, it is that Thompson practically refused to load further cargo unless the 'tween-decks were removed, and, in short, exercised all the authority that inhered in the secretary and treasurer of the chartering company. Decision is not grounded on Thompson's actions; but this endeavor to explain away or deny Thompson has induced me to believe rather those who are truthful regarding him or know him not.

I am therefore of opinion that when this charter was made it was not divulged to respondents that the staves were to be made into wine casks; that as soon as this became known to respondents they

offered to cancel the charter; that libelants' representatives in New York, after consideration, concluded to rely on the cleaning process and to "take their chances"; that the holds of the Alexandra were made as clean as possible, short of taking the ship apart; and that she finally sailed only when her condition was entirely satisfactory to Thompson, who had ample authority to withhold all cargo, if the holds were not satisfactory.

For these reasons the libel is dismissed, with costs.

SIM v. EDENBORN.

ALDER v. SAME.

(Circuit Court, E. D. New York. August 6, 1908.)

FRAUD—FRAUDULENT REPRESENTATIONS—REMEDY.

A plaintiff, who with others entered into an agreement with a promoter to form a syndicate to purchase stock of a corporation, which agreement was carried out and the stock purchased, cannot, on the ground that the promoter made fraudulent representations, rescind the agreement and on a tender of the stock to him maintain an action at law in tort against him alone to recover the money paid in; but his remedies are limited to an action against the promoter to recover damages for the fraud, in which the value of his stock must be taken into account, or to a suit for rescission, to which the corporation and other members of the syndicate are necessary parties.

At Law. On demurrers to complaints.

Theron G. Strong and Theron R. Strong, for plaintiffs.

Martin W. Littleton (Fredk. Allis, of counsel), for defendant.

CHATFIELD, District Judge. The plaintiff in each of the above actions entered into an agreement with the defendant upon the 15th day of April, 1902, by which the plaintiff agreed to join a syndicate to purchase certain industrial stocks. The defendant, with two other individuals, were named in this agreement as managers of the syndicate, and the plaintiff Alder subsequently carried out his part of the contract, paid the sum of \$10,136.08 upon the 17th day of December, 1902, and about January 1, 1903, received a certificate for shares in one of the companies purchased. The plaintiff Sim is the assignee of a number of individuals, who likewise entered into an agreement with the defendant with relation to the same syndicate transaction. Each of the assignors of the plaintiff Sim paid the amount of their subscriptions and received their stock, and it is now alleged on behalf of each plaintiff that Alder and Sim, and Sim's assignors, were induced by fraudulent representations of fact to make the agreement aforesaid. The plaintiffs further allege that the defendant performed certain acts and did certain things in managing the syndicate, with the idea of continuing the deception of the plaintiffs and the other subscribers, and that the plaintiffs, as soon as they discovered the alleged fraud and deceit on the part of the defendant, notified the defendant of an election to rescind their subscriptions, offered to return to the defendant the certificates of stock which they had received, and

demand payment of the amount advanced, which demand has been refused, and which tender of stock has been kept good.

The plaintiff in each of the actions, therefore, asks for judgment for the amount of the subscription, with interest from the date of payment, and the defendant in each case has demurred on three grounds, which must be considered: First, that there is a defect of parties, in that the co-syndicate managers are not made defendants; second, that the corporation whose stock was transferred is not made a party defendant; and, third, that the plaintiff in each case has included in one cause of action the allegations of an action in equity to rescind a contract and allegations in an action at law to recover damages for fraud and deceit. The plaintiff in each case has met this demurrer by contending that his action is properly brought against the individual who made the false representations of fact, and who has perpetrated, as he alleges, the fraud upon him. He claims that he is entitled to rescind the contract and demand restitution at the hands of this person, and at the same time contends that his action is not in equity for rescission of the contract, but is an action at law, sounding in tort, based upon a rescission, for damages equal in amount to the sum which the plaintiff in each case paid, tendering at the same time to that plaintiff the consideration which he received.

But one question involved in this idea need be considered, and that is whether in the case of a syndicate, or the carrying out of a promotion agreement to form a syndicate, rescission can be relied upon, restitution offered, and the original payment demanded back, in an action at law against the individual who acted as promoter or agent. The plaintiff could unquestionably have sued for damages for the fraud, if fraud existed. He could have brought various actions looking towards the disaffirmance of the agreement which he made upon going into the syndicate, if he could show a cause of action. None of these latter suits have been attempted. In any of them the other persons interested in the syndicate and the corporation with respect to which the syndicate was formed would necessarily have been parties; but the plaintiff in each case contends that he is not suing upon a disaffirmance of his agreement with the others in the syndicate, but is suing in tort, upon a rescission of his original agreement to enter into a syndicate, which agreement was a personal contract with the defendant. It is believed that the action cannot be maintained in its present form. Unless the plaintiffs rescind their entire agreement with all of the individuals and with the corporation, alleging that they have been deceived by misrepresentations of fact in going into these agreements, the court does not see how the cause of action can be alleged as other than an action for damages against the defendant as an individual for his alleged misrepresentations of fact. In such an action for damages, if the plaintiff should demand the entire amount invested, the value of the securities obtained, if any, might be an offset against the damage proved. So, too, the plaintiff, while alleging damage, might admit, as an offset, the stock obtained, and offer to the defendant an election to take the stock and pay the entire amount of damage, or to reimburse the plaintiff for the actual damage, repre-

sented by the amount invested, less the value of the stock received, and whatever profits, if any, could be shown therefrom.

But the precise action which has been brought, in form alleging a rescission of the contract and demanding the return of the money invested, while perhaps in effect capable of being considered as a demand for damages, less the offset of the stock received, is not so in terms, and is in form an action not maintainable as an action sounding in tort, and even, apparently, not an action at law. The apparent fallacy of the plaintiff's position is contained in the statement in his brief that:

"These are actions to recover moneys paid to the defendant pursuant to subscriptions made by plaintiffs to a syndicate promoted by defendant for acquiring certain properties, which said subscriptions were induced by fraud and deceit practiced upon plaintiffs by defendant. Upon the discovery of the fraud and deceit, plaintiffs rescinded their subscriptions, demanded repayment of the same, and tendered to defendant the shares of stock received from him as representing the amounts subscribed."

This paragraph shows that the plaintiff is stating an action involving the rescission of the agreement with the other parties to the syndicate, while apparently endeavoring to set forth a demand for damages for tort.

The demurrers will be sustained, with leave to the plaintiffs to amend their complaints in accordance with this opinion, if they are so advised.

HAGAN et al. v. CARGO OF LUMBER.

(District Court, E. D. New York. August 6, 1908.)

1. SHIPPING—DEMURRAGE.

Demurrage cannot be recovered from a charterer for delay in discharging, due to the refusal of the owner to discharge without settlement of a prior claim for demurrage at the port of loading.

[Ed. Note.—Demurrage, see notes to *Harrison v. Smith*, 14 C. C. A. 657; *Randall v. Smith*, 21 C. C. A. 337; *Hagerman v. Norton*, 46 C. C. A. 4.]

2. SAME.

Under a charter for the carriage of a cargo of lumber to be loaded at two ports, which required the charterer to pay for the towage between the two, the time of such towage cannot be charged in the lay days for loading, nor the time lost in obtaining a tug not due to any default of the charterer; but demurrage is recoverable for delay in loading, due to the fact that the cargo was different from that specified in the charter.

3. SAME—DEAD FREIGHT—SUIT IN REM.

A claim for dead freight is not recoverable in an action in rem against the cargo.

4. SAME—EXTRA COST OF HANDLING CARGO.

A claim by a vessel owner for the extra cost of handling timber of larger dimensions than that specified in the charter can only be recovered in an action in rem against the cargo in so far as it is a claim for the services of stevedores who would be entitled to a lien, and is not so recoverable where the stevedores were furnished by the charterer.

In Admiralty.

James J. Macklin, for libelants.

Hyland & Zabriskie, for claimant.

CHATFIELD, District Judge. The libellant has sued for four different sets of items arising out of a charter party to secure the services of the schooner Berks in bringing a cargo of lumber from Virginia to New York. The charter party is substantially as follows:

Under date of April 20, 1906, the owners of the barge Berks agreed with the Southern Pine Timber Company to make a voyage from Norfolk and Windsow Shades, Va., to New York, for which the party of the second part agreed to furnish a cargo of "air-dried pine boards and Virginia pine framing," and to pay \$3 per 1,000 feet, with free wharfage and shifting towage, if any; barge to be towed from Norfolk, Va., to Windsow Shades, and back to Norfolk, Va., at expense of charterers; on loading and discharging, Sundays, holidays, and rainy days to be excepted; lay days to commence 24 hours from the time the vessel was ready to receive or discharge; cargo to be loaded as per usual custom for loading at Norfolk and Windsow Shades, and to be discharged as per rules of the New York Maritime Exchange, with a default of \$30 per day; cargo to be received and delivered alongside within reach of vessel's tackle; lumber to be delivered on rail of barge; owners guarantee barge to insure at current rate, etc.

It appears from the testimony that part of the lumber was Virginia pine boards, and some Virginia pine framing of the ordinary character; but, in addition to this lumber, a large quantity of long and heavy timber of green Virginia pine, of sizes 8"x10"x16' and intended to supply a contract for underpinning, to be used in building the Brooklyn Subway, was delivered to the vessel. Such timber, the testimony shows, was of unusual dimensions, was designed for a special purpose, and could not be called "framing," in the ordinary meaning of that term. Considerable of the delay occasioned in loading was caused by the character of this heavy timber, and this fact must be considered later.

The four claims or causes of action are as follows: First, 16 days' alleged demurrage at the shipping port at \$30 a day, or \$480 in all; second, a claim for dead freight, arising from the difference between the amount of freight charges for the quantity of ordinary framing which could be carried, and the amount, according to measurement, of the heavy timber above specified (this difference is stated to amount to \$400); third, the extra expense to which the vessel is claimed to have been put in loading and discharging this heavy timber (this item is also claimed to amount to \$400); fourth, an alleged detention at New York of 30 days, which at \$30 a day demurrage would amount to \$900.

Taking up the last claim first, it would appear that under the rules of the New York Maritime Exchange the only days for which demurrage can be charged were three days at Smith's Dock, Newtown creek, during which days another schooner was lying at the berth. One of these days was the 4th of July, and therefore but two days' demurrage can be allowed. The other delay at the port of New York would seem to have been occasioned by an attempt on the part of the libellant to compel the allowance of his claim for demurrage at the

port of loading, and this cannot be made a basis of damage. *Murray v. George W. Jump Co.* (D. C.) 148 Fed. 123.

As to the first item of demurrage, the libelant has claimed that the cargo was not furnished to him at Norfolk as fast as the contract called for, that he was compelled to wait for a tug to go to Windsow Shades, and in going to Windsow Shades and Norfolk, and in delay at Windsow Shades in obtaining stevedores. The time of going to Windsow Shades and getting back to Norfolk cannot be considered in computing demurrage. It was a part of the contract to take the load at each of these places, and the time in going to Windsow Shades and returning therefrom was, therefore, contemplated as a part of the contract. The delay in obtaining a tug was not the fault of the party of the second part. The agreement was to pay for towage, and this did not include an agreement to furnish towage. *Barrett v. Oregon Ry. & Nav. Co.* (D. C.) 22 Fed. 452. There would seem to have been at Norfolk a delay chargeable to the party of the second part of two out of three days, May 19th, 22d, and 23d, on which but one car load a day was furnished to the vessel. At Windsow Shades one day was lost in obtaining stevedores, because of the character of the timber, and for this day the party of the second part should be held responsible. As to the delay in the actual time of loading at Windsow Shades, no allowance can be made. The stevedores were ultimately furnished by the party of the second part, who was supplying the timber, and no charge is made therefor, and the acceptance of this service by the libelant would seem to absolve him from damage for the extra time consumed. Therefore but three days demurrage should be allowed at Norfolk and Windsow Shades, amounting to \$90.

As to the second alleged cause of action, the claim for dead freight is not properly the basis of an action in rem, but is a claim for damages, and must be disallowed.

The third alleged cause of action, as to extra cost in handling the heavy timber, can only be made the basis of an action in rem in so far as it is a claim for stevedores' services. *The Hattie Thomas* (D. C.) 59 Fed. 297; *The Seguranca* (D. C.) 58 Fed. 908. But this claim was a lien against the cargo itself in favor of the stevedores, and, inasmuch as the stevedores were furnished by the company offering the timber, no extra expense therefor paid by the libelant has been proved.

The libelant, therefore, may have a decree for \$90 demurrage at Norfolk and Windsow Shades, and \$60 demurrage at New York. As to the balance of his claim the libel must be dismissed.

HOLTON v. HELVETIA-SWISS FIRE INS. CO. OF ST. GALL, SWITZERLAND.

(Circuit Court, E. D. New York. August 4, 1908.)

REMOVAL OF CAUSES—PETITION FOR REMOVAL—JURISDICTIONAL AVERMENTS.

A petition for removal filed by an alien, which alleges positively that plaintiff is a citizen of one of the states of the United States, and on information and belief that he is a citizen and resident of the district, is sufficient to give the federal court jurisdiction on the face of the record.

On Motion to Remand to State Court.

Wendell P. Barker, for plaintiff.

Wallace, Butler, & Brown (Charles M. Turrell, of counsel), for defendant.

CHATFIELD, District Judge. The plaintiff brought an action in the Supreme Court of Kings county against the defendant, which is stated in the summons to be a corporation of St. Gall, Switzerland. This summons, with notice, was served, under the laws of the state of New York, upon Hon. Otto Kelsey, Superintendent of Insurance, and the defendant, having appeared specially, demanded a copy of the complaint. Subsequently, this appearance having been set aside by the state court, a general appearance was entered, and before the time to serve the complaint had expired discovery and the inspection of a contract between the defendant and the Rhine & Moselle Fire Insurance Company of Strasburg, Germany, was ordered. This order also directed the deposit of the contract with the clerk of Kings county for inspection, and an appeal was taken from said order, on which appeal the order was affirmed and the deposit of the contract directed made within 30 days.

The defendant thereupon removed the case to this court, upon a petition containing a statement that the plaintiff "at the time of the commencement of said suit was, and still is, a citizen of a state of the United States, to wit, as your petitioner is informed and believes, a citizen of the state of New York, residing in the Eastern district thereof," and that the defendant "at the time of the commencement of said suit was, and still is, a citizen of a foreign state, to wit, a citizen of the republic of Switzerland." The petition further alleges that the assignor of the plaintiff (the plaintiff being alleged to claim under assignment of a chose in action) "was at the time of the commencement of this suit, and still is, a citizen of a state of the United States, to wit, as your petitioner is informed and believes, a citizen and a resident of the state of California."

The motion to remand has been made upon the ground that the removal record does not show that the plaintiff nor the plaintiff's assignor is a citizen of the United States, as required by Act March 3, 1887, c. 373, § 1, 24 Stat. 552, as amended by Act August 13, 1888, c. 866, § 1, 25 Stat. 433 (U. S. Comp. St. 1901, p. 508).

The defendant contends that the doctrine set forth by *Ex parte Wisner*, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264, has been amended or overruled by the cases of *In re Moore*, 209 U. S. 490, 28 Sup. Ct. 585, 706, 52 L. Ed. 904, and *Western Loan & Savings Co. v. Butte & Boston Consolidated Mining Co.*, 210 U. S. 368, 28 Sup. Ct. 720, 52 L. Ed. 1101, so as to make it the law of the United States, under the sections of the statute above quoted, that United States courts have jurisdiction over all actions between an alien and citizens of the states, and that an action can properly be removed into the district containing the place where the action was instituted, and that the strict construction of the statute with relation to removals, as interpreted by this court in the case of *Tierney v. Helvetia-Swiss Fire*

Insurance Company (March 5, 1908) 163 Fed. 82, has been expressly overruled. Be this as it may, that question need not be considered. This motion must rest on whether the allegations of the removal record are sufficient, and if they are ambiguous or lacking in some statement which the record shows could be supplied, under the doctrine in the case of *Kinney v. Columbia Savings, etc., Ass'n*, 191 U. S. 78, 24 Sup. Ct. 30, 48 L. Ed. 103, whether amendment can be made.

The plaintiff has cited the cases of *Wolff v. Archibald* (C. C.) 14 Fed. 369, *Jones v. Adams Express Co.* (C. C.) 129 Fed. 618, and *Thompson v. Stalman* (C. C.) 131 Fed. 809, to support his contention that a statement of residence upon information and belief is insufficient, unless facts are shown by which that statement can be substantiated. In the present record of removal the verification of the petition may have been unnecessary. *Street Railway Co. v. Hart*, 114 U. S. 660, 5 Sup. Ct. 1127, 29 L. Ed. 226; *Removal Cases*, 115 U. S. 17, 5 Sup. Ct. 1113, 29 L. Ed. 319. But if the necessary allegation of residence were not contained in the petition and there were no verification, or if a verification be added and no sufficient allegations are contained therein, it is immaterial whether the verification be necessary or not.

The question of alleging citizenship upon information and belief is set forth at length and with great clearness in the case of *City of Detroit v. Detroit City Railway* (C. C.) 54 Fed. 1, wherein Judge Taft says that the petition for removal is in the nature of an interlocutory motion, and that by the practice of the High Court of Chancery of England, which by equity rule 90 regulates the equity practice of the Circuit Courts in this country, so far as its rules may be applicable, parties were permitted "to submit at the hearing of interlocutory motions affidavits on belief, provided that the facts were stated upon which such belief was founded." The statement of facts showing jurisdiction has always been held necessary. *Brown v. Keene*, 18 Pet. 115, 8 L. Ed. 885; *Martin v. Baltimore & Ohio Railroad*, 151 U. S. 691, 14 Sup. Ct. 533, 38 L. Ed. 311; and many other cases.

On the present application the allegation upon information and belief, and the verification, fail to show facts from which the conclusion of the petitioner that the plaintiff and the plaintiff's assignor are citizens can be satisfactorily inferred, and if these allegations stood alone the motion to remand would be granted. But the petitioner has sworn, not on information and belief, but as a matter of positive statement, that the plaintiff and the plaintiff's assignors are both citizens of the United States. The statement upon information and belief is with relation to the particular state of which those parties are citizens, and under the doctrine of the case of *Western Loan & Savings Co. v. Butte & Boston Consolidated Mining Co.*, supra, the federal courts could have jurisdiction; and the Circuit Court of the United States in this particular district, being the district within which the action in the state court was brought, would therefore have jurisdiction upon removal, and the papers upon which the removal was had would therefore seem to be sufficient.

If it should affirmatively appear subsequently that the United States courts had no jurisdiction, the case must then be remanded, under

the provisions of section 2 of the act of March 3, 1887, as amended by the act of August 13, 1888; but upon the present record the motion to remand must be denied.

THE CARACAS.

(District Court, E. D. New York. August 4, 1908.)

SHIPPING—CARRIER OF PASSENGERS—LIABILITY FOR INJURY TO PASSENGER.

Libelant, a passenger on a steamship, was sitting on the deck at a time when the sea was rough, and to escape an unusually large wave, which washed over the deck, stepped upon a bench and rested his hand upon a glass ventilator or skylight, which broke and his hand was cut by the glass. There was a frame, with cross-rods, over the sash, designed to protect the glass; but the preponderance of the evidence showed that it was displaced by libelant and fell to the deck before his injury. *Held*, that the condition of the skylight was not such as to charge the vessel with negligence which would render it liable for the injury, which was entirely attributable to accident.

In Admiralty.

William C. Reddy, for libelant.

Convers & Kirlin (John M. Woolsey, of counsel), for claimant.

CHATFIELD, District Judge. The libelant was injured in his left hand, upon the 16th day of September, 1906, while off Cape Hatteras, upon the steamer Caracas, on a trip from New York to Venezuela. The weather at the time was not stormy, but the sea was comparatively rough, and not many passengers were upon deck. The libelant was seated in a chair near a ventilating hatchway, which was covered by an A-shaped glass roof or skylight, when a somewhat larger wave than usual washed over the decks, and the libelant, attempting to get out of the way of the wave, stepped upon a shelf or bench, running alongside of this ventilator or skylight, and rested his weight upon his left hand upon the glass of the skylight. This glass, which was ordinarily thick window glass, with woven wire imbedded therein, broke, and cut quite severely the libelant's left hand. There is some evidence to indicate that the libelant's treatment of his hand did not induce healing; but, in general, the condition of the hand is due to the accident and the hand seems to have some permanent injury, as well as disfigurement. It may be remarked that the libelant is right-handed, and therefore has not lost any facility in the use of the hand with which he writes.

The steward of the vessel testifies that a short time before the accident he closed the various frames of the skylight at which the accident occurred. These frames were suspended by hinges from the ridge, and they were worked up and down by a ratchet or cog lever, and, when closed, the sides of the skylight occupied a position at an angle of about 45 degrees. Over the four panes of glass in each sash of this skylight rested a square frame, with a middle bar equipped with 11 cross-rods about the size of a lead pencil, but far enough apart to permit the insertion of a person's hand. The libelant testi-

fied that this protecting frame was missing from the sash of the skylight nearest to where he was sitting. The steward testified that the frame was there when he closed the sash, and that the buttons, two at the bottom and one at the top, were turned over the sash, so that it could not be lifted out without disturbing these buttons. The second officer of the vessel testifies that immediately after the accident he found this particular frame upon the deck of the vessel, within a few feet of where the libelant had been sitting, and the operator of the wireless telegraph upon the vessel, who had been lying or sleeping some 18 or 20 feet away, alongside of the rail or gunwale, claims to have seen the occurrence, and testifies that the libelant drew up his feet to avoid the wave, and upon leaning over, in order to climb upon the hatchway, seized the protecting frame with his left hand, that it came loose and fell upon the deck, and that the libelant then made a second effort to get upon the hatchway, when his left hand broke through the unprotected glass, with the result indicated. The doctor was immediately called to dress the wound, and the subsequent treatment, as has been stated, need not be considered.

A serious contradiction has arisen from the testimony of the libelant and another passenger, to the effect that the carpenter placed some canvas over the opening, which was not repaired for some time, while the second officer and the carpenter of the vessel deny such an occurrence, and allege that the glass was replaced in the ordinary course of affairs, and no canvas used. The burden being upon the libelant, and there being no apparent reason why the carpenter should misstate occurrences after the accident (which idea applies as well to the testimony of the second officer), it must be assumed that the libelant and his fellow passenger were mistaken in their recollection that the glass was repaired with canvas. But this, as has been said, while serious as a contradiction, is immaterial to the question of liability.

It would seem that if the libelant, in order to avoid the discomfort of a wetting, attempted to climb upon the skylight, and thereby pulled the protecting frame from the glass, and then leaned upon the glass, no liability should rest upon the vessel. Certainly no negligence can be imputed for an occurrence happening in this manner and under such circumstances. The testimony of the ship's officers, and of every one connected with the matter, is that the rods in the protecting frame were not of sufficient strength to hold a person leaning his full weight upon one hand, or planting a foot upon the frame. But the libelant charges that the accident happened when the frame was not in place, and therefore the question as to whether the frame was sufficiently heavy to protect a person from falling need not be considered. The skylight was not intended as a place upon which to sit, nor to climb, and the frame was designed to protect the glass from objects of any sort which might fall thereon. It cannot be considered negligence to have not anticipated that this frame could be pulled from its place by a man of ordinary size, when tossed around by the motion of the ship, or slipping back under the effect of an extraordinary wave. Such an occurrence is an accident pure and simple.

As to the libelant's contention that the frame was not upon the glass, it need only be said that the burden of proof has not been sustained, and in fact the testimony of the various witnesses above recited would indicate that the frame was dislodged before Mr. Chase could realize the condition of the surface upon which he was resting.

The claimant argues that the libelant was guilty of contributory negligence in climbing upon a glass near which he had been sitting for some time, and where he might have seen that the glass was unprotected, as he charges this to have been; but no contributory negligence can be imputed to a person acting under such circumstances that no time is given within which to form a proper judgment as to the risk. Further, the court is unwilling to decide, when unnecessary, that a vessel need not in any way protect a skylight upon the frequented portions of the main deck of a vessel, at a level below the waist of the ordinary person, and where any fall might precipitate a person through the skylight.

But upon the entire testimony there is no need of considering that situation, and the libel must be dismissed.

In re SACHAROFF & KLEINER.

(District Court, E. D. New York. July 31, 1908.)

BANKRUPTCY—SETTING ASIDE COMPOSITION—INTEREST OF CREDITORS.

A motion to set aside a composition by a bankrupt should be denied, notwithstanding the fact that it was shown that some creditors fraudulently obtained notes for more than their pro rata share of their debts, where the applicant for the order also obtained a preference, and, because of the fact that the bankrupt had been unable to pay the composition notes, new proceedings in bankruptcy had been instituted against him, in which the innocent creditors could be best protected by the disallowance of the fraudulent claims.

In Bankruptcy. On motion to set aside composition.

Frank L. Entwisle, for petitioner.

Walter T. Kohn, for bankrupts.

Engel Bros., for creditors.

CHATFIELD, District Judge. The bankrupts were originally adjudicated upon a voluntary petition filed November 14, 1907. A composition was effected on the basis of 10 per cent. cash and two notes of 10 per cent. each, making 30 per cent. in all, and the property released to the bankrupts on March 27, 1908. The expenses of the bankruptcy proceedings were also paid by the bankrupt, and the first of the two series of notes have fallen due and have not been paid. It now appears that one Emanuel Strauss advanced money to Sacharoff with which to make the first payment of 10 per cent., and that Sacharoff made an independent agreement with Strauss, which he has been unable to perform, and by reason of which failure Strauss has not advanced to Sacharoff the necessary money to meet the notes as they became due.

A second petition in bankruptcy was thereupon filed by E. Reis & Co., J. Vroom Roscoe, and the Primrose Tapestry Company, upon the 30th day of June, 1908. This petition was verified by Carl Reis, as president of E. Reis & Co., a corporation, by J. Vroom Roscoe individually, and by J. Vroom Roscoe, as agent of the Primrose Tapestry Company, and this second petition in bankruptcy contains the allegation that a fraudulent assignment had been made by the alleged bankrupts, while insolvent, to Emanuel Strauss, with intent to hinder, delay, and defraud their creditors, and with the intent to prefer said Strauss. The amounts of the claims of each of these creditors set forth in the second petition are the same amounts proven by them in the original proceeding in bankruptcy, and a payment of 10 per cent. on each claim is admitted. These claims are followed by this paragraph:

"That no part of said sums has been paid, excepting as aforesaid, and that the alleged bankrupts have no set-offs, counterclaims, or defenses thereto in law or equity."

The petition as drawn contained the names of "—— Weinreb and —— Weinreb, copartners composing the firm of Weinreb Bros."; but these names were stricken out and the name of the Primrose Tapestry Company written wherever necessary, and neither of the members of the firm of Weinreb Bros. joined in the petition as filed. On the 1st day of July, 1908, one Jacob Weinreb, a member of the firm of Weinreb Bros., obtained an order from this court directing the bankrupts to show cause why the composition should not be set aside for fraud, upon allegations that the compromise was obtained by statements that all of the creditors were to share equally, and that since the entry of the order of composition, and within a few hours prior to the obtaining of the order to show cause, Weinreb had discovered that the statements of the bankrupts were false, in that the bankrupts had preferred several creditors, including the Matred Mills and J. Vroom Roscoe, who had received 40 per cent. of their claim, instead of 30. The petition contains the further allegation that Weinreb had relied upon the representations of the bankrupts, and would not have accepted the compromise if he had known the exact situation. The petitioner asks that the composition be vacated, and the proceeding reinstated, and the property returned to the trustee for distribution.

An answer has been interposed by the bankrupts, denying the allegations of fraud, also alleging that Weinreb had knowledge of whatever had transpired prior to the acceptance of the offer of composition, and that Weinreb had himself obtained certain property which must be considered a preferential payment, and was therefore not asking for the statutory relief in the nature of the action of a court of equity when himself free from wrongdoing.

The testimony need not be discussed at length. It appears that Roscoe received promissory notes to the extent of \$150, partly as commissions or payment for his time in obtaining other creditors to sign the composition agreement, and partly as an extra payment on account of his principal, although the bankrupts allege that they understood

the entire amount of these notes was for the compensation of Roscoe, in the form of commissions. Under either aspect of the matter, Mr. Roscoe was committing a fraud upon the other creditors, inasmuch as in a second involuntary petition he alleges that the claims were his own, and has now testified that he held them by assignment. Carl Reis, who verified the second petition in bankruptcy, admitted upon the stand that through transactions with his partner, of which he had more or less knowledge, his firm had received notes covering their claim in full, and that these notes had not been paid, and were now in process of suit. Weinreb testified on the stand that, immediately preceding the original petition in bankruptcy, he had obtained certain goods from Sacharoff, with the tacit or unwilling consent of Sacharoff himself, which goods had been originally purchased from Weinreb, and were all that could be certainly identified by him.

There can be no doubt that Weinreb had knowledge of Sacharoff's insolvency at the time he took these goods, and Weinreb's relations with Roscoe, and with the various creditors at the time of the composition, were such that it is impossible to consider him an innocent party in the matter. It may be true that Weinreb did not learn of the preferences to Roscoe and Reis till after the acceptance of the composition; but Weinreb is certainly not in the position of a creditor coming into this court with his hands clean, and entitled to the consideration due to a deceived and innocent creditor. It is evident that sufficient fraud in the transaction itself is shown to justify any action by this court, under the authority of the statute as interpreted in the case of *In re Roukous* (D. C.) 128 Fed. 645, 12 Am. Bankr. Rep. 128.

But it must also be considered whether the general creditors will profit by setting aside the compromise, and whether the fraud shown is such that, if the circumstances had been known to the court at the time of approving the compromise, the compromise itself would have been rejected by the court, and the amount deposited by the bankrupt to effect this composition returned. It is plain that the notes to Roscoe and to the Reis Company were obtained by fraud; even the money paid to Roscoe as commissions, in view of the fact that he was individually a creditor, although actually merely an assignee, being fraudulent as against the other creditors. These notes, unless in the hands of innocent parties, should be void as between Sacharoff and the creditors to whom they were given; and it is believed that in no court could the recipients of these notes justify their claims to the notes, if the issue of fraud had been raised. Certainly the other creditors in the bankruptcy proceeding are entitled, and were entitled, to have the preferential payments set aside, and whatever money might be paid by Sacharoff on account of these fraudulent and preferential payments distributed for the benefit of the creditors generally.

But this result the testimony now shows is impossible, inasmuch as Sacharoff has been unable to pay any notes, is to-day unable even to carry out the terms of the compromise which was approved by the court, and is on the verge of again being put in bankruptcy, when the fraudulent and preferential notes will be considered and their validity may be questioned. Under the circumstances, it would seem

that the application to set aside the composition should be denied. The fraudulent notes in evidence should be declared void, so far as the bankruptcy proceeding is concerned, and the persons holding them, unless they have been transferred to an innocent holder for value, should be enjoined from attempting to collect them, as against the other creditors of the estate. If Mr. Sacharoff has sufficient assets to take care of his obligations subsequent to the confirmation of the composition, and to meet these notes, the amount thereof should be turned over to the trustee in the original proceeding, which should be revived for the purpose, and a dividend declared to creditors who have been innocently imposed upon. In the meantime the notes will be held by the clerk as exhibits in this proceeding, and further transfer thereof prevented.

THE PLANTER.

(District Court, E. D. South Carolina. July 13, 1908.)

ADMIRALTY—EXECUTION OF DECREE—SALE OF VESSEL—VACATING—INADEQUACY OF PRICE.

A court of admiralty has discretionary power, like a court of equity, to set aside or refuse to confirm a sale of property made under its process, but, where such sale was fairly made, after due advertisement, and there was a considerable attendance of persons having knowledge of the property, it should not be set aside on objection of other parties interested, who had full opportunity to protect themselves on the ground alone of inadequacy of price, or on a later offer by them of an increased price.

In Admiralty. On motion to confirm sale and objections thereto.

Nathans & Sinkler, for Consumers' Coal Co.

Young & Young and Von Kolutz & Waring, for interveners.

BRAWLEY, District Judge. Upon hearing the report of the marshal of this court on the sale of the steamer Planter to the Consumers' Coal Company for the sum of \$500, the said company having been the highest bidder under a writ of venditioni exponas issued out of this court, a motion was made by the proctors for the Consumers' Coal Company for a confirmation of said sale. On the same day the proctor who had filed an intervention in behalf of seamen for wages due brought to the attention of the court that the claims for wages amounted to more than \$500, but no formal motion or petition was filed. Inasmuch as seamen are in an especial degree wards of the court, I was unwilling to confirm the sale at and for the sum of \$500, being of opinion that that was an inadequate price without some investigation as to the circumstances attending the sale, and with that view I caused to be summoned all of the proctors in the cause. Before the date fixed for the hearing, a bid for \$1,000 and a bid for \$1,500 was filed with the clerk. The parties bidding, it was understood, were parties who had claims against the Planter for materials or supplies furnished. Upon the hearing affidavits were submitted as to the circumstances attending the sale, and it appears that on the day of sale a large crowd attended the same, among them masters of

steam tugs and other watercraft who had knowledge of the value of steamers, and were well acquainted with the steamer Planter. The day was clear, and it does not appear that there were any circumstances showing that there was any effort to chill the sale; the whole proceeding having been conducted regularly, after due advertising.

That the court has a judicial discretion in cases of the kind is undoubted, and it is generally governed by the rules which control the courts of equity. The old rule in chancery cases which obtained in England for many years, that until the confirmation the bidding would be opened upon a mere offer to advance the price 10 per cent., has been rejected in England, and has never met with much acceptance in this country. I have lately had occasion in another case to consider whether mere inadequacy apart from any circumstances which would tend to raise a suspicion of fraud, irregularity, or unfairness should of itself suffice to vitiate a sale. Gross inadequacy, such as would shock the conscience and be of itself evidence of fraud, has been stated in some cases to furnish sufficient grounds for setting aside sales; but, where there has been no fraudulent conduct on the part of the purchaser, no evidence of any combination to restrict the bidding, where the sale was open and public, and after being duly advertised, and no lack of attendance of buyers, it seems to me that it would greatly impair confidence in judicial sales if the courts should refuse to confirm a sale simply because the price is inadequate. It appears that since the sale parties who were interested in it have offered in one case double and in the other case treble the amount of the bid of the successful bidder. No reason is given by them or either of them why they did not attend the sale.

In *Ballanetyne v. Smith*, Justice Brewer says on page 289 of 205 U. S., on page 528 of 27 Sup. Ct. (51 L. Ed. 803):

"Something may be said on each side of the question. On the one, that a court of equity owes a duty to the creditor seeking its assistance in subjecting property to the payment of debts to see that the property brings something like its true value, in order that to the extent of that value the debts secured upon the property may be paid; that it owes them something more than to merely take care that the forms of the law are complied with and that the purchaser is guilty of no fraudulent act. On the other, that it is the right of one bidding in good faith at an open and public sale to have the property for which he bids struck off to him if he be the highest and best bidder; that, if he be free from wrong, he should not be deprived of the benefits of his bid simply because others do not bid, or because parties interested have done nothing to secure the attendance of those who would likely give for the property something nearer its value; that, if the creditors make no effort and are willing to take the chances of a general attendance, they have no right to complain on the ground that the property did not bring what it should have brought."

It appears that the bidder to whom the property was knocked down has a claim for coal furnished amounting to something over \$2,000. The proctor for the said bidder states that he represents other claims of the same character, among them a firm of which his own brother is a member. None of these parties have appeared and filed objections to the confirmation, and there being no circumstances suggestive of fraud, unfairness, or irregularity, I am of opinion that the sale should be confirmed, for parties interested in sales made by the courts should

understand that it is their duty to protect themselves at such sales. Inasmuch, however, as seamen are wards of the court, and are generally unable to protect themselves by bidding on such sales, the sale will be confirmed upon the condition that the Consumers' Coal Company shall pay into court such sum in addition to the amount of their bid as will suffice to pay all the seamen's wages which may be justly due, and the costs.

In re BAUGHMAN.

(District Court, D. South Carolina. July 14, 1908.)

BANKRUPTCY—COMMISSIONS OF REFEREE AND TRUSTEE—PROCEEDS OF MORTGAGED PROPERTY.

Property of a bankrupt was subject to a chattel mortgage for less than \$1,000. The mortgagee applied to the referee for delivery of the property to him, whereupon the trustee filed a petition for an order to sell the property, showing that it was appraised at \$1,585. No objection being made by the mortgagee after notice to him, such order was made, and the property was sold by the trustee at public auction for \$875, which was less than the mortgage debt. The mortgage did not in terms give the mortgagee the right to take possession of the property on default, and could only have been foreclosed by suit. *Held*, that the action of the referee was proper, and that the mortgagee was entitled to the proceeds only after deduction of the costs of sale and the commissions of the referee and trustee.

In Bankruptcy. On review of action of referee.

B. C. Bellinger, for M. Hornik & Co.

BRAWLEY, District Judge. The petition of M. Hornik sets forth that he is a creditor of the above-named bankrupt, holding a certain bill of sale or chattel mortgage, upon which at the time of adjudication there was due \$961.37; that, upon learning of the adjudication, he filed with the referee his petition, praying that the goods and merchandise covered by his mortgage should be surrendered to him, but the referee, "instead of acting upon said petition, finally passed an order authorizing the sale by the trustee, and, in accordance with said order, the trustee sold and delivered all and singular the said goods and merchandise covered by your petitioner's mortgage as above mentioned at public outcry for the sum of \$875." He alleges that, if the property had been surrendered to him, he could have had the property sold at an expense not exceeding \$8 or \$10, and that it is wholly unjust to permit the referee and trustee to be allowed their costs.

Upon the filing of the petition an order was made directing service upon the referee, with direction to report the facts, etc. The referee has filed his report and subsequently a letter, wherein he states that M. Hornik & Co. did file a petition for an order allowing the sale of the merchandise in question, wherein he stated that the security was insufficient to satisfy the mortgage; that thereafter the trustee filed a petition stating that the property had been appraised a \$1,585; that he thereupon notified Mr. Bellinger, attorney for Hornik & Co.,

of the trustee's report, and told him that, if he had no objections, he would proceed to give notice of the hearing on the trustee's petition, but Mr. Bellinger did not file any objection thereto, after due notice, and that he thereupon made an order in accordance with the trustee's petition, and the stock of merchandise was sold realizing the sum of \$875, and the referee thereupon made an order directing that the fund be disbursed as follows: To M. Hornik & Co. \$808.75; advertising sale and printing notices \$5; trustee's commissions \$45; referee's commissions \$8.75.

The question for determination is whether or not these costs and expenses of administration shall be allowed out of the fund. The bankruptcy act (Act July 1, 1898, c. 541, 3 Stat. 563 [U. S. Comp. St. 1901, p. 3448]), provides (section 64, subd. 5) for the payment of the costs of administration, and it is not disputed that the commissions charged by the trustee and the referee are such as are allowed by the bankrupt act; the only question being whether M. Hornik & Co. was authorized to take possession of the stock of merchandise belonging to the bankrupt and dispose of it at his own pleasure. The instrument under which Hornik claims is a rather peculiar one. After providing that Hornik should sell and ship to Baughman merchandise to the limit of \$1,000, and that the latter should pay on the Monday of each week at least 7 per cent. of the amount due, the instrument provides as follows:

"And it is hereby agreed that my entire stock of goods, wares, merchandise, store fixtures, etc., now in my store at Wagners, S. C., together with the goods this day purchased and those which may be hereafter purchased and placed in my said store or in any other building appurtenant, are hereby pledged, bargained, and transferred to the said M. Hornik & Co. as security to guarantee my honesty, and that I will faithfully deal with them and will perform every obligation hereby assumed, and it is distinctly understood and agreed that should I neglect to make any payment herein referred to, or, if I should attempt to dispose of the goods or any part thereof other than in the regular course of retail trade, or to do any other act reasonably leading to the suspicion that I intend to avoid making payment or otherwise defraud the said M. Hornik & Co., then immediately upon the happening of either or any of the said events the whole amount owing by me to the said M. Hornik & Co. shall immediately become due and payable, and I hereby agree to pay the same on demand of the said Hornik & Co."

There is no provision that Hornik & Co. should be entitled to take possession of said stock of merchandise. The said stock is in terms pledged "as security to guarantee my honesty." It appears from the report of the referee that the stock of merchandise was appraised at \$1,585. Hornik's claim amounted to less than \$1,000. In these circumstances it seems to me to have been necessary in the interest of the creditors of the bankrupt that the mortgage should be foreclosed in some court of competent jurisdiction, and it appears from the referee's statement that after the filing of the petition by the trustee notice was given to Mr. Bellinger, attorney for Hornik & Co., for the hearing on the trustee's petition, and that, Mr. Bellinger "not taking any objection, after due notice" the order of sale was made upon the trustee's petition. If it had been Mr. Bellinger's desire to take proceedings for the enforcement of his lien in another forum where the costs of administration would have been less expensive, if such there

be, he should have taken steps to review the action of the referee after he had notice that the referee was proceeding to administer the estate of the bankrupt in bankruptcy.

Loveland, in his work on Bankruptcy (section 267 [3d Ed.]) says:

"In the distribution of an estate a secured creditor as a mortgagee or lienholder is entitled to be paid in full or to the extent of the amount realized from the funds derived from the sale of the property which is subject to the specific lien or security, less expenses of foreclosing the lien, including commissions of referee and trustee."

The order of the referee deducting the expenses of administration is confirmed, and the petition for review dismissed.

ATKINSON v. ADAMS et al.

(Circuit Court, E. D. Pennsylvania. July 14, 1908.)

No. 38.

DISCOVERY—IN EQUITY—PARTIES ENTITLED TO DISCOVERY.

Where the evidence already taken in a suit for specific performance shows that complainant is not entitled to the relief prayed for, an order will not be made to compel the defendant to make discovery.

In Equity. On motion for order on defendants to make discovery by answering interrogatories.

Henry H. Belknap and E. Spencer Miller, for complainant.
Edward Harvey and Read & Pettit, for defendants.

J. B. McPHERSON, District Judge. In my opinion, this motion must be refused. The testimony already taken—which the parties have agreed to submit in order to obtain a decision whether the complainant is entitled to discovery—proves to my satisfaction that a proper legal tender was neither made nor waived on March 26, 1906. If this is correct, the present bill which asks for specific performance, or, in the alternative, for damages, has no sufficient ground, and discovery should be denied.

PUSEY & JONES v. PENNSYLVANIA PAPER MILLS.

(Circuit Court, M. D. Pennsylvania. August 25, 1908.)

No. 44, October Term, 1908.

1. LIENS—FORECLOSURE—DECREE OF SALE.

In a decree for the sale of property to pay liens, it is correct practice to determine the relative priority and order of payment of such liens, but it must be on notice to the parties in interest.

2. JUDGMENT—RES JUDICATA.

The establishment of a mechanic's lien by judgment against the debtor is not conclusive as to its validity, or right to priority as against the trustees of the first mortgage bondholders who were without notice of the proceeding.

In Equity. Sur petition of trustees for first mortgage bondholders to modify decree giving priority to the mechanic's lien of the George M. Newhall Engineering Company.

W. H. Rhawn, for the motion.

Sheldon Potter and C. W. Miller, opposed.

ARCHBALD, District Judge. It was correct practice to undertake in the decree of sale to determine the relative priority and order of the payment of the different liens upon the property (27 Cyc. 1761; *Jerome v. McCarter*, 94 U. S. 734, 24 L. Ed. 136), but not, of course, without notice (*Pitts., Cin. & St. L. R. R. v. Marshall*, 85 Pa. 187), which not having been given in the present instance, the decree as it stands cannot be maintained. Notwithstanding the judgment obtained by the George M. Newhall Engineering Company on the mechanic's lien which they hold, it is still open to the first mortgage bondholders to show that the lien is invalid or not entitled to the priority claimed for and accorded to it by the decree. *Safe Deposit Co. v. Iron & Steel Co.*, 176 Pa. 536, 35 Atl. 239; *Prudential Trust Co. v. Hildebrand*, 34 Pa. Super. Ct. 249. It would be competent, as well as of advantage—the parties being now before the court—to go into this question and settle it before the sale. But the time is short and the facts somewhat complicated, and I have concluded under the circumstances to reserve it, as asked, until the hearing on the distribution of the proceeds.

The decree of sale will therefore be modified by striking out the reference to the mechanic's lien of the George M. Newhall Engineering Company, as well as to that of the Goulds Manufacturing Company, which latter for the same reason may as well go out with the other. And it is so ordered.

GILBANE et al. v. FIDELITY & CASUALTY CO. OF NEW YORK.

(Circuit Court of Appeals, First Circuit. June 18, 1908.)

No. 757.

1. APPEAL AND ERROR—REVIEW—ACTION AT LAW TRIED TO COURT.

The rule applied that, where an action at law in a Circuit Court is tried by stipulation without a jury, the appellate court cannot review rulings of law except so far as they relate to the admission and rejection of evidence or otherwise concern the progress of the case, though it may, perhaps, have power to set aside the judgment where there is no evidence whatever to support the findings of fact.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3347-3366.]

2. INSURANCE—EMPLOYEE'S LIABILITY INSURANCE—ACTION TO RECOVER PREMIUMS—EVIDENCE.

Where the assured under an employer's liability policy obligated itself to furnish to the insurer correct statements of the amount of wages paid to employes covered by the policy as a basis for the adjustment of premiums, in an action to recover additional premiums on the ground that the defendant understated such wages, the fact that the plaintiff is unable to prove with certainty the amount of such payments because of the manner in which defendant kept its books does not deprive it of the right to recover at all, and the court is justified in accepting approximate estimates as a basis of recovery, in the unavoidable absence of specific evidence.

In Error to the Circuit Court of the United States for the District of Rhode Island.

Seeber Edwards (James J. McGovern and Edwards & Angell, on the brief), for plaintiffs in error.

John P. Beagan, for defendant in error.

Before COLT, PUTNAM, and LOWELL, Circuit Judges.

PUTNAM, Circuit Judge. This was a suit at common law, the circumstances of which, so far as we need consider them, are told by the plaintiffs in error in the following language:

"The Fidelity & Casualty Company of New York brought this action of assumpsit against William Gilbane and Thomas F. Gilbane, copartners as William Gilbane & Bro., building contractors of Providence, R. I., to recover premiums alleged to be due on policies of casualty insurance issued by the company to the assured from August 1, 1897, to August 1, 1905. The premiums payable under such policies, when the policies were issued, were based upon an estimated pay roll for the ensuing year of the assured's employes who were covered by such insurance, and at the end of the policy year the policy provided for a statement for the year of the wages paid employes covered by the insurance. If the wages actually paid exceeded the estimate, the assured should pay the additional premium earned; if less than the estimate, the company would return to the assured the unearned premium pro rata. The company by this action claims that the assured's annual returns of wage expenditures were incorrect, and the purpose of this action was to recover such additional premiums from 1897 to 1905." "The assured's books of account were not so kept that the wages of insured and uninsured labor were separated." "The premiums were based on a classification of labor, and in the record the exact classification of the labor covered by these policies is set out at length. The assured made annual returns to the company of the wages of workmen upon whom they were supposed to be insured, and paid the company the premiums due on the basis of such returns." "The com-

pany had never exercised its right to examine the assured's books until 1905, when an examination of these books was made, and the company, after this examination, brought in a claim of several thousand dollars for premiums alleged to be due, covering this period of years."

The case was submitted to the presiding judge, a jury being waived under the statute, and the judge rendered a decision for the plaintiff on which judgment was entered, and the defendants took out this writ of error. We will throughout designate the parties as designated in the Circuit Court, the plaintiffs in error as the defendants, and the defendant in error as the plaintiff.

The court made certain findings of fact and certain rulings of law; but, as is well settled, such rulings of law do not afford the basis of a writ of error, except so far as they relate to the admission or rejection of evidence, or otherwise concern the progress of the case. Beyond that, all the appellate court has to look at is the findings of fact. From these it determines whether the judgment was correct. It may, perhaps, also be added that, where the whole case comes up, and there is no evidence whatever to sustain the findings of fact, it may be that the appellate tribunal has power to set aside the judgment; but the extent to which that power may be exercised, and whether it can be exercised only where there is an absolute lack of proof, have never been explicitly decided by the Supreme Court. The rule, whatever it is, is appealed to by the plaintiff in error; but we have no occasion to analyze it.

The findings of fact were almost the equivalent of a general verdict, so that it is difficult to ascertain from the record how far we may go, and how far we are limited, in re-examining it, and this to such an extent that it may well be doubted whether we have any power whatever over the questions submitted to us. However all this may be, we are satisfied that the proceedings of the Circuit Court were not erroneous, and we reach this conclusion in any possible view of the case.

The first point taken by the plaintiff in error is to the effect that the Circuit Court was at fault in finding that the plaintiff had sustained the burden of proof. The facts in reference thereto are not clearly and consecutively stated on either side, but sufficient appears to make it plain that we cannot revise the judgment on account of this proposition. The proofs in behalf of the plaintiff consisted of the pay rolls and books of the defendant, the testimony of an accountant, sometimes called in the record an "auditor," who examined the books and pay rolls in behalf of the plaintiff, and who was examined at great length, indeed to such an extent that his testimony covers 50 printed pages. As already said, the defendant did not on its pay rolls or books apportion the labor so as to show definitely what parts of it classified as concerning the insured occupations. The result was, as we understand it, that, although there was no explicit apportionment in the pay rolls and books, the accountant found sufficient to show what were the gross amount of expenditures involved in connection with the different classes of occupations, including, we suppose, labor, material and profit, so that he, for the purpose of ascertaining the amounts represented in the insured occupations, adopted the method of dis-

tributing the expenditures for labor in proportion to the total amounts shown to have been expended on the various contracts. There was no evidence on the part of the defendant in any way diminishing the effect of such an apportionment. This apportionment was permitted by the court, and the court expressly found that the result sustained the burden of proof and was satisfactory to itself, and it is too apparent to need much explanation that, in the absence of any more definite proofs, the court was justified in supporting the position of the plaintiff in this respect. Certainly it cannot be maintained that the plaintiff was not entitled to any damages whatever because the amounts which should be justly returned to it could not be found with absolute accuracy. Such a claim can never be made except under extraordinary circumstances. Whatever proofs were offered by the plaintiff were subject to explanations, qualifications, and limitations by the defendants, so that there was no unusual danger of substantial injustice if the defendants availed themselves of the privileges to which they were thus entitled. Our observations apply particularly to this case, in which the defendants originally obligated themselves to furnish the plaintiff correct and exact details, and, if they willfully refused to furnish such details, or so conducted their business that they could not furnish them, no one can justly claim that the plaintiff should be deprived of all relief because such relief could be only approximate. The mass of the transactions involved was very great, so that whether or not the result was sufficiently approximate to form a just basis for a decision was necessarily, under the circumstances, a question of fact which it is outside of the jurisdiction of this court to determine.

The next objection of the plaintiffs in error, put in their own language, is:

"The court erred, as a matter of law, in finding specially that the returns made by the assured to the company of wage expenditure were untrue and entirely unreliable; there being no evidence in the record to support this special finding."

This is an immaterial proposition, because the issue was whether or not the defendants had made correct returns, and the finding of the court that they had not done so, which finding we have already determined we cannot revise, was the crucial thing, and the adjectives which it used were wholly immaterial.

The third proposition is as follows:

"The court erred in finding specially that the defendants' evidence that their books of account covered wage expenditures upon which they were not liable for premiums, other than those excluded by the auditor, is too vague and unreliable to be of probative force."

We are frank to say that we do not well understand this proposition. It may have relation to the fact that the plant of the assured consisted of a carpenter shop, factory, and yard, while the policies had relation to only a portion of the plant, and to a claim that, in the classification which the court made, it did not properly distinguish on that account. If we are correct in our understanding, this topic is covered by what we have said as to the alleged error first brought to our attention; but, if there is anything in this proposition which we do not correct-

ly comprehend, it must be referred to the fact that our rules require that a party complaining should enable us to put our fingers directly upon the portions of the record involved, and that we cannot be expected to search the numerous details in reference thereto for ourselves, which is what we have been left to do.

The next proposition is that the court erred in allowing a motion by the plaintiff to strike out certain evidence. It is not necessary that we should detail the facts about this. We have examined them carefully. They relate to a certain position taken at one time by the plaintiff favorable to the defendants, as to which there was subsequently a change by the agreement of both parties, so that the whole became immaterial.

The closing proposition of the plaintiffs in error we need not give in detail, because it falls within the topic of classification by approximation which we have disposed of in connection with the alleged error first herein considered.

The judgment of the Circuit Court is affirmed, with interest, and the appellee recovers its costs of appeal.

NOTE.—The following is the opinion of Brown, District Judge, in the court below:

BROWN, District Judge. This is an action of assumpsit to recover additional premiums claimed to be due the plaintiff on policies of casualty insurance issued by the plaintiff to the defendants from 1897 to 1905. The premiums paid were based on estimated payrolls; each policy providing in effect that at the end of the year the actual wage expenditure should be determined, and that for any excess of the estimated wage expenditure over the actual expenditure the company should repay the unearned portion of the premium, or, if the actual wage expenditure exceeded the estimate, the insured should pay an additional premium.

To claims accruing prior to September 15, 1899, six years before the date of the writ, the defendants have pleaded the statute of limitations; and the plaintiff, in its replication, alleges that the defendants "did fraudulently, by actual misrepresentation, conceal from it the existence of the causes of such action," and "that it, said plaintiff, had no knowledge thereof, nor was the same by any means disclosed or discovered to it, until within six (6) years next before the commencement of its, the said plaintiff's, action."

Findings.

(1) I find, as matter of fact, that the plaintiff's proof fails to sustain the allegations of its replication, and that the claims based upon policies marked Exhibits 22 to 31, inclusive, are barred by the statute of limitations. My reasons for this finding, and the conclusions of law applicable thereto, are as follows:

The policies marked Exhibits 22 to 31, inclusive, all expired more than six years before the date of the plaintiff's writ. To meet the plea of the statute of limitations the plaintiff must maintain its replication and show affirmatively that the defendants fraudulently, by actual misrepresentation, concealed the existence of a cause of action. By the provisions of its contracts the plaintiff had a full right to examine the defendants' books to determine the amount of actual wage expenditure. In making the contract the plaintiff did not rely solely upon returns to be made by the defendants, but secured to itself the right to fix the true amount of the premiums, and to correct the estimated amount of wages, by an independent inspection of the defendants' books.

It is not contended that the defendants' books concealed any of their actual expenditures. Can it be said that that is concealed which is immediately apparent when resort is had to a means of ascertainment provided

for by the contract? The causes of action arose from the fact that the wage expenditures exceeded the estimated payrolls. It is said that the false returns by the defendants lulled the plaintiff into inaction for more than six years. It is not enough, however, to show that the statements were material and false, to prove concealment upon this theory. *Ming v. Woolfolk*, 116 U. S. 599, 6 Sup. Ct. 489, 29 L. Ed. 740. The plaintiff must also show that it relied upon the statements believing them to be true. There is no proof of reliance upon these statements, save the fact that the plaintiff made no examination of the books. But the plaintiff's conduct is quite as consistent with the idea that it did not deem it worth while to investigate the matter as with the idea that it relied implicitly upon the truth of the statements. Though, in making the contract, the plaintiff clearly did not choose to rely solely upon the defendants' statements, it contends that, in carrying out the contract, it did so. But all statements were made subject to the plaintiff's right to verify them by recourse to the books, and there is not a particle of evidence showing that the defendant made any attempt to prevent a verification.

It certainly cannot be said that the plaintiff's failure to verify the accounts was due to any act of concealment by the defendants. As the plaintiff always had the means of knowledge, its failure to discover a cause of action was due to not using ordinary means of information rather than to any affirmative concealment by the defendants. *Wood v. Carpenter*, 101 U. S. 135, 25 L. Ed. 807; *Bates v. Preble*, 151 U. S. 149, 160, 14 Sup. Ct. 277, 38 L. Ed. 106. "The law does not afford relief to one who suffers by not using the ordinary means of information, whether the neglect be attributable to indifference or credulity." *Andrus v. St. Louis Smelting Co.*, 130 U. S. 643, 647, 9 Sup. Ct. 645, 646, 32 L. Ed. 1064; *Slaughter v. Gerson*, 13 Wall. 379, 20 L. Ed. 627; 14 Am. & Eng. Enc. Law, 115, 117; 19 Am. & Eng. Enc. Law, 250. The above authorities show that section 7, c. 234, of the General Laws of Rhode Island, upon which the plaintiff's replication presumably is based, does not relieve the plaintiff from the necessity of using ordinary means of information available to him. This statute does not differ substantially from the statute before the Supreme Court in *Wood v. Carpenter*, 101 U. S. 135, 25 L. Ed. 807.

Considering next the claims not barred by the statute of limitations:

(2) Upon the policies marked Exhibits 18 to 21, inclusive, I find that the defendants are indebted to the plaintiff for the sums claimed by the plaintiff and conceded by the defendant to be due.

(3) Upon the policies marked Exhibits 36 and 37, I find that the defendants are indebted to the plaintiff for the sums claimed. I am of the opinion that the plaintiff's evidence shows *prima facie* that all entries for wage expenditures during this period relate to insured occupations, and that the defendants have presented no sufficient evidence to show that any part of the wage expenditures during this period was for uninsured occupations.

(4) Upon policies marked Exhibits 1 to 15, inclusive, and Exhibits 32 to 35, inclusive, I find that the defendants are indebted to the plaintiff to the amounts shown in the plaintiff's bill of particulars and auditor's account.

I am of the opinion that the plaintiff's evidence shows *prima facie* that substantially all entries on the defendants' books during the periods of these policies relate to insured occupations. As the defendants did not apportion the labor expenditures to the various classes of insured occupations, the plaintiff was entitled to do so, and to adopt the method, shown in its account, of distributing expenditures for labor in proportion to the amounts shown on the defendants' books to have been expended for insured occupations. I am of the opinion that, upon the whole evidence, it appears beyond a reasonable doubt that the defendants' returns to the company are entirely unreliable. It was a clear requirement of the contracts that the defendants should keep an accurate account of the wage expenditures which were to be the basis for the premiums. The only accounts kept by the defendants are those upon which the auditor's account is based.

The defendants seek to explain the discrepancy between their books and their returns by saying that they were excused by Mr. Sheldon, a local agent,

from making classifications corresponding to the policies. But this is entirely insufficient to explain an omission to report under any classification by far the larger part of the actual wage expenditures. Aside from the fact that Mr. Sheldon had no power to waive a requirement of the contract, the evidence of conversations with him is insufficient to explain the discrepancy between the returns and the defendants' books.

A further explanation is that much of the expenditure was for wages which did not appertain to insured occupations. Several buildings were referred to, in which carpenters, masons, or others erected iron uprights and set steel and iron beams. It is apparent, however, that the fact that a building contains some iron does not exclude that building entirely, and that the wages of a carpenter, mason, or laborer who may occasionally do other work of an uninsured kind are not, therefore, to be wholly excluded. At most, there should be excluded only the wages during those hours in which he was engaged in an uninsured occupation; and that this was an important item there is no sufficient proof. On the contrary, the estimate, in one of the policies, of \$300 for a wage expenditure in this class of work, tends to show that it bore a very small proportion to the whole amount of wage expenditures. The same may be said concerning demolition, done by carpenters in the course of repairs.

There was certain evidence as to steel construction of the tower of a fire station, and of work at Brown & Sharpe's, which, if made more definite, might have been a proper basis for some deductions from the amounts shown on the books. But the evidence as to these matters, as well as to all expenditures for noninsured occupations, was of the vaguest and most indefinite character. The vagueness and indefiniteness of the defense on these points, and especially as to comparatively recent matters concerning which experienced builders might easily have presented approximate figures, is an indication that more exact evidence would not assist the defendants. It is apparent that, if the defendants had desired to show the amount of uninsured work done, they could have done so in a much more definite manner; but it seems very clear that the result of such an attempt would have been simply a confession of the gross inaccuracy of the defendants' returns.

The plaintiff having established a *prima facie* case by introducing the accounts kept by the defendants, it was incumbent upon the defendants, if they desired to show that they had not kept the accounts as required by the contract, but had confused other matters therewith, to point out such matters specifically. They cannot be permitted to destroy the plaintiff's claim by vaguely impeaching in general terms accounts which it was their duty to keep for the benefit of the plaintiff, and, if there are specific items which properly should be excluded, it was the duty of the defendants to point them out specifically.

Should either party desire more specific findings, a request therefor may be filed within 30 days from the date of these findings.

Counsel may compute the amount due, and interest, in accordance with the above findings, and judgment will thereupon be entered for the plaintiff.

TAYLOR v. BREESE et al.

(Circuit Court of Appeals, Fourth Circuit. July 21, 1908.)

No. 740.

1. COURTS — FEDERAL COURTS — CIRCUIT COURTS OF APPEALS — APPEAL — CONSTRUCTION OF STATUTE — "HEARING IN EQUITY" — "INTERLOCUTORY" ORDERS.

In Act March 3, 1891, c. 517, § 7, 26 Stat. 828, creating the Circuit Courts of Appeals, as amended by Act Feb. 18, 1895, c. 96, 28 Stat. 666, and Act June 6, 1900, c. 803, 31 Stat. 660 (U. S. Comp. St. 1901, p. 550), relating to appeals from Circuit and District Courts, and providing that

"where upon a hearing in equity * * * an injunction shall be granted or continued or a receiver appointed, by an interlocutory order or decree * * * an appeal may be taken from such interlocutory order or decree," the phrase "hearing in equity" does not mean the trial of an equity cause on the merits; the right of appeal being given from an "interlocutory" order or decree, which means one entered pending the cause and before final hearing on the merits, and disposing of some intervening matter relating to the cause.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 1100.

For other definitions, see Words and Phrases, vol. 4, p. 3712-3715.]

2. SAME—APPEALABLE ORDERS—"ORDER GRANTING INJUNCTION."

Under Act March 3, 1891, c. 517, § 7, 26 Stat. 828, creating the Circuit Courts of Appeals, as amended by Act Feb. 18, 1895, c. 96, 28 Stat. 666, and Act June 6, 1900, c. 803, 31 Stat. 660 (U. S. Comp. St. 1901, p. 550), an appeal lies from a preliminary restraining order granting temporarily the relief prayed for by the bill and requiring the defendants to show cause why it should not be made permanent, which is an order granting an "injunction" within the meaning of the statute.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 1100.

Orders, decrees, and judgments reviewable in Circuit Court of Appeals, see note to *Salmon v. Mills*, 13 O. C. A. 374.]

Appeal from the Circuit Court of the United States for the Eastern District of Virginia, at Norfolk.

Burr, Brown & Lloyd and William L. Royall, for appellant.

Percy S. Stephenson, for appellees.

Henry W. Anderson, for appellee Norfolk & Ocean View Railway Company.

Before GOFF and PRITCHARD, Circuit Judges, and BOYD, District Judge.

BOYD, District Judge. On the 23d of March, 1907, Charles Parker Breese commenced the present proceeding by filing his petition in the Circuit Court of the United States for the Eastern District of Virginia, at Norfolk, in the equity case of Charles E. Fink v. Bay Shore Terminal Company et al. The petition reads as follows:

"Your petitioner, Charles Parker Breese, respectfully represents to the court that he is now, and has been for several years, the owner of three bonds of the Bay Shore Terminal Company, one of the defendants in the above-entitled cause, and that his bonds have been proven before the special master appointed herein, and being for \$1,000 each. Your petitioner further represents that on the 25th day of January, 1906, an agreement was entered into between S. L. Foster, W. T. Simcoe, and W. C. Cobb, attorneys for your petitioner and others, with D. L. Groner and Tazewell Taylor, the said agreement being especially referred to and shown at page 85 of the record made up for the Circuit Court of Appeals, and at page 60 of the transcript, in the suit of Zell, Appellant, v. Leigh and Others, Appellees. It is especially set out in the aforesaid agreement as follows: 'It is understood between the parties hereto that authority has been given to the present receivers to begin proceedings for the condemnation of such part of the right of way of the said company as is in dispute, and it is further understood that such proceedings are to be begun and concluded without cost to the parties of the second part, hereto, and in the event that the said parties of the second part hereto are called upon to pay anything on account of the said right of way, they shall be reimbursed proportionately by the bondholders herein represented.'

"It was further set out in the said agreement that your petitioner should receive from the parties of the second part, or their assigns, an amount equal to the face value of the bonds surrendered thereunder of an issue of bonds secured upon the property, not to exceed \$1,500,000 and a certain amount of stock as therein set out. The right of way above referred to was formerly owned by the Consolidated Turnpike Company, a corporation, but by a deed bearing date on the 1st day of March, 1902, and filed in this cause with the report of the special master, Robert T. Thorp, Esq., the said right of way was sold and conveyed to one of the defendants, the said Bay Shore Terminal Company, and the consideration mentioned therein, your petitioner is informed and therefore alleges, was delivered to the said Consolidated Turnpike Company. Your petitioner is advised, and therefore alleges, that a portion of the said consideration was bonds of the Bay Shore Terminal Company, and that the same are now held by Walter H. Taylor, the trustee hereinafter mentioned, to secure the bonds covered by the deed from the said turnpike to him as trustee. But there existed upon the property two deeds of trust, each of which was made to Walter H. Taylor, trustee, one made on June 1, 1898, for \$25,000, and the second deed of trust made on April 2, 1900, for \$200,000, and each of the said deeds of trust was, at the time of the aforesaid deed from the said Consolidated Turnpike Company to the said Bay Shore Terminal Company, and is now, a lien upon the aforesaid right of way, or is claimed to be such. Condemnation proceedings to secure the aforesaid right of way were entered in the circuit court of Norfolk county on March 3, 1906, and commissioners therein were appointed on April 14, 1906, to ascertain the value of the aforesaid parcel of land. The record of the said proceedings shows, and your petitioner therefore alleges, that Arthur W. Dupue appeared in the aforesaid proceedings and objected, both by demurrer and answer, to the same, and on account of the aforesaid objection the right of way has not been acquired. The property of the Bay Shore Terminal Company has been sold to the Norfolk & Ocean View Railway Company, and your petitioner is entitled, under the aforesaid agreement, made between the said Foster et al. and the said D. L. Groner and Tazewell Taylor, to \$3,000 in bonds, secured by a deed of trust upon the property formerly owned by the Bay Shore Terminal Company, and, if the aforesaid right of way is not held and owned by the said Norfolk & Ocean View Railway Company, the entire property will be valueless, and the bonds of your petitioner will therefore be of little value. The said Arthur W. Dupue, in addition to his objection in the aforesaid condemnation proceedings, secured a judgment in the circuit court of Norfolk county, on March 18, 1907, for the sum of \$3,750 against the said Consolidated Turnpike Company, and on the same day filed a suit setting up the obtaining of the said judgment and asking to have the properties of the said turnpike company subjected to his lien, and to the liens of the aforesaid deeds of trust; and on the same day the said Consolidated Turnpike Company appeared, by its president, H. L. Page, and filed an answer admitting the allegations of the said bill, and the said Page was thereupon appointed receiver of the said company.

"Your petitioner further alleges that the said right of way has been in the possession of your honorable court since the date of the appointment of the receivers in the above-entitled cause, and that the aforesaid suit, on the part of the said Dupue, is for the purpose of depriving the said Norfolk & Ocean View Railway Company, as assignee of the said Bay Shore Terminal Company, of the aforesaid right of way. At the time the aforesaid sale was made, by the Consolidated Turnpike Company to the Bay Shore Terminal Company, the said H. L. Page was president of both companies, and the said Page was fully advised of the cloud upon the title of the said piece of right of way by reason of the alleged liens, and while the consideration mentioned in the aforesaid deed from the Consolidated Turnpike Company to the Bay Shore Terminal Company has been fully paid, and an agreement has been entered into by which the Bay Shore Terminal Company's bonds, which were delivered to the said Consolidated Turnpike Company, should be exchanged for the new bonds issued by the Bay Shore Terminal Company's assignee, and, notwithstanding the aforesaid cloud upon the title of the said piece of right of way, the said Consolidated Turnpike Company has demanded that

the aforesaid agreement as to the exchange of bonds be carried out. The said turnpike company is also a party to this cause and is now praying your honor to enter a decree in its favor for two years interest on the said Bay Shore bonds given it as a part of the consideration for the aforesaid right of way. The aforesaid suit, in which the said Dupue is plaintiff, and in which the said H. L. Page was appointed receiver, was brought before the execution issued upon the said judgment was returned, and is a collusion on the part of the said Dupue and the said Page to deprive the said Norfolk & Ocean View Railway Company of the parcel of right of way aforesaid, and this conduct on the part of the said Dupue and the said Page, which your petitioner believes and alleges is a part of the plan heretofore conducted by F. D. Zell and others to control or destroy the property of the said Bay Shore Terminal Company, will render your petitioner's bonds of little value, for which adequate damages cannot be secured in a court of law.

"For as much, therefore, as your petitioner is without remedy save in your honor's court, he prays that the said Arthur W. Dupue and the said Walter H. Taylor, trustee, the Norfolk & Ocean View Railway Company, a corporation, and the Consolidated Turnpike Company, a corporation, be made parties defendant hereto, and be required to answer, but answer under oath is hereby expressly waived, and that they, the said Arthur W. Dupue, Walter H. Taylor, trustee, and the Consolidated Turnpike Company, and all other persons, their agents, attorneys, servants, and employes, and all other persons or corporations acting by or through them, on their order or on their behalf, may be enjoined and restrained, until the further order of this court, from any act or acts whereby the status of the said right of way or any part thereof may be changed or disturbed, or whereby the possession and user of the Norfolk & Ocean View Railway Company may be interfered with. And your petitioner further prays that such relief, whether general or special, may be granted him, as may be meet and proper in the premises. And he will ever pray."

And on the said day, the court entered this order:

"This cause coming on to be heard upon the papers formerly read, and upon motion of Charles Parker Breese, by his counsel, Percy S. Stephenson, asking leave to file his petition herein, and was argued by counsel. Upon consideration whereof, it is ordered that the same be filed, which is accordingly done, and that Arthur W. Dupue, Walter H. Taylor, trustee, Norfolk & Ocean View Railway Company, and Consolidated Turnpike Company, a corporation with its principal office in the city of Norfolk, Va., be made parties defendant hereto. It is further ordered that the said Arthur W. Dupue, his agents and attorneys, and all other persons, be and are hereby temporarily restrained, until the further order of this court, from prosecuting, in the circuit court of Norfolk county a suit against the Consolidated Turnpike Company, so far as it affects the property hereinafter described, and the said Arthur W. Dupue, his agents and attorneys, and all other persons, are restrained, as aforesaid, from prosecuting any other suit affecting the same, and Walter H. Taylor, trustee, the Consolidated Turnpike Company, and their servants, agents, and attorneys, and all other persons, are temporarily restrained, until the further order of this court, from in any way disturbing and from the doing of any act in any way affecting the Norfolk & Ocean View Railway Company in its use or possession of that certain parcel of land leading from Norfolk to Ocean View, occupied by the said company as the right of way, and being the same which was conveyed to the Bay Shore Terminal Company by Consolidated Turnpike Company, by its deed of March 1, 1902, and which was conveyed among other properties of the Bay Shore Terminal Company, by deed of February 6, 1907, duly of record in the clerk's office of the corporation court of the city of Norfolk, from Floyd Hughes and others, special commissioners and others, to the Norfolk & Ocean View Railway Company, a corporation existing under the law of the state of Virginia. It is further ordered that a copy of this decree and of the aforesaid petition be served upon Walter H. Taylor, trustee, Consolidated Turnpike Company, and Norfolk & Ocean View Railway Company, and that copies of the same be served upon N. T. Greene, of counsel for the defendant, Arthur W. Dupue. And it is

further ordered that the said defendants and each of them show cause, in the city of Norfolk, on the first Monday in May, 1907, or as soon thereafter as the same may be heard by this court, why this restraining order should not be made permanent."

From this order, Walter H. Taylor, trustee, appealed to this court.

Previous to the filing of Breese's petition, as appears, the suit of Fink v. Bay Shore Terminal Company et al., had been brought for the purpose of foreclosing a certain deed in trust executed by the terminal company to the Atlantic Trust & Deposit Company, trustee, amounting to \$500,000. A decree of sale was entered by the circuit court, at Norfolk, on the 17th day of March, 1906, in which it was directed that the following property be sold, to wit:

"All that certain railroad, railway, roadbed, rights of way and lands, buildings, bridges, structures, engines, boilers, power plant, poles, wires, motors, cars, rolling stock, equipment of every kind, and all and singular the estate, real, personal and mixed, of the Bay Shore Terminal Company's railroad, beginning at a point near Ocean View, in the county of Norfolk, and extending thence southwardly to the city of Norfolk, Virginia, and over and upon numerous streets of said city, as allowed by franchises granted by the councils of the city of Norfolk, together with all extensions, cross-tracks and turnouts, poles, wires, appurtenances and fixtures which may be laid by said company under rights and powers now owned or hereafter obtained; together, also with all of the franchises, powers, rights and privileges of the said company, and together with all and singular the easements, hereditaments, incidents and appurtenances whatsoever, thereunto belonging or in any wise appertaining, and all the estate, right, title and interest of the said company in and to the same and every part thereof."

Under the authority of the decree for sale the property was sold and purchased by Edward B. Smith & Company at the price of \$765,000. This sale was duly reported to the court by the commissioners appointed to make it and was, on the 21st of November, 1906, confirmed, and on the 7th of February, 1907, a deed was duly executed by the commissioners and delivered to the purchasers under the direction of the court, conveying all of said property to the purchasers. During the progress of the suit of Fink v. Bay Shore Terminal Company et al., and prior to the decree for sale, to wit, on the 20th day of January, 1906, the court entered the following decree:

"This cause came on this day to be heard upon the papers formerly read, and it appearing to the court from the report of the special master, R. T. Thorp, that the Bay Shore Terminal Company has never acquired title to a portion of its right of way and to the property on which its power house is located, the court doth adjudge, order, and decree that B. W. Leigh, H. L. Page, and J. A. C. Groner do proceed in the proper court or courts to institute condemnation proceedings for the purpose of acquiring title to said property, and said receivers are hereby authorized to take any and all necessary steps to institute and conduct said condemnation proceedings to as speedy a determination as possible."

This decree directing proceedings for condemnation of the right of way was based upon the report of the special master, the terms of which report are substantially set out in plaintiff's petition, and the further fact is set out therein that condemnation proceedings were instituted in the circuit court of Norfolk county, Va., on March 3, 1906, to condemn the right of way, and commissioners were appointed on the 14th of April, 1906, under an order of the court, to ascertain the

value. This suit was pending in the said court of Virginia and undetermined at the time of the filing of plaintiff's intervention. It appears further from the petition: That the right of way referred to was formerly owned by the Consolidated Turnpike Company, a corporation, but was, on the 1st day of March, 1902, sold and conveyed by that company to the Bay Shore Terminal Company, and the consideration for this purchase is alleged to have been fully paid; that a portion of the said consideration was bonds of the Bay Shore Terminal Company; and that these bonds are now held by Walter H. Taylor, the appellant in this case. And it is further charged in the bill, and admitted as a fact, that Walter H. Taylor is trustee in two several deeds of trust executed by the Consolidated Turnpike Company, one dated June 1, 1898, to secure bonds of the said Turnpike Company to the amount of \$25,000 and the second dated April 2, 1900, to secure other bonds of said turnpike company to the amount of \$200,000. And it is further set out in the bill that at the time of the conveyance of the right of way from the Consolidated Turnpike Company to the Bay Shore Terminal Company these deeds in trust were liens upon the interest and property of the said turnpike company in the lands over which the said right of way, conveyed as before stated, extended.

Two questions are presented to the court upon this appeal: The first as to whether an appeal will lie from the order of March 23, 1907, entered by the Circuit Court; and, second, whether complainant's petition, on the facts averred therein, states a cause of action sufficient to authorize the court, sitting in chancery, to entertain jurisdiction. The first question arises under the seventh section of the act of March 3, 1891 (26 Stat. 828, c. 517), as amended by the act of June 6, 1900 (31 Stat. 660, c. 803 [U. S. Comp. St. 1901, p. 550]); the said section, as amended, being as follows:

"That where upon a hearing in equity in a District Court or in a Circuit Court, or by a judge thereof in vacation, an injunction shall be granted or continued, or a receiver appointed by an interlocutory order or decree in a cause in which an appeal from a final decree may be taken under the provisions of this act to the Circuit Court of Appeals, an appeal may be taken from such interlocutory order or decree granting or continuing such injunction, or appointing such receiver, to the Circuit Court of Appeals."

The order appealed from was granted in vacation and is an interlocutory order. The question first to be determined involves two inquiries: Was the order appealed from granted upon a hearing in equity, and is the order an injunction as contemplated by the statute? An affirmative answer to both of these questions is necessary to bring the case by appeal to this court.

It is contended by the appellee that the phrase "hearing in equity" used in the statute, must be construed to mean the "trial" of an equity cause upon its merits, and a number of authorities are cited to sustain the position that a "hearing in equity" is synonymous with the term "trial" in a case at law. We concede that the term "hearing" is used ordinarily in an equity cause to refer to that stage in the proceeding at which the case is before the court after pleadings are completed and the proofs, or at least some of them, have been taken; but if we construe the act we are considering to mean that an appeal

cannot be taken from an injunction, or a decree appointing a receiver, unless such injunction is granted, or such decree entered, upon a final hearing, we would, in our opinion, destroy the whole purpose of the law. There was no need of a statute to authorize an appeal from a final decree in equity, for that right already existed. The object of Congress is, as expressly declared in the statute, to provide for an appeal from an order or decree granting or continuing an injunction, or appointing a receiver, where such order or decree is interlocutory in character. The term "interlocutory," used in the act, dispels at once the idea that the appeal provided for could not be taken until the final hearing or the trial of the cause on the merits, for that term means something done between the commencement of an action and its determination. "Interlocutory," in law, means not that which decides the cause, but that which settles some intervening matter relating to the cause.

It is scarcely necessary to cite authorities for this definition of the term "interlocutory," for they are many, both federal and state; but we take the liberty of referring to *Wooster v. Handy* (C. C.) 23 Fed. 49, *Bissell Carpet Sweeper Company v. Goshen Sweeper Company*, 72 Fed. 545, 19 C. C. A. 25, and *Dudley E. Jones Company v. Munger Improved Cotton Machine Mfg. Co.*, 50 Fed. 785, 1 C. C. A. 668; also, *Teaff v. Hewitt*, 1 Ohio St. 511, 59 Am. Dec. 634; *McKinney v. Kirk*, 9 W. Va. 26, and *Daniel* (2) *Chancery Practice*, c. 26, § 1. In all of these cases it is held: That "an interlocutory decree is a decree rendered when the consideration of a particular question to be determined in the litigation for the further consideration of the cause in general is reserved until some future time." That "an interlocutory decree is one which is made pending the cause and before a final hearing on the merits." We are led to the conclusion therefore that the order of March 23, 1907, was granted upon a hearing in equity, such as is contemplated by the statute. This then brings us to the question whether the order was an injunction from which an appeal will lie, the consideration of which necessarily involves the character and effect of the order.

The case in which the present action was taken was already pending in the Circuit Court. It was the case of *Charles E. Fink v. Bay Shore Terminal Company and Atlantic Trust & Deposit Company*, Trustee, which was brought to foreclose a mortgage executed by the first-named company to secure the payment of its bonds. The property of the Bay Shore Company had been sold under a decree of the court and purchased by the Norfolk & Ocean View Railway Company, the sale confirmed, and deed executed to the purchaser. The master appointed in the course of the proceedings in the case had reported that a part of the right of way of the Bay Shore Company was incumbered in the following manner: That the said right of way was formerly owned by the Consolidated Turnpike Company, a corporation, which had, by deed dated the 1st of March, 1902, conveyed the same to the Bay Shore Terminal Company, but that at the time of the conveyance there existed upon the property conveyed two deeds in trust, each of which was made to Walter H. Taylor, trustee, one executed on the 1st of June, 1898, to secure the payment

of \$25,000 of the bonds of the Consolidated Turnpike Company, and the other dated on the 2d of April, 1900, to secure the payment of an additional \$200,000 of the bonds of said company. When this fact was made known to the Circuit Court, an order was entered in the case of *Fink v. Bay Shore Terminal Company et al.*, directing the receivers who had been appointed in the case to institute proceedings for the condemnation of the right of way which had theretofore been conveyed to the Bay Shore Company by the Consolidated Turnpike Company, in order to relieve that part of the said right from the lien of the two deeds in trust, and the receivers, in obedience to the direction of the court, commenced the condemnation proceedings in the circuit court of Norfolk county, Va., on the 3d of March, 1906, and commissioners were duly appointed, as appears by the record, on the 14th of April, 1906, to appraise the value of the right of way as provided under the laws of the state of Virginia, and, as further appears, this proceeding is still pending undetermined. The petitioner intervened in this action and seeks the relief set out and, among other things, an injunction against Arthur W. Dupue, Walter H. Taylor, trustee, and the Consolidated Turnpike Company from in any way disturbing or doing any act in any way affecting the Norfolk & Ocean View Railway Company in its use and possession of the right of way heretofore referred to. The order entered on March 23, 1907, restrained Dupue and Walter H. Taylor, trustee, from doing the acts which the complainant sought by his petition to enjoin, and required them to show cause on the first Monday in May following why the restraining order should not be made permanent. So the effect was to give the injunctive relief demanded in the bill, to remain in force permanently, unless the defendants themselves showed cause sufficient to authorize the court to dissolve it.

There are several decisions of the Circuit Court of Appeals and of the Circuit and District Courts of the United States upon the construction of the statute we are considering; but they are not in harmony, and the main question involved in this case has not, so far as we have been able to find, been presented directly to the Supreme Court; but in *Re Tampa Suburban Railroad Company*, 168 U. S. 583, 18 Sup. Ct. 177, 42 L. Ed. 589, the reasons assigned by the court for the denial of a writ of certiorari we think sustain the view that an appeal will lie from a preliminary restraining order. In that case, as stated, there was an application for the review of two interlocutory orders, the one a preliminary restraining order and the other appointing a receiver and continuing the injunction in aid of the receivership. Chief Justice Fuller, in delivering the opinion refusing the writ, cites the seventh section of the Judiciary Act of March 3, 1891 (26 Stat. 828, c. 517) as amended by Act February 18, 1895, c. 96, 28 Stat. 666, and Act June 6, 1900, c. 803, 31 Stat. 660 (U. S. Comp. St. 1901, p. 550), and says that:

"An appeal to the Circuit Court of Appeals might have been taken from these orders or from an order refusing to set them aside and dissolve the injunction."

And in *Smith v. Vulcan Iron Works*, 165 U. S. 518, 17 Sup. Ct. 407, 41 L. Ed. 810, Mr. Justice Gray delivered the opinion, which

involved to some extent a construction of the above-mentioned statute, and in the course of the opinion he said:

"The manifest intent of this provision, read in the light of the previous practice in the courts of the United States, contrasted with the practice in courts of equity of the highest authority elsewhere, appears to this court to have been, not only to permit the defendant to obtain immediate relief from an injunction, the continuance of which throughout the cause might seriously affect his interest, but also to save both parties from the expense of further litigation, should the appellate court be of the opinion that the plaintiff was not entitled to an injunction because his bill had no equity to support it."

The order of March 23, 1907, was at least a preliminary restraining order. It had all of the effects, so far as the defendants were concerned, of an injunction, because it forbade them to do the acts which the complainant sought to restrain, and this restraint was continuing, unless by subsequent action of the court, based upon good cause to be shown by the defendants, the order was vacated. We must conclude therefore that the order entered by the Circuit Court on March 23, 1907, was granted upon a hearing in equity, and that it is also an injunction, and, having come to this conclusion, it necessarily follows that the appeal was properly taken.

This court, in the opinion filed by it in the case of *Walter H. Taylor, Trustee, v. Norfolk & Ocean View Railway Company* (decided during the present term) 162 Fed. 452, a case involving the facts now presented for our consideration, affirmed the right of the court below to restrain all proceedings relating to the underlying turnpike mortgages, until the condemnation suit concerning the right of way now claimed by the appellee, the Norfolk & Ocean View Railway Company, could be completed. That decision in effect disposed of the questions of jurisdiction now relied on by the appellant, and, as this appeal presents no disputed fact, none of the defendants below having either demurred, answered, or pleaded, it would not be proper for this court to now pass on the merits of the claim presented in the petition of the appellee, Breese, as that will be done by the court below in due time. Let the case be remanded, with permission to the defendants below to make such defense to the petition as they respectively may find proper, and for such further proceedings as to equity appertains. The costs in this court will be paid, one-half by the appellant, and one-half by the appellees.

Affirmed.

ELLIS v. SOUTHERN RY. CO.

(Circuit Court of Appeals, Fourth Circuit. July 17, 1908.)

No. 689.

1. RAILROADS—INJURY TO PERSON ON TRACK—STATUTE REQUIRING CROSSING SIGNALS.

Civ. Code S. C. 1902, § 2132, which requires a bell to be rung or whistle sounded on every railroad engine for at least 500 yards before it crosses any highway or street or traveled place, was designed to protect travelers at such crossings, and, as construed by the Supreme Court

of the state, has no application to the case of a person injured or killed on the track at any other place.

2. SAME—CONTRIBUTORY NEGLIGENCE.

Plaintiff's decedent, who, after flagging a fast train on defendant's railroad in the darkness, at a point some 140 yards from a station, started to walk down the track to the station ahead of the train, but was struck and killed by the train, which did not stop, *held* chargeable with contributory negligence which precluded a recovery for his death.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1293, 1294.]

In Error to the Circuit Court of the United States for the District of South Carolina.

J. P. K. Bryan, for plaintiff in error.

Joseph W. Barnwell (B. L. Abney, on the brief), for defendant in error.

Before GOFF and PRITCHARD, Circuit Judges, and MORRIS, District Judge.

GOFF, Circuit Judge. This writ of error is prosecuted from a judgment rendered in the Circuit Court of the United States for the District of South Carolina. The suit was instituted by the plaintiff in error against the defendant in error for damages alleged to have been caused by the negligence of the Southern Railway Company, resulting in the death of W. J. Ellis. The plaintiff alleges: That the deceased, who was the husband of L. D. Ellis, his administratrix, went to a regular station of the Southern Railway Company in South Carolina, known as Furman, about 4 o'clock of the morning of March 3, 1902, for the purpose of becoming a passenger on one of the trains operated by that company; that said station is located near where that railroad crosses a public highway; that soon after he reached the station a passenger train then due to arrive appeared in sight, whereupon he—said station being a signal station—gave the usual sign for it to stop, and that those in charge of the train responded by the usual locomotive whistle, indicating that the train would stop, but that they willfully, maliciously, wantonly, carelessly, and negligently ran the train by the station without first for 500 yards before reaching the public highway and station ringing the bell or sounding the whistle on the locomotive; that the train went by said station at an exceedingly high rate of speed, and willfully, maliciously, wantonly, carelessly, and negligently struck the person of said W. J. Ellis with some part of the locomotive, whereby he was instantly killed; that he left, surviving him, a wife and seven minor children, for whose benefit the suit was instituted and prosecuted. The answer of the defendant denied the allegations of the plaintiff, and alleged that the injury which caused the death of W. J. Ellis would not have occurred but for his negligence and his want of care in placing himself upon the track of the defendant's railway when its train was then due and approaching, and in remaining on said track where he could be struck, which said negligence contributed to his injury as the proximate cause thereof. The case came on regularly to be heard before the court and a jury, when, at the close of the testimony offered by the plaintiff below, the court,

on motion of the defedant below, directed a verdict in its favor. The writ of error now under consideration was then sued out.

The testimony shows: That W. J. Ellis, intending to go from Furman, in South Carolina, to a point in Florida, desired to take passage on the fast train of the defendant from the north, which did not regularly stop at that station, but that under the rule of the company should stop there when duly flagged. That he drove in a buggy accompanied by two of his friends, about the hour of the morning mentioned in the complaint, to the public road where it crossed the railroad track about 140 yards to the north of Furman station. That they had started from said crossing going toward the station when the train was observed to be approaching, at which time he said to one of those with him, "jump down and go across and wave the train," when the party so requested—this party being a witness at the trial—jumped from the buggy, crossed to the sidetrack, and struck some matches which were applied to a roll of paper in the hands of the decedent, who by this time had joined him. That the blazing paper was waved over the track. That two whistles were sounded from the locomotive. That the decedent said: "Let's go to the station. They are going to stop for us." That the two then started down the track towards the station, Ellis, following behind the party so subsequently examined as a witness, saying to him three different times: "Get off the track." That the party so spoken to got off the track and walked the space between the main and the side track, which was from six to eight feet wide, and that he, alarmed, and not knowing which was the main track, sat down on the ground and was not injured. That the train did not stop, but passed by at a high rate of speed, striking the decedent, who was on the main track, and killing him instantly. That the point at which the body of Ellis was found was somewhere between 20 and 40 feet of the station, and near the point where persons desiring to enter the cars usually did so after the train had been flagged. That the watch, some silver coin, and other effects of the deceased were found still north of that point, and nearer the highway crossing.

The facts relating to this deplorable accident are few, and there is really but little controversy concerning them. As we see the case there are but few questions of law applicable to the facts presented by the record, though counsel for plaintiff in error has, with great research and ability, presented for our consideration questions which he insists are fairly raised by the evidence, but which we are constrained to say we find not to be pertinent.

In addition to the principles of the law generally applicable to cases of this character, the plaintiff in error relies upon a statute of the state of South Carolina which reads as follows:

"A bell of at least thirty pounds weight and a steam whistle shall be placed on each locomotive engine, and such bell shall be rung, or such whistle sounded, by the engineer or fireman, at the distance of at least five hundred yards from the place where the railroad crosses any public highway or street or traveled place, and be kept ringing or whistling until the engine has crossed such highway or street or traveled place." Civ. Code S. C. 1902, vol. 1, p. 820, § 2132.

While it is true that this statute, construed in connection with other provisions of the South Carolina Code applicable thereto, has been held by the courts of the state as indicating that the injury of a person by collision with trains at a "public highway or street or other traveled place" is prima facie evidence of negligence on the part of the railroad company, nevertheless, as the undisputed testimony here shows that the deceased met his death not on a public highway or street or traveled place, nor at a station, but on the main track of the Southern Railway Company, some distance from a public highway or traveled place, we must hold from the facts here disclosed that said statute has no bearing on this case.

The Supreme Court of South Carolina, in *Neely v. Railroad Co.*, 33 S. C. 139, 11 S. E. 636, said:

"Section 1483, Gen. St. 1882 (now section 2132, Civ. Code 1902), requires railroad corporations to ring a bell or sound a steam whistle at the distance of at least 500 yards from the place where the railroad crosses any public highway or street, or traveled place, to be kept ringing or whistling until the engine has crossed such highway or street, or traveled place, in the neglect of which, by section 1529, supra (now 2139), the corporation is made liable for any injury resulting from a collision at such crossing, unless it is shown that in addition to a mere want of ordinary care the person injured, etc., was at the time of the collision guilty of gross and willful negligence, etc. Now, there can be no doubt but that the object of these sections was to prevent collisions which might occur between persons attempting to cross the track of the railroad and the locomotive and cars approaching the crossing at the same moment, and the provisions of the act did not include, nor was the act intended to include, injuries inflicted upon bystanders not intending to cross, or upon cattle that happened to be killed or injured pasturing nearby, but not upon the crossing or using it to pass from the one side to the other."

Deceased was, at the time he was killed, on the main track going toward the station, with his back to the approaching locomotive. He was anxious to stop the train. He was evidently late in reaching the vicinity of the station, was surprised when he reached the crossing, several hundred feet from the station, to see the train rapidly approaching, was in a hurry, greatly excited, considerably confused, evidently in doubt as to which was the main track, and very anxious to signal and stop the train so that he might proceed upon his journey. He was solicitous for the safety of his companion, whom he continually cautioned, and he seemed to be unmindful of himself, although he was in great danger. It is evident that he misconceived the situation, and that his judgment was at fault. He was under the impression that the signal had been observed, and that the train would stop, and he must have thought that he was on the sidetrack, for he knew that the train would have to pass the point where he was in order to reach the station, which was still some distance before him. Had he observed the caution that his companion did, a warning that he himself suggested, he would not have been injured.

It may be admitted that the train did not give the proper signals for either the crossing of the county road, or for the station, and still the deceased, who necessarily knew that the train was very near him, who had heard and seen and aided in the effort to flag it, who cautioned another to keep out of its way, was not absolved from the rule

which required at least ordinary care, prudence, and caution on his part, which, instead of observing, he entirely ignored, and by his conduct contributed to a degree seldom equaled to the lamentable accident in which he was so fearfully involved. Why he followed the main track, instead of using the sidetrack, or the space between the tracks, or the road that led from the crossing to the station, we may surmise concerning, but will never know. At that time he should have made vigilant use of his senses, and should have exercised the care required to avoid the danger that was not only possible but was then imminent.

We conclude that the court below was right in reaching the conclusion that there was "no legal ground upon which any verdict in favor of this plaintiff can be sustained," and we further find that said court was justified by the testimony before it, in saying:

"This unfortunate deceased, from all the testimony a very reputable and good man, husband, and father, came to his death by accident the result of his own carelessness."

As we are forced to the conclusion that under the law no recovery can be had in favor of the plaintiff in error, upon any view which can be properly taken of the facts the evidence tends to establish, it follows that there is no error in the judgment complained of.

Affirmed.

ATLANTIC TRUST & DEPOSIT CO. v. TOWN OF LAURINBURG.

(Circuit Court of Appeals, Fourth Circuit. July 18, 1908.)

No. 816.

1. MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—CONTRACTS—CONSTRUCTION—CONTRACT TO COMPLETE WATER SYSTEM.

A town had plans and specifications made for a complete water and sewer system, and advertised for bids for the same, all of which were rejected because they exceeded \$34,000, which was all the town purposed to expend. The engineer of the Southern Contracting Company, which was the lowest bidder, then proposed that his company would construct the system within such limit, if certain changes were made in the specifications, and, his proposal being accepted, a resolution prepared by him was adopted "that the plans and specifications by * * * be revised for a completed plant, without extras, and be constructed by the Southern Contracting Company at cost plus 10 per cent. for material furnished and work done, the total amount not to exceed \$34,000." The company then gave a bond, with defendant as surety, conditioned for the performance of the contract "for the amended construction of a water and sewer system" for the town "upon a basis of 10 per cent. upon the materials and labor furnished, not to exceed \$34,000." The bond also gave defendant the right to complete the contract on default by the principal. The company, after doing a part of the work, abandoned the same, and, defendant refusing to complete it, the town did so, as authorized by the contract, at a total cost largely exceeding \$34,000. Held, that the contract was not one to do work for the town on account of its water and sewer system to the extent of \$34,000 on a commission of 10 per cent., but was one for the completion of the system in accordance with the amended specifications at a cost not to exceed \$34,000, and less if the actual cost, including 10 per cent. profit to the company, should be less, and that defendant was liable to the town for the damages sustained by its breach, to the extent of the penalty named in the bond.

2. SAME—ACTION ON BOND—EVIDENCE.

In an action on such bond, in which the declaration alleged a breach of the contract by abandonment of the work, to the damage of the town in the full penalty of the bond, the town was entitled to prove what it did in completion of the work in accordance with the specifications, and the amount expended therein.

3. BONDS—ACTION—PLEADING.

In an action of debt on a bond with collateral conditions, the declaration is not required to set forth the damages alleged, but only the breaches; and when the breach alleged is the abandonment of the contract, the performance of which the bond was given to secure, and the damages are alleged to equal the full penalty of the bond, the specific details of damages cannot be required to be set out.

4. PRINCIPAL AND SURETY—SURETY COMPANIES—RULES GOVERNING OBLIGATION OF SURETY.

The strict rules governing the liability of sureties growing out of the ordinary relations of creditor and simple surety are not as fully applicable to the contracts of a bonding company insuring the performance of contracts as a business and for profit.

In Error to the Circuit Court of the United States for the Eastern District of Virginia, at Norfolk.

John L. Jeffries and Harry K. Wolcott (Jeffries, Wolcott & Wolcott and Floyd Hughes, on the brief), for plaintiff in error.

M. L. John and Luther B. Way (Pender & Way, on the brief), for defendant in error.

Before PRITCHARD, Circuit Judge, and BOYD and DAYTON, District Judges.

DAYTON, District Judge. This was an action of debt upon a bond with collateral conditions, instituted by the town of Laurinburg, a municipal corporation of North Carolina, against the Atlantic Trust & Deposit Company, a Virginia corporation, engaged in the guaranty and bonding business. The defendant entered some 9 different pleas and filed a statement of 12 different grounds of defense. A trial by jury was had, resulting in a verdict and judgment for \$9,000 for the plaintiff and the defendant took 16 bills of exception thereto. Twenty-two assignments of error are now here relied on to reverse this judgment.

It seems the town, having a limited sum of money in hand for the purpose, undertook the installation of a complete water and sewer system. To this end, through a commission created by it, full plans and specifications were prepared for such system on the basis of a cost not to exceed \$34,000. Bids were advertised for, and the Southern Contracting Company, a Virginia corporation, was found to be the lowest bidder at a price of \$37,500. This and all other bids were rejected, because the town authorities determined not to exceed in cost the \$34,000 limit. This was on July 7, 1906. On the 19th of the same month, Kitson, engineer of the Southern Contracting Company, again entered into negotiation with the town's commission, and agreed to reduce the contracting company's bid to \$34,000, provided some extras in the way of house connections, in no way impairing the system as a whole, were cut out. This offer was accepted, and the contract was signed by the town and by the company, and the

\$1,000 check in forfeit was deposited. Kitson went back to Norfolk, and after a lapse of time returned and announced that his company could not do the work outlined in the plans and specifications for \$34,000, and that, unless some other arrangement could be made, his company would have to forfeit the \$1,000. He urged that there was still a large amount of work set forth in the plans and specifications which could be dispensed with, and that if the town would have its engineer revise its plans, leaving off all the streets and parts of the work specified by him, his company would undertake to construct a complete system, according to such revised plans, for not to exceed \$34,000, and complete it by February 15, 1907. The town acceded to this, and incorporated into the contract by means of a resolution prepared by Kitson himself:

"That the plans and specifications by J. M. Bandy be revised for a completed plant without extras, and be constructed by the Southern Contracting Company at cost plus 10 per cent. for material furnished and work done, the total amount not to exceed \$34,000."

This was on August 8, 1907, and Bandy did revise his plans, eliminating all streets and parts of streets agreed upon. Kitson took this contract to Norfolk, and returned by mail the indemnity bond of the contracting company, signed by the defendant trust company as surety, upon which this action was brought, whereby the contracting and trust companies bound themselves jointly and severally to the town in the penalty of \$9,000 to indemnify any default in the conditions and obligations of the contract. The contracting company went on with the work until about 60 per cent. of it was completed and near \$33,500 of the price had been expended, then abandoned it, went into bankruptcy, and its receiver declined to finish the work. The defendant trust company also refused to complete the work and denied liability. The town did complete it at an expense of more than \$10,000.

Notwithstanding the numerous exceptions and assignments of error, the case does not involve any great difficulty. Most of the controversy turns upon the construction to be given the clause of the contract written into it by the contracting company itself, through Kitson, its engineer and agent, which we have quoted above, and which was guaranteed by the trust company for a monetary consideration. The words used in this guaranty bond are:

"Whereas, said principal has entered into a certain written contract, a copy of which is hereto attached and made a part hereof, bearing date the 8th day of August, A. D. 1906, wherein they agree to furnish materials and labor for the amended construction of a water and sewer system for the town of Laurinburg, N. C., upon a basis of 10 per cent. upon the materials and labor furnished, not to exceed \$34,000, in accordance with plans made by J. M. Bandy, engineer in charge, by February 15, 1907: Now, therefore," etc.

By the trust company it is contended substantially that, under the terms of the contract referred to, the contracting company only undertook to do work for the town on account of its sewer and water system to the extent of \$34,000 on a commission of 10 per cent. profit over and above cost of labor and material. On the contrary, it is contended by the town that the true construction shows that this company undertook to secure to the town a completed water and sewer

system, according to certain amended plans and specifications, at a price not to exceed \$34,000, which was to include a 10 per cent. profit to it on the actual cost of labor and material. The terms of the contract, of the specifications, of the indemnifying bond, and the conditions and circumstances, all show beyond all question, in our judgment, that the first contention cannot be true, and that the second one, as held by the court below, was the true purpose and intent of the parties. It is needless to say the contract is to be read as a whole, and each clause thereof is to be read in connection with the others, so as, if possible, to give effect to each and all. It is needless, also, to say that the party who writes a contract, or any of its clauses, must have such read most favorably to the other party; where any ambiguity exists. The clause in question may well and properly be construed to provide that the plans of Bandy, the town's engineer, were to be revised—

"for a completed plant without extras, and be constructed [that is, the complete plant, as provided for by the revised plans] by the Southern Contracting Company at cost plus 10 per cent. for [that is, over the cost of] material furnished and work done, the total amount [that is, of cost of complete plant, as provided by the revised plans and the 10 per cent. compensation] not to exceed \$34,000."

The obligation of the bond was to guarantee "the amended construction of a water and sewer system," and it was to be done in accordance with plans made by J. M. Bandy, engineer in charge, by February 15, 1907. With nothing else before us than these two clauses, one from the contract and the other from the bond, how could we draw any other conclusion than the one given to them by the court below? We must remember, too, that in addition to this the advertisement set forth the intention to be "to let the entire work"; that "lump sum bids" were called for, by reason of which "no classification of material" was to be specified, "hence any and all qualities of material must be included in the lump sum bid"; that the contract in other clauses than the one in question provided that the contracting company agreed "to construct one or both [water and sewer] systems in a good substantial and workmanlike manner," to begin construction "not later than August 7, 1906," and "complete the same, and the whole thereof, on or before 15th day of February, 1907"; that "all plans, drawings, profiles, and specifications on file in the mayor's office, and all subsequent drawings, supplementing more particularly the work herein contemplated, are mutually held to be controlling parts of this contract"; that, "to prevent all suits and litigation, it is further agreed by and between the parties to this contract that the engineer shall in all cases determine the amounts of work done which are to be paid for under the contract; that he shall be the judge of the manner of construction, the quality of materials, and of the interpretation of the specifications; that he shall decide all questions which may rise relative to the carrying out of this contract, and that his estimates, figures, measurements, directions, and decisions shall be final and conclusive"; that 10 per cent. of the money was to be retained by the town "until the whole work is properly completed, and all the provisions of the contract complied with to the satisfaction

of the engineer"; that, "in case the contractor shall fail in the performance," then the town should have the right either "to relet the undertaking of said contract, or any part thereof," or "complete the work" itself at the cost of the contractor.

It is further to be remembered that the bond, wholly prepared by the trust company, surety, expressly guaranteed to save harmless the town "from pecuniary loss resulting from the breach of any of the terms, covenants, and conditions of the said contract," upon conditions, first, that notice within 30 days of default should be given the trust company, surety; second, that such surety company should have, at its option, the right to complete the contract; third, that the surety company should not be liable in any event for a sum in excess of the penalty of the bond, nor subject to any action unless instituted within six months after first breach of the contract; and, fourth, that such surety should not be liable for damages for work destroyed by act of God, the public enemies, mobs, riots, civil commotion, or by employes on strike. With all these provisions in the contract and bond, no other conclusion can be reached than that this was a contract for a "completed system" and not "on a percentage basis, 10 per cent., plain force job." It would be in no effect different from a contract made by A. with B. for the building of a house according to fixed plans, the cost of which, in no event, should exceed \$34,000, and to be as much less as the cost of labor and material with 10 per cent. added for the builder's profit should turn out to be less than this sum. The liability to complete the system if it should exceed this sum was clearly assumed by the contract and guaranteed by the bond. Having reached this conclusion, the other defenses set up can be readily disposed of, because they are purely technical in character.

Defendant's exceptions 1, 2, and 3 relate to the overruling of the motion to exclude the contract as evidence. The contract was executed in triplicate, and the receiver of the contracting company and Bundy, the mayor of the town, clearly identified the copy introduced as one of the triplicate ones.

Exceptions No. 4 and 6 were to the admission of evidence tending to show what steps the town took to protect and complete the work after default made, and are based upon the idea that such evidence tended to prove special damages not set forth in the declaration. We can see no merit in this contention, for the reason, among others, that the declaration alleges substantially the breach of the contract to have arisen from the abandonment of, and failure to complete, the work, to the damage of the town the full penalty of the bond. It expressly sets forth the terms of the bond based upon the contract. The bond gave the surety company the option to complete the work. The contract gave the town the right to complete it if the contracting company or its surety did not. In completing it the town necessarily had to show that it had, with reasonable care as to expense and within the bounds of the specifications, completed the work at a cost in excess of the penalty of the bond. This evidence tended directly to show this, and was entirely proper and pertinent. Again, in an action of debt upon a bond with collateral conditions, the declaration is not required to set forth the damages alleged, but only the

breaches. If these breaches relate to specific acts, such as, in this case, might have been the use of defective pipe or other material, the improper and defective excavations made, and other specific charges of a like character, the defendant before trial could have asked the court to require the plaintiff to file a definite statement of damages to be claimed as a result of such breaches in particular details of the work; but this demand must be made before trial, and, where the breach alleged is simply one of abandonment of the work, the damages for which are alleged to equal the full penalty of the bond, no such statement, even if asked for before trial, would be required to be filed.

Exceptions 5 and 8 are taken to the court's refusal, first, after conclusion of plaintiff's evidence, and, second, after the introduction of all the evidence, to direct a verdict for the defendant. In support of these motions it was urged, in addition to the matters set forth in the exceptions already considered, that (1) material changes were made in the location and character of the work; (2) the time of payment was changed, and made semimonthly, instead of monthly; (3) the 10 per cent. was not reserved; and (4) the town guaranteed and paid an order for \$12,000 worth of material. All of these objections were without merit. The contract and specifications, fairly construed, we think, authorized reasonable changes under the direction of the town's engineer, as he was to be the judge of the "manner of construction" of the system, and his plans and "subsequent drawings, supplementing more particularly the work herein contemplated, are mutually held to be controlling parts of this contract." But, if this were not so, it is undisputed that the changes made were all in favor of the contractor, and in the aggregate lessened his liability under the contract several hundred dollars. Fully recognizing the rule of *strictissimi juris* as applying to contracts growing out of the ordinary relation of creditor and simple surety, we cannot and do not recognize this rule as applying to contracts underwritten by these bonding corporations, whose business it is (and a profitable one, too, it would seem, from the number organized and existing) to insure, for a monetary consideration, the obligee against a failure of performance on the part of the principal obligor. In such cases, before such bonding company can be released, it must show that the changes made in a contract like this, guaranteed by it, operated injuriously to affect its rights and liabilities. The Supreme Court of the United States has said:

"The rule of *strictissimi juris* is a stringent one, and is liable at times to work injustice. It is one which ought not to be extended to contracts not within the reason of the rule, particularly when the bond is underwritten by a corporation which has undertaken for a profit to insure the obligee against a failure of performance on the part of the principal obligor." *United States F. & G. Co. v. U. S.*, 191 U. S. 416, 24 Sup. Ct. 142, 48 L. Ed. 242.

The very reason for the existence of this kind of corporations, and the strongest argument put forward by them for patronage, is that the embarrassment and hardship growing out of individual suretyship that give application for this rule is by them taken away; that it is their business to take risks and expect losses. If, with their

superior means and facilities, they are to be permitted to take the risks, but avoid the losses, by the rule of *strictissimi juris*, we may expect the courts to be constantly engaged in hearing their technical objections to contracts prepared by themselves. It is right, therefore, to say to them that they must show injury done to them before they can ask to be relieved from contracts which they clamor to execute. In this case no injury, but benefit, came to this defendant from all the changes made, and from the town's guaranteeing the material order and advancing the money for the contracting company to advance and perform the work, and its exceptions because of these are groundless.

Exception 7 relates to the refusal of the court to allow testimony to be introduced touching a wholly independent contract between the town and the contracting company for work done in "the mill district." Such testimony was wholly irrelevant, and was properly excluded.

Finally, exceptions 9, 10, 11, 12, 13, 14, and 15 relate to instructions refused and to charges given by the court to the jury. No. 16 is to a refusal to set aside verdict and award new trial. It is sufficient for us to say that we have carefully considered the charge delivered to the jury by the court below, and in our judgment it was a clear, concise, fair, and complete exposition of the law governing the case.

We see no error in the judgment of the court below, and it is affirmed.

DILLINGHAM v. BOOKER et al.

(Circuit Court of Appeals, Fourth Circuit. July 17, 1908.)

No. 729.

HABEAS CORPUS—NATURE OF RESTRAINT—UNLAWFUL ENLISTMENT OF MINOR.

The civil courts should not interfere by habeas corpus to discharge a minor under 18 years of age who has been enlisted in either the military or naval service without the consent of his parents or guardian, if at the time of the presentation of the petition for the writ the minor is under arrest and held for trial by court-martial on a charge of desertion or fraudulent enlistment or other charge cognizable by a military or naval court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Habeas Corpus, § 16.]

Appeal from the District Court of the United States for the Eastern District of Virginia.

L. L. Lewis, U. S. Atty. (Robert H. Talley, Asst. U. S. Atty., on the brief), for appellant.

Before GOFF and PRITCHARD, Circuit Judges, and BOYD, District Judge.

GOFF, Circuit Judge. This appeal is from an order of the District Court of the United States for the Eastern District of Virginia, discharging on habeas corpus from the United States navy the appellee William Booker.

The record before us shows: That on the 23d day of April, 1906, William Booker enlisted as an apprentice seaman in the United States navy for the term of four years. That at the time of such enlistment he stated on oath that he was born at Osceola, Ind., on December 16, 1886. That on the 7th day of May, 1906, he deserted from the United States receiving ship Franklin, then at Norfolk, Va. That the appellant, the commanding officer of that vessel, offered a reward for his apprehension and return. That on October 6, 1906, he was returned to the appellant, having been arrested in the state of Indiana. That, as required by the laws relating to the government of the navy, court-martial proceedings were recommended by said commanding officer, and he was held for trial on the charge of desertion. That on October 8, 1906, the appellee Rooney Booker filed his petition asking for the discharge upon habeas corpus, of his son, the appellee William Booker. That the court below entered an order requiring the appellant to have the body of said enlisted seaman before the court at Norfolk, on October 15, 1906. That after the service of the said writ the court-martial proceedings were held in abeyance, until the hearing before the court, William Booker in the meanwhile being kept confined on board the United States ship Richmond. That as commanded by said writ the body was duly produced in court together with the return showing the cause of detention, when the appellees proved that William Booker was under the age of 18 years at the time he enlisted, and his enlistment was without the consent of his parents. That the return to the writ set forth, in substance, the facts hereinbefore mentioned, and asked that said seaman be returned to the custody of the respondent so that trial by court-martial for fraudulent enlistment and desertion might be had. That on the hearing the court below entered an order containing, among other provisions, the following:

"It appearing to the court that William Booker, being under the age of 18 years, was enlisted in the United States navy without the consent of his parent, the petitioner, and that consequently the said enlistment is illegal and in contravention of the statute in such case made and provided, and that the said William Booker is now unlawfully restrained of his liberty, it is further ordered by the court that the said William Booker be forthwith discharged from the custody of the said A. C. Dillingham and the United States navy, and be restored to the custody of his father."

That after such order had been entered the appellant asked for and was allowed the appeal now under consideration.

It is insisted by appellant that the court below erred in refusing to remand William Booker to the custody of the United States naval authorities, when it was clearly shown that he was being detained for trial on the charge of desertion, and that he was also liable to be proceeded against on the charge of fraudulent enlistment.

It is provided by statute that fraudulent enlistment is an offense against naval discipline, punishable by general court-martial. Act March 3, 1893, c. 212, 27 Stat. 716 (U. S. Comp. St. 1901, p. 1006). The Revised Statutes authorize the enlistment of boys between the ages of 16 and 18 years, with the consent of their parents or guardians. Section 1419, Rev. St. (U. S. Comp. St. 1901, p. 1007). The appellee

William Booker made oath when he was enlisted that he was over the age of 18 years, thereby rendering it unnecessary to secure the assent of his parents, and seemingly making his enlistment legal. Consequently, even though he was entitled to his discharge as a seaman, because he had not in fact been lawfully enlisted, it does not follow that he was not amenable to trial under the statute cited.

But, also, it was shown beyond question that he was being held for trial by court-martial for the crime of desertion, as provided for in the articles for the government of the navy. Section 1624 of the Revised Statutes (U. S. Comp. St. 1901, p. 1105) says:

"Such punishment as a court-martial may adjudge may be inflicted on any person in the navy, * * * who in the time of peace deserts or attempts to desert."

We think that the naval authorities had jurisdiction to hold and to try the appellee William Booker for both of the offenses mentioned. Such trials would necessarily have been as provided for by court-martial, and as such court would have had jurisdiction of such charges, the writ of habeas corpus should have been denied, pending the action of such court. *Grimley's Case*, 137 U. S. 147, 11 Sup. Ct. 54, 34 L. Ed. 636; *Smith v. Whitney*, 116 U. S. 167, 177, 6 Sup. Ct. 570, 29 L. Ed. 601; *Ex parte Mason*, 105 U. S. 696-699, 26 L. Ed. 1213; *Dynes v. Hoover*, 20 How. 65, 82, 15 L. Ed. 838.

The Supreme Court, in considering the crime of desertion in *Kurtz v. Moffitt*, 115 U. S. 487, 6 Sup. Ct. 148, 29 L. Ed. 458, said:

"From the very year of the Declaration of Independence, Congress has dealt with desertion as exclusively a military crime, triable and punishable in time of peace as well as in time of war, by court-martial only, and not by the civil tribunals; the only qualification being that since 1830 the punishment of death cannot be awarded in time of peace."

The crime of fraudulent enlistment is exclusively a military or naval offense, triable and punishable only by the court-martial, and it has been found necessary so to legislate in order to maintain the discipline and efficiency of the military and naval establishment of the government.

The appellee William Booker did enlist as an apprentice seaman, and did serve as such until he deserted. It may be admitted that he fraudulently enlisted. Still he was both *de facto* and *de jure* in the navy, until discharged therefrom by operation of law, and while he was so a seaman, he was subject to the rules and regulations of the navy, and liable to be tried and punished for any infraction of the laws relating thereto. To hold otherwise will make enlistment a farce, will destroy discipline, and offer a premium for desertion. It will not do to hold that he cannot be punished by court-martial for crimes committed when he was in the naval service, simply because his parents did not consent to his enlistment. The lack of such consent will necessitate his discharge from the service, but it will not absolve him from punishment for the crimes he committed when in the service.

The Circuit Court of Appeals for the Fifth Circuit, in *United States v. Reaves*, 126 Fed. 127, 60 C. C. A. 675, said:

"In the present case the minor had deserted the naval service. The executive authority, as appears by the return, had acted by proclaiming him a de-

serter, and offering a reward for his arrest, and he had been arrested before the writ was issued. And the case further shows that within a reasonable time after the arrest, and before the judgment in the Circuit Court, the Secretary of the Navy preferred formal charges for fraudulent enlistment and desertion. These charges can only be tried before a naval court-martial. Under this state of facts, on principle and authority, it must be held that the jurisdiction of the naval courts had fully attached, and that the naval authorities are entitled to the custody of the minor, notwithstanding the enlistment was without consent of his father and voidable on his demand."

In re Miller, 114 Fed. 838, 52 C. C. A. 472, Judge Shelby, speaking for the court said:

"That he (the minor) could not, but that the parents could, secure his release from the contract of enlistment, seems clear; * * * but that is very different from obtaining release in immunity from a prosecution for an offense committed against law. * * * His enlistment having made the prisoner a soldier, notwithstanding his minority, he is amenable to the military law just as the citizen who is a minor is amenable to the civil law. * * * When an enlisted soldier is imprisoned by military authority upon a charge of desertion or other military crime, a civil court will not interfere on habeas corpus when such military authorities have jurisdiction; and if a minor, over the age of 16 years, enlisted in the service, is so charged and detained, a civil court will not, either on his own application or that of his parents or guardian, discharge him until he has been released from the prosecution pending against him."

We are of opinion that the contention of appellant is well sustained by principle and authorities that the civil courts should not interfere by habeas corpus to discharge a minor under 18 years of age, who has been enlisted in either the military or naval service without the consent of his parents or guardian, if at the time of the presentation of the petition for the writ such minor is under arrest and held on any charge cognizable by either a military or naval court.

There is error in the order of the court below discharging the appellee William Booker, and the same will be reversed. This cause is remanded, with directions that said appellee be returned to the custody of the appellant to be further dealt with as authorized by law. His discharge from the service should not be ordered until the court-martial has disposed of the pending charges.

Reversed.

In re EAGLE HORSESHOE CO.

MILWAUKEE TRUST CO. v. FIDELITY TRUST CO.

(Circuit Court of Appeals, Seventh Circuit. April 14, 1908.)

No. 1,419.

FIXTURES—BETWEEN MORTGAGOR AND MORTGAGEE OF LAND—ANNEXATION OF MACHINERY TO REALTY.

Under the decisions of the Supreme Court of Wisconsin, as well as those of the Supreme Court of the United States, in manufacturing plants, where machinery is purchased and used in connection with the plant, the intention to devote such machinery to the use of the realty, accompanied with the act of bringing it on the realty, amounts to annexation, as between mortgagor and mortgagee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fixtures, §§ 32-41.]

Appeal from the District Court of the United States for the Eastern District of Wisconsin.

J. H. Marshutz, for appellant.

Wheeler P. Bloodgood, for appellee.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

GROSSCUP, Circuit Judge. The petition is by the Fidelity Trust Company, Trustee under a certain trust deed dated September 1, 1904, executed by the bankrupt upon certain real estate situated in the County of Milwaukee, and State of Wisconsin, "together with all the buildings, improvements and appurtenances thereon, and thereunto belonging," and is for an order authorizing the trustee to sell the same at public auction.

The plant covered by the trust deed consists of eleven acres of land upon which there are buildings equipped for manufacturing horseshoes and bar iron, comprising mills, office buildings, sheds, shanties and bins, machine shop, electric lighting plant, and warehouses.

In the making of bar iron and horseshoes, a large amount of scrap is used, in addition to the ordinary pig iron. To cut this scrap into lengths, shears are used, the shears being operated by machines weighing some ten thousand pounds, that are built upon brick and stone foundations. These and other shears, anchored to some portion of the building, are operated by an engine used for no other purpose.

In all of the mills there are roughing rolls of different diameters, made of steel, and weighing from nine hundred to one thousand pounds each; and in each of the mills there are ten extra rolls of this kind, some of them turned for use, and some unturned. Also tongs hung upon chains, wheels, and rods attached to the building, and duplicate tongs intended to take the place of these.

In the horseshoe factory there are certain punch presses, bolted to planks placed upon the floor, and connected with the main shafting by belts, the purpose of these presses being to punch holes in the creases of the horseshoes; as also certain emery grinders that are also bolted to the floor, and operated by belts connecting with the main shafting of the building, used for sharpening the tools in the horseshoe plant. Besides this, in the machine shop are certain planers, shapers, a bolt and screw machine, lathes and emery grinders, all of which were in use. And to light the plant there is an electric plant consisting of one general Edison Electric Company 20 kilowatt dynamo, on its own bed, side bolted and lag screwed to the floor, and directly connected by belting.

It is thus seen that with the exception of the extra roughing rolls, shears and tools intended to replace their counterparts adjusted to the machines when occasion arose, all the articles above described are attached, in some measure, to the realty. Indeed the argument of appellant in this court that the articles did not come within the conveyance, was confined to these extra rolls, shears and tools, the argument being that these were personal property, and not a part of the realty.

The court below having found in favor of the Fidelity Trust Company upon the issue thus raised, the sole question presented here is

whether the property thus enumerated was within the property conveyed under the trust deed.

Appellant contends that under the decisions of the Supreme Court of the State of Wisconsin, three concurring tests are essential, to make any article a fixture, viz.: (1) Actual physical annexation to the realty; (2) Application or adaptation to the use or purpose to which the realty is devoted; and (3) The intention on the part of the person making the annexation to make a permanent accession to the freehold. And if it be true as contended, that all these tests applied independently, must concur, appellant's contention respecting the extra rolls, tools, and the like, would have to be sustained.

But we do not so understand the ruling of the Supreme Court of Wisconsin, especially in cases not covering the relations of landlord and tenant. Our understanding of the decisions of the Supreme Court of Wisconsin is, that in manufacturing plants where machinery is purchased and used in connection with the plant, the intention to devote such machinery to the use of the realty, accompanied with the act of bringing it on the realty, amounts to annexation. *Gunderson v. Swarthout*, 104 Wis. 186, 80 N. W. 465, 76 Am. St. Rep. 860; *Spruhen v. Stout*, 52 Wis. 517, 9 N. W. 277; *Cooper v. Cleghorn*, 50 Wis. 113, 6 N. W. 491. And such is the "entity" doctrine adopted by the Supreme Court of the United States in *Hill v. National Bank*, 97 U. S. 450, 24 L. Ed. 1051—a doctrine that in the absence of any decision upon the question in Wisconsin (and no decision in Wisconsin contrary to that doctrine has been called to our attention) would determine the correctness of the order appealed from.

The order appealed from is affirmed.

UNITED STATES TOBACCO CO. v. AMERICAN TOBACCO CO. et al.

(Circuit Court, S. D. New York. July 10, 1908.)

1. MONOPOLIES—RESTRAINT IN INTERSTATE COMMERCE—STATUTES—MANUFACTURERS.

Act Cong. July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), provides: That every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is illegal; that every person who shall monopolize, or attempt to monopolize, or combine, or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several states or with foreign nations, shall be guilty of a misdemeanor; and that any person injured in his business or property by anything forbidden by the act may sue therefor. *Held*, that a mere agreement to monopolize the manufacture of an article of commerce is not prohibited, but that, in order to be within the act, the contract, combination, or conspiracy must be in itself in restraint of trade or commerce among the several states or with foreign nations, or, if a monopoly or attempted monopoly or combination or conspiracy to monopolize, it must be of some part of the trade or commerce among the several states or foreign nations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Monopolies, §§ 11.]

2. SAME—SCOPE OF AGREEMENT.

An agreement between defendants, manufacturers of licorice paste used in the manufacture of tobacco, provided that there should be no competi-

tion in price between them, and they, from time to time, agreed and maintained arbitrary and noncompetitive prices for paste at which it was actually sold in interstate commerce. Defendants also agreed with and induced certain competitors in the business to establish and maintain arbitrary and noncompetitive prices in excess of the normal and reasonable prices that would otherwise have prevailed, and also apportioned the interstate trade and commerce in such substance and of the customers of two of the manufacturers, arbitrarily fixing the amount of business they should do, and also so managed and agreed with another that the latter should only sell 1,000,000 pounds of paste during 1904, and not more than 50,000 pounds additional during each year for five years from December 31, 1903, and, if he sold more, he should pay to another of the defendant companies certain sums approximately equal to the profits of the excess. *Held*, that such agreement constituted an unlawful interference with interstate commerce, prohibited by Act Cong. July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), declaring that every contract, combination, or conspiracy in restraint of trade among the several states or with foreign nations should be illegal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Monopolies, § 13.]

Demurrers to Complaint. Action for treble damages under the provisions of Act Cong. July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), entitled "An act to protect trade and commerce against unlawful restraints and monopolies."

Harlan F. Stone, for plaintiff.

A. H. Burroughs, for defendants American Tobacco Company and MacAndrews & Forbes Company.

Nicoll, Anable, Lindsay and Fuller (De Lancey Nicoll, of counsel), for defendants James B. Duke and Karl Jungbluth.

RAY, District Judge. The plaintiff is a Virginia corporation engaged in the manufacture of plug and smoking tobacco and selling said articles of merchandise in the several states of the United States and in foreign countries and engaged in commerce among the said states. The American Tobacco Company, organized in 1904, is a New Jersey corporation, and defendant James B. Duke its president. The MacAndrews & Forbes Company is a New Jersey corporation, and defendant Karl Jungbluth is its president. The J. S. Young Company is a marine corporation, organized in December, 1903, and Howard E. Young is its president.

The American Tobacco Company is the result of the merger of three companies, viz., Continental Tobacco Company, Consolidated Tobacco Company, and the American Tobacco Company about October 1, 1904. This merger took place under the laws of the state of New Jersey and pursuant to an agreement, and all the debts, duties, and liabilities of the Continental Tobacco Company attached to the defendant American Tobacco Company. Duke, from December 8, 1893, was the president of the Continental Company and has been president of the American Company since its organization, and he and these companies are and have been engaged in carrying on business in interstate commerce in tobacco and articles manufactured therefrom. From about December 8, 1903, the defendants, MacAndrews & Forbes Company and said J. S. Young Company and their presidents, respectively, were engaged in carrying on business as manufacturers and dealers in licorice paste,

a valuable article of merchandise, useful and necessary in the manufacture of plug and smoking tobacco. These last-named companies had factories for its manufacture in different states. These companies and their presidents by authority of the companies sold large quantities of such licorice paste to manufacturers of plug and smoking tobacco, including the plaintiff company, throughout the United States, and in pursuance of the sales shipped same from their said factories to such manufacturers in other states of the United States than those wherein the said factories were situated. The said last-named companies and their presidents controlled more than 85 per cent. of the interstate business in such licorice paste of which the MacAndrews & Forbes Company had and controlled about nine-tenths and the said J. S. Young Company about one-tenth. Prior to the consolidation, etc., these companies were competitors in business, and the plaintiff charges that they would have continued to be competitors but for the alleged unlawful combination, conspiracy, contract, and agreement set out in the complaint, as follows:

"(a) Competition as to the price at which the said licorice paste was during said period sold and delivered by the said MacAndrews & Forbes Company and said J. S. Young Company, as between said corporation defendants and among them severally and their several competitors in said interstate business, trade, and commerce, was under the direction and control of the Continental Tobacco Company and of defendants, the American Tobacco Company and James B. Duke, as hereinafter stated, prevented and destroyed by the defendants herein agreeing among themselves that there should be no such competition, by the said defendants from time to time agreeing upon establishing, fixing, and maintaining arbitrary and noncompetitive prices for the said licorice paste so sold and delivered by the said defendants, MacAndrews & Forbes Company and J. S. Young Company and their several competitors in said interstate business, trade, and commerce as aforesaid, by their selling and delivering such licorice paste in such business, trade, and commerce at such arbitrary and noncompetitive prices, and by their agreeing with and inducing certain of the competitors of the said MacAndrews & Forbes Company and said J. S. Young Company, to wit, one John D. Lewis of Providence, R. I., engaged throughout said period in the manufacture and sale of and in interstate commerce in said licorice paste in the United States, and the Weaver & Sterry Company, Ltd., of New York City, N. Y., engaged throughout said period in the manufacture and sale of and in interstate commerce in said licorice paste in the United States, likewise to establish and maintain arbitrary and noncompetitive prices for said licorice paste, in said interstate business, trade, and commerce of such competitors, which said prices so agreed upon, established, fixed, and maintained by the defendants herein, and by said competitors, were greatly in excess of the prices which would at such times and during said period have prevailed for the said licorice paste in said interstate business, trade, and commerce of the said MacAndrews & Forbes Company and J. S. Young Company and their said competitors or any of them, and in excess of reasonable and normal prices for such licorice paste which would have prevailed in such business, trade, and commerce if said defendants had not engaged in said unlawful combination, conspiracy, contract, and agreement in restraint of said interstate trade and commerce, and if they had not attempted to restrain and monopolize said trade and commerce as aforesaid.

"(b) A division and apportionment of said interstate business, trade, and commerce, and of the customers of the said MacAndrews & Forbes Company and the said J. S. Young Company were made under and pursuant to the direction and control of the Continental Tobacco Company and of defendants, the American Tobacco Company and James B. Duke, as hereafter set forth, between the MacAndrews & Forbes Company and J. S. Young Company, by the terms of which division and apportionment as agreed upon by the Con-

tinental Tobacco Company and the defendants herein, and each of them, the customers with whom each of the said defendant corporations, the MacAndrews & Forbes Company and the J. S. Young Company, should deal, and to whom the said corporations should sell such licorice paste so arbitrarily fixed and agreed upon and the amount of the profits which the said defendant, J. S. Young Company, should be allowed from the total business carried on by the said defendants, MacAndrews & Forbes Company and J. S. Young Company, was arbitrarily fixed, determined, and agreed upon by said Continental Tobacco Company and defendants.

"(c) The defendants herein, and each of them, under and pursuant to the control and direction of the Continental Tobacco Company and defendants, the American Tobacco Company and James B. Duke, as hereinafter set forth, so contrived and managed and agreed that the said John D. Lewis contracted and agreed with the said J. S. Young Company that he would not sell more than 1,000,000 pounds of such licorice paste during the year 1904, nor more than 50,000 pounds additional during each year for five years from December 31, 1903, so that it was agreed that the total product of sale of John D. Lewis should be not more than 1,200,000 pounds during the year 1908; it being provided by the said agreement that if he, the said John D. Lewis, should sell more than said amounts during said years respectively, he was to pay to the said J. S. Young Company an amount of money approximately equal to his profits upon the quantity sold by him in excess of such amounts respectively, and that he should establish and maintain arbitrary and noncompetitive prices as hereinbefore set forth for all licorice paste sold by him, the terms and conditions of which said agreement were during said period duly complied with by the said John B. Lewis by his selling large quantities of such licorice paste at such prices.

"(d) The terms and conditions upon and under which during the said period sales of such licorice paste were made by the said MacAndrews & Forbes Company and J. S. Young Company in respect to discounts and times of payment for and of delivery of such licorice paste, and with respect to the form and character of all contracts under which the same was sold, were made non-competitive as between said MacAndrews & Forbes Company and J. S. Young Company in said interstate business, trade, and commerce, pursuant to agreement by and between the Continental Tobacco Company and the defendants, and each of them, as hereafter set forth."

The complaint then alleges that the said conspiracy, combination, contract, and agreement was brought about by the agencies set forth in the complaint, viz.:

"In 1902 the Continental Tobacco Company acquired control of the defendant MacAndrews & Forbes Company through ownership of a majority of the capital stock of the MacAndrews & Forbes Company having voting power, and thereupon said Continental Tobacco Company and defendant James B. Duke, in the attempt to establish a monopoly in the business of manufacturing and selling licorice paste in the United States, and in the aid of the establishment by the said Continental Tobacco Company of a monopoly in the manufacture and sale of tobacco and tobacco products in the United States, acquired through said MacAndrews & Forbes Company control of several competitors in the business of manufacturing licorice paste, to wit, the Mellor & Rittenhouse Company of Camden, N. J., and the Stamford Manufacturing Company of Stamford, Conn., so that in the summer of 1902 the principal manufacturers of licorice paste, who remained independent of the MacAndrews & Forbes Company and the Continental Tobacco Company, and carrying on business in competition with the said MacAndrews & Forbes Company, were the J. S. Young Company, a corporation organized under the laws of the state of New Jersey (predecessor of defendant J. S. Young Company) and the said John D. Lewis, and these the MacAndrews & Forbes Company in agreement with the Continental Tobacco Company and said James B. Duke undertook to drive out of business as independent manufacturers, and to that end sold and distributed licorice paste at greatly reduced prices and made special inducements to customers of their said competitors. That until the organization of the de-

endant the American Tobacco Company, as aforesaid, the business policy of the MacAndrews & Forbes Company was conducted and directed by the said Continental Tobacco Company and by the defendant James B. Duke, and the several acts of the several defendants, their agents and servants, herein set forth and constituting the combination, conspiracy, and agreement in restraint of trade and commerce herein complained of, until the organization of the said the American Tobacco Company, were dictated and directed by the said Continental Tobacco Company and the said James B. Duke, and upon the merger of the Continental Tobacco Company into the defendant the American Tobacco Company, as aforesaid, it then acquired control of the MacAndrews & Forbes Company through ownership of a majority of the shares of the capital stock of said MacAndrews & Forbes Company having voting power, and thereafter the business policy of the said MacAndrews & Forbes Company was directed and controlled by the defendant the American Tobacco Company, through and by the defendant James B. Duke, as its president, and the several acts occurring thereafter of the several defendants, their agents and servants, herein set forth and constituting the combination, conspiracy, and agreement in restraint of trade herein complained of, were dictated and directed by the said the American Tobacco Company and by defendant the said James B. Duke, as its president.

"On or about October, 1903, under and pursuant to the direction and control, as aforesaid, of the Continental Tobacco Company and of said James B. Duke, an agreement was reached between the defendant MacAndrews & Forbes Company and the said J. S. Young Company of New Jersey, by which it was agreed that a new corporation was to be organized with the name 'J. S. Young Company' and \$800,000 capital, to which the business of the old Young Company was to be transferred, and a large majority of the common stock, which alone had voting power, was to be issued to the MacAndrews & Forbes Company for no other consideration than its guaranteeing the annual sale of 5,000,000 pounds of licorice paste by the new Young Company, and guaranteeing payment of dividends of 6 per cent. on \$500,000 of its preferred stock. Pursuant to this agreement, J. S. Young Company was organized on or about December, 1903, and on or about December 8, 1903, the defendant, MacAndrews & Forbes Company, then being controlled and directed by the Continental Tobacco Company and defendant James B. Duke, as aforesaid, in the manner herein set forth, and pursuant to such control and direction, and pursuant to said agreement between MacAndrews & Forbes Company and the J. S. Young Company of New Jersey, entered into and executed a written agreement with said J. S. Young Company, which written contract or agreement provided, among other things, for the acquisition by the said MacAndrews & Forbes Company of control of the defendant J. S. Young Company through the acquisition and ownership of a majority of the shares of stock of the defendant J. S. Young Company having voting power. That a true copy of said contract marked 'A' is annexed hereto and made part hereof. That pursuant to said contract defendant MacAndrews & Forbes Company acquired 2,000 shares of the capital stock of said J. S. Young Company, having a par value of \$100 each, being a majority of the shares of capital stock of the J. S. Young Company having voting power, and from and after said date, and throughout said period, said contract was fully performed by the parties thereto, and the said defendant J. S. Young Company, although maintaining a separate corporate existence, came under the complete control of said MacAndrews & Forbes Company, whose officers issued orders and directions directly to the agents and servants of the said J. S. Young Company, which control continued through the said period hereinbefore mentioned.

"After the organization of the defendant J. S. Young Company, it announced and advertised itself to be independent of the said Continental Tobacco Company and said MacAndrews & Forbes Company, and of all trusts and combinations, and sought to and did mislead and defraud the public by falsely advertising, as aforesaid, that it was independent of and engaged in fair competition with other manufacturers of licorice paste, and after December 8, 1903, the said defendants, acting in concert and by agreement, and combining together as aforesaid, under the ultimate direction of the Continental Tobacco Company and James B. Duke, as aforesaid, from time to time raised the price

of said licorice paste to purchasers and consumers thereof in said trade and commerce. Thereafter, on or about December 31, 1903, the defendant J. S. Young Company, pursuant to the directions and control of the said MacAndrews & Forbes Company, and pursuant to the ultimate direction and control of the Continental Tobacco Company and defendant James B. Duke, as aforesaid, entered into a written contract with the said J. D. Lewis of Providence, R. I., wherein and whereby it was agreed that the amount of output of licorice by the said Lewis for the period of five years from the date thereof should be limited, and wherein and whereby the said J. S. Young Company was given power to regulate the price at which the said Lewis should sell the same said licorice paste and an interest in the profits made on his said business by Lewis, and wherein and whereby it was provided that the price for licorice paste, sold by the said Lewis should be always during said five years one-quarter of a cent per pound less than that sold by the said J. S. Young Company. That a true copy of said agreement, marked 'B' is annexed hereto and made part hereof. Thereafter, the said defendants, acting in concert with the said Lewis and by agreement and combining together, as aforesaid, and under the ultimate direction at first of said Continental Tobacco Company and thereafter of the American Tobacco Company and of said James B. Duke, as aforesaid, from time to time with said Lewis raised the price of said licorice paste to purchasers and consumers thereof in said trade and commerce; the said prices for licorice paste being always as provided in and by the said agreements and contracts so fixed and arranged by said defendants. That the defendant MacAndrews & Forbes Company charged one-half a cent per pound for said licorice paste more than the said J. S. Young Company, and that the said J. S. Company charged always for said licorice paste one-quarter of a cent a pound more than the said J. D. Lewis. Thereafter, by agreement and concerted action also among the several defendants and the said J. D. Lewis, the said MacAndrews & Forbes Company and the said J. S. Young Company with said J. D. Lewis, and each of them, declined to sell to prospective purchasers of said licorice paste, including plaintiff, the full amount of the orders of such purchasers, but by such agreement and concert arbitrarily limited the amount which should be sold to any such customer or customers. Thereafter, on or about June, 1904, the said J. S. Young Company, still under the direction of defendant MacAndrews & Forbes Company, and under the ultimate direction of the Continental Tobacco Company and said James B. Duke, as aforesaid, entered into an agreement with the said Weaver & Sterry Company, Ltd., whereby it was agreed that the uniform minimum price of said Weaver & Sterry Company, Ltd., for said licorice paste should be fixed at 9½ cents per pound after July 1st of that year, and that no contracts for furnishing an indefinite quantity of said licorice paste to customers at that or any price should be made, and that such price agreement should continue until the close of the year 1906.

"The Continental Tobacco Company and defendants other than the American Tobacco Company, having thus acquired control of interstate trade and commerce in the United States in licorice paste, thereafter from time to time during said period and together with defendant the American Tobacco Company, after its organization, by concerted action between them and said J. D. Lewis and Weaver & Sterry Company, Ltd., raised the price of such paste, and in pursuance of said combination and conspiracy and agreement in restraint of trade, it was on or about July, 1904, and thereafter arranged and agreed by the Continental Tobacco Company and by said defendants and by the said J. D. Lewis and said Weaver & Sterry Company, Ltd., and each of them, and said arrangement and agreement thereafter carried out by concerted action by them, that the trade in said licorice paste should be apportioned as follows: As far as pre-existing contracts would permit, said MacAndrews & Forbes Company was thereafter to sell said licorice paste to no one but to the said the American Tobacco Company and said Continental Tobacco Company, and manufacturers controlled by or affiliated with them, and in the event that any other manufacturer attempted to buy from the said MacAndrews & Forbes Company, said MacAndrews & Forbes Company was to demand of such prospective customers a price for such licorice paste uniformly higher than that asked by any of the said other parties to said combination

and conspiracy, and thus induce such independent manufacturers to purchase their supplies or licorice paste of the said J. S. Young Company, J. D. Lewis, and Weaver & Sterry, Ltd., or some of them under a uniform form of contract as hereafter stated. It was further agreed and provided that defendant J. S. Young Company and said J. D. Lewis should offer to manufacturers of tobacco known as 'independent tobacco manufacturers,' i. e., manufacturers other than those controlled by or affiliated with the American Tobacco Company and the said Continental Tobacco Company as aforesaid, a uniform form of contract, being for two years, whereby the supply demandable by the manufacturer was fixed at a minimum, which he was obligated by said contract to take and a greater maximum beyond which he was not entitled to purchase licorice paste at 9½ cents per pound from the said J. S. Young Company, and 9½ cents per pound from the said Lewis, and the price for said paste to be subject to increase for the second year. That a true copy of such proposed contract, omitting dates and names, amounts and prices, marked 'C,' is annexed hereto and made part hereof. That the persons with whom said Lewis could make this agreement or contract were fixed and determined upon by the defendant MacAndrews & Forbes Company, which instructed both the said Lewis and the defendant J. S. Young Company to sell to no customer whose requirements exceeded 20 cases of said licorice paste per annum, who failed to sign said form of contract, and it was further agreed among the said defendants, the said Continental Tobacco Company and the said Lewis and said J. S. Young Company, that very small consumers, i. e., those using less than 20 cases per year, might still obtain licorice paste at 10½ cents per pound from Lewis or 10½ cents per pound from the said J. S. Young Company. That said last-mentioned agreement between defendants and John D. Lewis was carried into effect by defendants and John D. Lewis by apportioning said contracts for licorice paste as aforesaid, and by said MacAndrews & Forbes Company placing prohibitive prices upon said licorice paste, as aforesaid, to all customers who were so-called 'independent' tobacco manufacturers, and by said J. S. Young Company and said J. D. Lewis offering to customers who were independent manufacturers, including the plaintiff, said uniform form of contract, and requiring them to execute said contract as a condition of filling their orders for licorice paste."

As I look at this complaint, the most material allegation is the one wherein it is charged that John D. Lewis contracted and agreed with the J. S. Young Company that he would not sell more than 1,000,000 pounds of such licorice paste during the year 1904, nor more than 50,000 pounds additional during each year for five years from December 31, 1903, so that the total production of Lewis should not be more than 1,200,000 pounds during the year 1908. It would seem from this allegation of the complaint that it was a part of the agreement and combination that one person engaged in the manufacture and sale of licorice paste to various customers throughout the United States was not to sell more than the amount specified. If he lived up to his agreement and did not sell but a limited amount, that limited amount only would be shipped by him, and the result would be that a less amount of licorice paste sold by Lewis would pass from state to state. It does not follow, however, that there would be any restraint upon interstate commerce. There was no agreement or combination that a sufficient amount of licorice paste should not be manufactured and sold to fully supply the market and all demands therefor throughout the United States. The allegations of the complaint are, however, that, if Lewis did sell more than the amounts specified, then he was to pay to the J. S. Young Company an amount of money approximately equal to his profits upon the quantity sold by him in excess of such specified amounts.

I do not find in this complaint any direct allegation of a conspiracy, combination, contract, or agreement to restrain or interfere with interstate trade and commerce. It seems to have been a combination and conspiracy to monopolize the production of licorice paste and to establish and maintain arbitrary and noncompetitive prices for such article. The act of July 2, 1890, "An act to protect trade and commerce against unlawful restraints and monopolies" (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901 p. 3200]), provides that:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal."

Also:

"Every person who shall monopolize or attempt to monopolize, or combine, or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor," etc.

And:

"Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act may sue therefor," etc.

It is self-evident that the contract, combination, or conspiracy must be in its operation in restraint of trade or commerce among the several states or with foreign nations, or, if a monopoly or attempted monopoly or combination or conspiracy to monopolize, that it must be of some part of the trade or commerce among the several states or with foreign nations.

In *United States v. E. C. Knight Company*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325, the American Sugar Refining Company by means of a combination had obtained a practical monopoly of the business of manufacturing sugar, but the combination only related to the manufacture of sugar, and not to its sale, transportation, and delivery among the several states. Manufacture is no part of interstate or international commerce, even though the article manufactured is designed for ultimate sale and transportation to another state or transportation to and sale in another state. But the court said:

"Contracts to buy, sell, or exchange goods to be transported among the several states, the transportation and its instrumentalities, and articles bought, sold, or exchanged for the purpose of such transit among the states, or put in the way of transit, may be regulated; but this is because they form part of interstate trade or commerce. The fact that an article is manufactured for export to another state does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the state and belongs to commerce."

Assume that the companies and individuals mentioned in the complaint here were engaged in the manufacture and production of licorice paste, that they were each engaged in selling and transporting their product to other states and to each of the other states, that one or more of them desired to monopolize the manufacture of such paste and to increase the price thereof and the cost thereof to the consumer, and that

an agreement was made by all whereby this privilege and power was conferred upon one or two of the companies. What has all this to do with interstate commerce? How does such an agreement or combination or monopoly have to do with interstate commerce or affect it? In the Knight Case, *supra*, the court said:

"Doubtless the power to control the manufacture of a given thing involves in a certain sense the control of its disposition, but this is a secondary and not the primary sense, and although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly."

In *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, at pages 240, 241, 242, 20 Sup. Ct. 96, at page 107, 44 L. Ed. 136, the court, in commenting on the Knight Case and in deciding the case then before it, said:

"The direct purpose of the combination in the Knight Case was the control of the manufacture of sugar. There was no combination or agreement, in terms, regarding the future disposition of the manufactured article—nothing looking to a transaction in the nature of interstate commerce. The probable intention on the part of the manufacturer of the sugar to thereafter dispose of it by sending it to some market in another state was held to be immaterial and not to alter the character of the combination. The various cases which had been decided in this court relating to the subject of interstate commerce, and to the difference between that and the manufacture of commodities, and also the police power of the states as affected by the commerce clause of the Constitution, were adverted to, and the case was decided upon the principle that a combination simply to control manufacture was not a violation of the act of Congress, because such a contract or combination did not directly control or affect interstate commerce, but that contracts for the sale and transportation to other states of specific articles were proper subjects for regulation because they did form part of such commerce. We think the case now before us involves contracts of the nature last above mentioned, not incidentally or collaterally, but as a direct and immediate result of the combination engaged in by the defendants. While no particular contract regarding the furnishing of pipe and the price for which it should be furnished was in the contemplation of the parties to the combination at the time of its formation, yet it was their intention, as it was the purpose of the combination, to directly and by means of such combination increase the price for which all contracts for the delivery of pipe within the territory above described should be made, and the latter result was to be achieved by abolishing all competition between the parties to the combination. The direct and immediate result of the combination was therefore necessarily a restraint upon interstate commerce in respect of articles manufactured by any of the parties to it to be transported beyond the state in which they were made. The defendants by reason of this combination and agreement could only send their goods out of the state in which they were manufactured for sale and delivery in another state, upon the terms and pursuant to the provisions of such combination. As pertinently asked by the court below, was not this a direct restraint upon interstate commerce in those goods?"

"If dealers in any commodity agreed among themselves that any particular territory bounded by state lines should be furnished with such commodity by certain members only of the combination, and the others would abstain from business in that territory, would not such agreement be regarded as one in restraint of interstate trade? If the price of the commodity were thereby enhanced (as it naturally would be), the character of the agreement would be still more clearly one in restraint of trade. Is there any substantial difference where, by agreement among themselves, the parties choose one of their number to make a bid for the supply of the pipe for delivery in another state, and agree that all the other bids shall be for a larger sum, thus practically restricting all but the member agreed upon from any attempt to supply the de-

mand for the pipe or to enter into competition for the business? Does not an agreement or combination of that kind restrain interstate trade, and when Congress has acted by the passage of a statute like the one under consideration, does not such a contract clearly violate that statute? As has frequently been said, interstate commerce consists of intercourse and traffic between the citizens or inhabitants of different states, and includes not only the transportation of persons and property and the navigation of public waters for that purpose, but also the purchase, sale, and exchange of commodities. *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196-203, 5 Sup. Ct. 826, 29 L. Ed. 153; *Kidd v. Pearson*, 128 U. S. 1, 20, 9 Sup. Ct. 6, 32 L. Ed. 346. If therefore an agreement or combination directly restrains not alone the manufacture, but the purchase, sale, or exchange of the manufactured commodity among the several states, it is brought within the provisions of the statute. The power to regulate such commerce—that is, the power to prescribe the rules by which it shall be governed—is vested in Congress, and, when Congress has enacted a statute such as the one in question, any agreement or combination which directly operates, not alone upon the manufacture, but upon the sale, transportation, and delivery of an article of interstate commerce, by preventing or restricting its sale, etc., thereby regulates interstate commerce to that extent and to the same extent trenches upon the power of the national Legislature and violates the statute. We think it plain that this contract or combination effects that result."

I think this brings us to a consideration of the question whether the contracts, combination, and agreement set forth in this complaint relate to or have anything to do with the sale and transportation to other states of licorice paste, or the transportation to and sale in other states of such article. If so, did it act or operate, when carried out in whole or in part, to restrain or interfere with interstate commerce? If so, the agreement or combination was illegal within the terms of the act referred to.

An analysis of the agreement or combination shows as follows: (1) It was agreed by the defendants that there should be no competition in price for said licorice paste. (2) The defendants agreed from time to time upon and maintained arbitrary and noncompetitive prices for such paste. (3) They actually sold at such prices. (4) They agreed with and induced certain competitors in the business of making and selling such paste to establish and maintain arbitrary and noncompetitive prices. (5) Such prices were in excess of the normal prices that would have prevailed and in excess of reasonable and normal prices. (6) A division and apportionment of such interstate trade and commerce in licorice paste and of the customers of said MacAndrews & Forbes Company and said J. S. Young Company were made by them, by the terms of which division and apportionment the customers with whom each of said defendant corporations the MacAndrews & Forbes Company and the J. S. Young Company should deal and to whom the said two corporations should sell such licorice paste at such prices, and the amount of profits which the Young Company should be allowed from the total business carried on by the MacAndrews & Young companies was arbitrarily fixed by the Continental Company and the defendants. (7) The defendants so managed and agreed that John D. Lewis contracted with the Young Company that he would only sell 1,000,000 pounds during the year 1904, nor more than 50,000 pounds additional during each year for five years from December 31, 1903, and so that his total sales should not be more than 1,200,000 pounds

during the year 1908, but that if he sold more than the amounts specified then he was to pay the Young Company certain sums of money. There is no allegation of any agreement to cut down the production of licorice paste or the aggregate sales by all together or to interfere with or restrict shipments to any point. Sales by certain parties were confined to certain customers in certain localities of course.

It is not difficult for me to see how all this, if done, would interfere with or restrain, and to an extent at least regulate, interstate commerce. All customers were to be supplied, all orders filled, all shipments called for made, we will assume; but this contract or these contracts, these agreements, this combination was to increase prices beyond what was reasonable, and it related, not to this merely, but to sales and necessarily to the transportation of the merchandise. It determined, to an extent at least, the points from which shipments were to be made and the amounts of such shipments as were actually made, and so affected rates, etc.

Says Mr. Justice Peckham, in the *Addyston Pipe Case*, *supra*, referring to the *Knight Case*:

"And the case was decided upon the principle that a combination simply to control manufacture was not a violation of the act of Congress, because such a contract or combination did not directly control or affect interstate commerce, but that contracts for the sale and transportation to other states of specific articles were proper subjects for regulation because they did form part of such commerce."

He then stated that the case then before the court involved contracts of the nature last above mentioned, and said:

"While no particular contract regarding the furnishing of pipe and the price for which it should be furnished was in the contemplation of the parties to the combination at the time of its formation, yet it was their intention, as it was the purpose of the combination, to directly and by means of such combination increase the price for which all contracts for the delivery of pipe within the territory above described should be made, and the latter result was to be achieved by abolishing all competition between the parties to the combination. The direct and immediate result of the combination was therefore necessarily a restraint upon interstate commerce in respect of articles manufactured by any of the parties to it to be transported beyond the state in which they were made. The defendants by reason of this combination and agreement could only send their goods out of the state in which they were manufactured for sale and delivery in another state, upon the terms and pursuant to the provisions of such combination. As pertinently asked by the court below, was not this a direct restraint upon interstate commerce in those goods?"

It seems to me that the allegations of this complaint, discarding conclusions, state facts which, if true, show an illegal combination in restraint of interstate commerce within the *Addyston Pipe Case*, *supra*. That case is not on all fours with this, but the principles enunciated seem to cover this case. It is clear that the combination alleged went beyond mere manufacture and the fixing of arbitrary and exorbitant prices for the article so manufactured. As alleged, it related to sales of the product in different states and necessarily to the delivery thereof.

As to damages, it seems to me very clear that the allegations are ample. Assuming that the combination was illegal and in violation of the act referred to, the complaint says the defendants fixed arbitrary

and excessive and unreasonable prices, and that they raised the price from 7 to 10½ cents per pound, and that by reason of such combination, etc., the plaintiff was compelled to pay, and did pay, the excessive and unreasonable price for licorice paste. If the defendants by an illegal agreement and combination, in violation of the act, arbitrarily increased the price of this commodity to the consumers, the plaintiff amongst others, and made the price excessive and unreasonable and much greater than it would have been but for such combination, and the plaintiff was compelled to pay that unreasonable and excessive price and more than its actual value because of the illegal agreement or combination, and did pay it, he was clearly injured in his property thereby. *Chattanooga Foundry v. City of Atlanta*, 203 U. S. 390, 396, 27 Sup. Ct. 65, 66, 51 L. Ed. 241, where it is said:

"The facts gave rise to a cause of action under the act of Congress. The city was a person within the meaning of section 7 by the express provision of section 8. It was injured in its property, at least, if not in its business of furnishing water, by being led to pay more than the worth of the pipe. A person whose property is diminished by a payment of money wrongfully induced is injured in his property. The transaction which did the wrong was a transaction between parties in different states, if that be material. The fact that the defendants and others had combined with the seller led to the excessive charge which the seller made in the interest of the trust by arrangement with its members, and which the buyer was induced to pay by the semblance of competition, also arranged by the members of the trust."

I am of the opinion that the complaint states a cause of action, and that the demurrers should be overruled, with costs. On payment of costs within 30 days, the defendants may answer.

WEISERT BROS. TOBACCO CO. v. AMERICAN TOBACCO CO. et al.

LARUS & BRO. CO. v. SAME

(Circuit Court, S. D. New York. July 10, 1908.)

Harlan F. Stone, for plaintiff.

A. H. Burroughs, for defendants American Tobacco Company and MacAndrews & Forbes Company.

Nicoll, Anable, Lindsay & Fuller (De Lancey Nicoll, of counsel), for defendants James B. Duke and Karl Jungbluth.

RAY, District Judge. In *United States Tobacco Company v. American Tobacco Company et al.*, 163 Fed. 701, I have stated some of the reasons which lead me to the conclusion that a cause of action is stated in that case. A reading of the complaints in the above cases leads me to the same conclusion therein.

Demurrers overruled, with costs. On payment thereof in 30 days, defendants may answer.

In re WESTERN BANK & TRUST CO. et al.

(District Court, N. D. Texas. June 20, 1908.)

No. 713.

1. CORPORATIONS—EFFECT OF ATTEMPTED AMENDMENT OF CHARTER—TEXAS STATUTE CONSTRUED.

Rev. St. Tex. 1895, art. 647, provides that any corporation incorporated by special act which would be authorized to incorporate under the provisions of such title may, like corporations organized thereunder, amend its articles of incorporation as therein provided. Article 664 provides that "any corporation heretofore organized and now in existence under any general or special law * * * may by a vote of its directors accept any or all of the provisions of this title, * * * whereupon that portion of its charter inconsistent with this title, or the portion accepted shall cease to be applicable to such corporation." Prior to the enactment of such statute a corporation had been chartered by special act having both banking and trading privileges. Under such statute and the state Constitution adopted after its charter, a corporation could not be formed for two distinct purposes nor with banking privileges. Such corporation, without having accepted any of the provisions of such title as provided in article 664, attempted to amend its charter, under article 647, by changing its name and principal place of business. *Held*, that it was not within the class of corporations given the right of amendment by such article, but that, if it be held by its attempted exercise of such right to have accepted a "portion" of the title, under article 664, its charter right to conduct a banking business was not inconsistent with such portion, and that in continuing such business under the name and at the place stated in the amendment it acted as a corporation de facto, and its stockholders cannot be held liable as partners.

2. SAME—CORPORATE EXISTENCE AND FRANCHISE—REISSUE OF STOCK.

Where a corporation, after changing its name, retired its old stock in the new name, the fact that, during a short interval while the change was being effected, there was no stock outstanding, did not affect the validity of its corporate franchise.

3. SAME—LIABILITY OF STOCKHOLDERS FOR CORPORATE DEBTS—ESTOPPEL OF CREDITORS TO DENY CORPORATE EXISTENCE.

Where an association for years conducted a banking business as a corporation in the belief that it was legally incorporated, issuing stock which was purchased by the stockholders in good faith and in the bona fide belief that it was a corporation, persons who dealt with it as such are estopped to deny that it was a corporation and to charge such stockholders with liability as partners.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 83-91.]

In Bankruptcy. On petition in involuntary bankruptcy.

Etheridge & McCormick, for petitioning creditors.

Davis & Meador, for intervening creditors.

M. M. Crane, Locke & Locke, Coke, Miller & Coke, Murphy Townsend, W. A. Kemp, Henry Jackson, U. F. Short, W. J. McKie, Gregory, Batts & Brooks, Hogg, Gill & Jones, M. B. Templeton, Terry, Cavin & Mills, C. K. Bell, Finley, Knight & Harris, Whitehurst & Whitehurst, W. W. Wilkinson, and John Spellman, for respondents.

MEEK, District Judge. It is sought in this involuntary proceeding to have the Western Bank & Trust Company decreed a partnership,

and as such to have it and the members thereof adjudged bankrupt. This concern, as a corporation, has been engaged in a general banking business at Dallas, Tex. In the exercise of corporate functions it issued and there is now outstanding all of the shares of the capital stock of \$500,000. Shares of this stock were held by approximately 70 persons, whose residences are scattered throughout the United states. It is sought to have these shareholders held to be members and copartners in the business of the Western Bank & Trust Company and to fix upon them a partnership liability for the debts and obligations of that concern.

In the first week of May, I listened to able and exhaustive arguments on the part of the attorneys, both for the petitioning creditors and the respondents, and have since given close attention to learned briefs submitted by them. I may say no case has ever been more thoroughly developed before me either in oral argument or by printed brief. There were involved so many questions demanding investigation preliminary to the conclusions reached that I will not undertake to set forth in extenso the reasons upon which I rest the decision of the case, nor to review conflicting authorities. To do so would be a wearisome elaboration. I will not do more than discuss the points deemed by me to be vital and controlling.

1. On April 11, 1873, the Legislature of the state of Texas, by special act, granted a charter to the City Bank of Sherman. This charter included more than one purpose as the object of incorporation. It vested the corporation with banking privileges as well as with certain trading privileges. It is admitted by petitioning creditors that the charter thus granted was duly accepted and acted upon by the incorporators, and that in pursuance thereof the City Bank of Sherman was created and established at Sherman, Tex. Those who in 1902 were instrumental in promoting and establishing the Western Bank & Trust Company, as such, in the banking business at Dallas, had for that purpose theretofore secured control of the charter and rights of the City Bank of Sherman by purchase of nearly the whole of the outstanding shares of its capital stock. To change the name and location of the bank it became necessary to amend its charter. There was no warrant of authority for such amendment unless it could be found in the general laws of Texas. Resort was had to the provisions of article 647 of title 21 of the Revised Statutes of Texas of 1895, relating to corporations.

Under the provisions of section 19 of the final title of the Revised Statutes of 1879 (page 719), as well as under the provisions of the same section and title of the Revised Statutes of 1895, it is necessary to construe article 647 as a continuation of section 10 of article 2 of the incorporation act of 1874 (Laws 1874, p. 122, c. 97). Article 647 differs somewhat in phraseology from that part of section 10 of the original act now incorporated in article 647. As the language used in the original section 10 is controlling, I quote that part of it now covered by article 647:

"Any corporation organized under the provisions of this act, or any private corporation or company incorporated by special act of the Legislature, which said company or corporation would have been authorized to incorporate it-

self under the provisions of this act, any such company or association or corporation may amend or change their articles of incorporation in the same manner that this act requires for the original organization of a body corporate, to-wit: By filing, authenticated, as by this act required, the amendments or changes to the original charter with the Secretary of State; and in case of a corporation created by special act of the Legislature, said corporation shall cause the changes or amendments to their charter to be authenticated as required by this act, and filed with the Secretary of State, together with their original charter, or such amendments as have been made by special act; which shall be recorded by the Secretary of State, followed by the proposed changes or amendments to same; such changes or amendments shall take effect and be in force from the date of filing with the Secretary of State."

Under the construction given the incorporation act of 1874 by the Supreme Court of Texas, a corporation could not incorporate thereunder for two or more distinct purposes; such purposes being designated in different subdivisions of the article specifying the various purposes for which incorporations may be organized. *Ramsey v. Tod*, 95 Tex. 614, 69 S. W. 133, 93 Am. St. Rep. 875. In my opinion section 10, when construed alone, extends the right to amend only to a corporation incorporated by special act of the Legislature which would have been authorized to incorporate itself under the provisions of the act of 1874. It follows that in 1902 article 647 extended the right to amend only to a corporation incorporated by special act of the Legislature which would have been authorized to incorporate itself under the provisions of title 21 as they then existed. As above stated, the City Bank of Sherman was incorporated for more than one purpose; its charter conferring certain trading privileges as well as banking privileges. In the year 1902 it could not have incorporated under this title with banking privileges, nor could it even have incorporated thereunder for two legitimate and specific purposes, if the same were designated in different subdivisions of article 642. It was therefore not privileged to avail itself of article 647 for the purpose of amendment, unless through some additional provision of the law the privilege of amendment accorded certain corporations by article 647 was extended so as to include it. Article 664 of title 21 of the Revised Statutes of 1895 is as follows:

"Art. 664. Any corporation heretofore organized and now in existence under any general or special law of the republic or state of Texas may, by a vote of its board of directors, accept any or all of the provisions of this title, and have and exercise all of the rights, power and privileges conferred by this title, by filing a copy of their acceptance with the Secretary of State; whereupon that portion of its charter inconsistent with this title, or the portion accepted, shall cease to be applicable to such corporation; and it shall have the exclusive right to carry out the objects of said corporation, as described in its act of incorporation, or certificate, filed with the Secretary of State, if acting under a general law within the limits or boundaries described in said act of incorporation, or certificate, as the case may be, without any limitation as to time, and shall possess all the privileges and franchises conferred by its act of incorporation or certificate filed with the Secretary of State, not abandoned in the copy of acceptance of any or all of the provisions of this title."

The above article is the same as section 22 of the incorporation act of 1874, and has been carried forward through the revisions of the statutes in the identical language in which it was originally passed.

Article 647 of the title unquestionably provided for the amendment of corporate charters, and the right to amend was one of the privileges conferred by the title. A fair construction of the language of 664 "extends this privilege to any corporation heretofore organized and now in existence under any general or special law of the republic or state of Texas" upon compliance with its terms and upon conditions stated. The City Bank of Sherman was such a corporation, and therefore upon compliance with the terms and conditions of article 664 it would have been permitted to amend its charter under article 647.

All the requisite and necessary steps were taken under article 647 to change the name of the bank from "City Bank of Sherman" to "Western Bank & Trust Company," and to change its home office from Sherman, Tex., to Dallas, Tex. None of the steps prescribed in article 664 as necessary to avail the corporation of the privileges therein conferred was taken. There was no vote of the board of directors by which "any or all of the provisions of the title" were accepted. Consequently there was no copy of acceptance filed with the Secretary of State.

It is admitted by petitioning creditors that at the time action was taken looking to the amendment of the charter, which was on October 7, 1902, the charter of the City Bank of Sherman was valid and subsisting. It is also admitted that the amendment whereby the name and domicile were changed was a valid amendment. But it is contended that the amendment could not be legally had under the provisions of article 647, and therefore must impliedly be held to have been had under or through the provisions of article 664; that thereby the corporation availed itself of a privilege conferred by title 21 and must be held impliedly to have assented to and accepted the consequences flowing therefrom, one of which it is contended was the striking down of its banking privileges.

The charter of the City Bank of Sherman granted in 1873 constituted a contract between the state and the bank, and it was not within the power of the state to revoke any of the provisions thereof. Const. U. S. art. 1, § 10; *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. Ed. 629. It would have been entirely competent and proper for the state through legislative enactment to extend to a corporation an offer to alter, modify, or enlarge its corporate privileges upon surrender by it of its banking privileges. To have accepted such an offer would have resulted in such surrender. Counsel for petitioning creditors contend that this is what was done by the bank in amending its charter by changing its name and domicile; that this was the effect of article 664 above quoted. The section now appearing as article 664 of title 21 of the Revised Statutes of 1895 was included in the incorporation act of 1874, and has ever since been embodied in the law of the state relating to corporations. So far as I am advised, this article has never been construed and its effect determined by a court of controlling authority of this state. The article may be construed to be an offer to certain specified classes of corporations permitting them by the taking of prescribed steps to accept any or all of the provisions of the title relating to corporations, and to have and exercise all the rights, powers, and privileges conferred by the title. The consid-

eration exacted and the condition imposed upon the accepting corporation are as follows:

"Whereupon that portion of its charter inconsistent with this title, or the portion accepted, shall cease to be applicable to such corporation."

Had this clause not contained the phrase, "or the portion accepted," it would have been easy to ascertain and declare the intention of the Legislature in this regard. With the phrase included, its intention is somewhat uncertain and ambiguous. But in construing a statute, if it is possible, effect should be given to every word and phrase thereof, unless so doing leads to an absurdity. This is a well-recognized and accepted canon of construction, and in its application here effort should be made to ascertain the meaning of and give effect to this phrase.

Descending to a somewhat critical analysis of the first part of the article under consideration, it will be observed that specified corporations are extended the invitation to accept 'any or all of the provisions of this title, * * * whereupon that portion of its charter inconsistent with this title, or the portion accepted, shall cease to be applicable to such corporation.' Are the conditions imposed upon a corporation accepting any or less than all of the provisions of the title identical with or different from those imposed upon a corporation accepting all the provisions of the title? The answer must be gathered from the context of the article wherein the conditions are imposed. Having extended the invitation to a corporation to accept all the provisions of the title, it would seem at least logical and consistent that the Legislature should impose as a condition of such acceptance that any portion of the charter inconsistent with the title should cease to be applicable to the corporation accepting all of the title. Having also extended the invitation to accept any (or less than all) of the provisions of the title, the Legislature might with propriety and of right have imposed the same condition as that imposed for accepting all the provisions of the title. This is what was done by the Ohio law upon the construction of which by the Supreme Court of that state counsel for petitioning creditors so largely rely. *Cincinnati, H. & D. R. Co. v. Cole*, 29 Ohio St. 126, 23 Am. Rep. 729.

It could also have imposed another and different and less comprehensive condition. "Or inconsistent with the portion accepted" are apt and appropriate words for expressing such modified condition. If an amendment to a charter were inconsistent with the portion of the title accepted, it would of necessity be inconsistent with the title, and there would have been no need to use the phrase "or the portion accepted" in event it was the intention of the Legislature to render inapplicable every portion of the corporation's charter in any wise inconsistent with the entire title upon the acceptance by it of less than all of the provisions thereof. Giving effect to this phrase, read in connection with the preceding portion of the article, it would appear the Legislature contemplated and intended that the corporation accepting some one or more, but not all of the provisions of the title, would thereby render only that portion of its charter inapplicable which was inconsistent with the provisions of the title accepted.

I will not undertake to analyze all of the remaining provisions of this article. It is sufficient to say they reveal added reasons to support the correctness and soundness of the above construction. This is true save in the following particular: It is provided that a corporation availing itself of article 664 and complying with its provisions, among other privileges enjoyed, "shall have the exclusive right to carry out the objects of such corporation as described in its act of incorporation, or certificate filed with the Secretary of State, if acting under a general law within the limits or boundaries described by said act of incorporation or certificate, as the case may be, without any limitation as to time."

Article 651, Rev. St. 1895 (Acts 1883, p. 98, c. 95), gives to a private corporation the right of succession by its corporate name for the period limited in its charter not to exceed 50 years, and, when no period is limited, for 20 years. This is one of the provisions of the same title in which article 664 appears. Section 11 of article 3 of the incorporation act of 1874 gives the right of succession for a period of 20 years. What is now article 664 of the Revised Statutes of 1895 is a literal continuation of section 22 of the incorporation act of 1874. If the phrase "without any limitation as to time" gives expression to the true legislative intent, then the right of indefinite and everlasting succession was given those corporations availing themselves of article 664, while the corporations coming into existence under the provisions of this very act of incorporation were granted life and succession for but 20 years.

Nowhere in the general incorporation laws, save in this phrase, is there manifest any disposition or intention to bestow on corporations everlasting succession. On the other hand, there is manifest a disposition and intention to, and there is placed upon them a definite limitation as to time of succession. I should be slow to hold that these two provisions as to time were to be construed in *pari materia* and both given effect; but in my view it is not necessary to determine this question. Under what I have concluded to be a proper construction of article 664, the City Bank of Sherman would not, as a condition of accepting the privilege of amendment under article 647, be compelled to abandon that portion of its charter inconsistent with the title, but only such portion thereof as was inconsistent with the portions accepted. This being true, if it was entitled to amend thereunder, it could partake of the privileges conferred that were lawful for it to partake of, but could not partake of a corporate life of a longer duration than was granted by the terms of its charter. This was denied it by the Constitution and the law.

Contemplating article 664 as a whole, and taking into consideration the time at which its substance was incorporated into our law, I am of the opinion its main purpose was not to whip into line or eliminate corporations possessing objectionable privileges and powers, but rather to afford a method by which existing corporations could avail themselves of the rights, powers, and privileges granted by the terms of the incorporation act. It was, of course, sought to bring these corporations into harmony with the laws of the state as such laws then existed, but it was sought to do this only in the limited way in-

licated in the above construction. It can be said with positiveness that the Legislature in the year 1874 did not have in view the elimination of corporations possessing banking privileges, as the very act of which the identical language of article 664 was a part permitted the incorporation of such banks.

From the foregoing it follows: (1) That there existed in the general laws of Texas authority for the amendment of the charter of the City Bank of Sherman in the particulars it was sought to be amended; (2) that there was an effort made to amend thereunder; (3) that, according to the contention of counsel for the petitioning creditors, it will be held to have accepted the provisions of the law it did not literally comply with. Therefore, after the amendment changing name and domicile, the Western Bank & Trust Company, having transacted business as a corporation, was, in contemplation of law, a de facto corporation. *Tulare Irrigation District v. Shepard*, 185 U. S. 13, 22 Sup. Ct. 531, 46 L. Ed. 773; *American Salt Company v. Heidenheimer*, 80 Tex. 344, 15 S. W. 1038, 26 Am. St. Rep. 743.

While I have entertained a construction of article 664 which does not result in the necessity of an abandonment by the City Bank of Sherman of "that portion of its charter inconsistent with this title," yet in view of the somewhat ambiguous and confusing phraseology of this article perhaps it would be relevant and pertinent to consider whether any portion of the corporation's charter is inconsistent or logically incompatible with any of the provisions of the title which would place in jeopardy its life as a corporation with banking privileges. There may be portions of the charter inconsistent with provisions of the title, the effect of which, if applicable, would have been to alter or modify some of the privileges; but of these I am not treating. Intervening between the time of the granting of the charter to the City Bank of Sherman and the time of the amendment in 1902, the laws of the state of Texas relating to private corporations with banking privileges had undergone marked changes. Section 16, art. 16, of the Constitution adopted in 1876, provides:

"No corporate body shall hereafter be created, renewed or extended with banking or discounting privileges."

The twenty-eighth specification of article 566, which specified the various purposes for which corporations might be formed, was incorporated in article 566 by act of March 23, 1887 (Laws 1887, p. 41, c. 58), and was as follows:

"The accumulation and loaning of money: but this subdivision shall not permit incorporations with banking or discounting privileges."

This specification, in substantially the same form, with a change of its number and number of the article in which it appeared, was continued in effect down to and including the time at which the City Bank of Sherman sought to amend its charter.

Article 649 of the Revised Statutes of 1895 is as follows:

"No amendment or changes violative of the Constitution or laws of this state, or of any of the provisions of this title, shall be of any force or effect; and no amendments or changes shall be of any force or effect which are not

germane to the original purpose or charter of incorporation, and calculated to carry out and effect the same."

It will be observed that the constitutional inhibition covers the creation, renewal, and extension of corporations with banking privileges. The statutory inhibition, read in the light of the context in which it appears, covers simply the creation of corporations. It was therefore the public policy of this state, as revealed in its fundamental law and its statutes, not to create, renew, or extend any private corporations with banking privileges. At the same time, it was the policy of the state as revealed in section 7, art. 12, of the Constitution, not to "divest or affect the rights guaranteed by any grant or statute of this state, or of the republic of Texas."

This provision places the Constitution of Texas in accord with the Constitution of the United States on this subject. It is certain that by amending the charter of the City Bank of Sherman in the matter of name and domicile its banking privileges were neither created nor renewed. Were they extended? "To extend," as used in this connection, would mean to make more comprehensive; to enlarge the scope of or give a wider range to. There cannot be said to be any extension of banking privileges involved in the change of name. There is some question as to the effect of the change of domicile. This might be considered as an enlarging of scope and widening of range; but the City Bank of Sherman in its original charter, without amendment, could have conducted a banking business at Dallas. Section 9 of the charter provides:

"It shall be lawful for such corporation to establish such and so many branch offices in this state and in such localities therein and with powers to exercise such of its rights and privileges, * * * as its directors shall from time to time provide."

In view of this very general grant of power to do a banking business in any part of the state, I cannot conclude there was any substantial extension of privilege involved in the change of the location of its main office from Sherman to Dallas. At most, the extension was not of that character which would justify a court in decreeing that because of it and because of the amendment authorizing it the Constitution and law had been violated, and the corporation as a banking concern consequently disincorporated and stricken down.

2. The City Bank of Sherman having changed its name to "Western Bank & Trust Company," all corporate acts were thereafter performed under the latter name, but in virtue of the authority granted in the original charter of the City Bank of Sherman. With relation to capital stock its charter, among other things, provided that:

"The capital stock of said corporation shall be \$200,000, in shares of \$100 each, but the same may be increased from time to time by a vote of the majority in interest of the stockholders of the said corporation voting in person or by proxy at any meeting duly held. Provided, that the capital stock of said corporation shall never exceed \$500,000."

On October 18, 1902, at a regularly called meeting of the stockholders, a resolution was unanimously passed increasing the capital stock of the corporation from \$200,000 to \$500,000 in shares of \$100

each. Thereafter, on the same day, the board of directors took the necessary steps looking to the subscription for and issuance of this stock. All the original shares of stock of the City Bank of Sherman were retired, and there were issued in their stead the shares of the capital stock of the Western Bank & Trust Company; a small allowance being made on the price of the new shares for the ascertained value of the old. There intervened a short period between the retirement of the old issue and the issue of the new.

Petitioning creditors complain that this left the Western Bank & Trust Company without stockholders, and they contend a corporation cannot exist without stockholders. The City Bank of Sherman as a corporation was brought into existence by the granting of its charter. Its charter was a franchise right to be exercised by those entitled under the law to exercise it. It existed before there were stockholders, so that its existence does not depend upon the existence of technical stockholders. This view is supported in *Jefferson v. Texas Investment Company*, 74 Tex. 421, 12 S. W. 101; *Rio Grande Cattle Company v. Burns*, 82 Tex. 50, 17 S. W. 1043. In any event, I am of the opinion that, if there were irregularities in the manner of retirement of the old and the issue of the new stock, the state alone would have the right to complain.

3. There remains but one question for consideration, that of estoppel. Aside from the question of the existence or nonexistence of the Western Bank & Trust Company as a de facto corporation, there is a question here as to whether, because of previous conduct inconsistent therewith, petitioning creditors are not now precluded from asserting that it is not a corporation. The Western Bank & Trust Company opened its doors in the city of Dallas to do a banking business on February 2, 1903, and continuously conducted such business until its doors were closed on January 15, 1908. With the advice of counsel as to each step necessary to the legitimate accomplishment of that end, the concern was founded upon the charter of the City Bank of Sherman. According to the uncontroverted evidence before me, its capital stock of \$500,000 was fully paid in. Regular annual meetings of its stockholders were held, at which directors were elected, and the directors in turn elected from their number the officers of the corporation. By-laws were adopted, and the minutes of the stockholders and directors' meetings were kept. A corporate seal was kept, and, where appropriate, corporate acts were attested therewith. No other conclusion can be reached from the testimony in the record before me than that there was a genuine and bona fide effort to legally establish the Western Bank & Trust Company as a banking corporation, with a paid-in capital of \$500,000, and that there existed a genuine and bona fide belief on the part of those who promoted the concern that they had in fact accomplished this result. In other words, there existed no fraudulent intent on the part of those promoting the concern, in its establishment in the banking business in Dallas, as a corporation. They were seeking to establish a legitimate corporation and thought they had done so.

From the time the concern opened its doors it made prominent in every phase of its business that it was a banking corporation, organized under special act of the Legislature of Texas. In all places and at all times it held itself out as and represented that it was such a corporation. It is admitted by petitioning creditors in the broadest terms that notice of such holding out was brought home to them in their dealings with it. Depositors placed their accumulated earnings and savings with it on the theory that it was a banking corporation. Those who entered into contracts with it contracted with it as a corporation, and they did not suppose they were contracting with the individuals who comprised its stockholders. The responsibility of the corporation was accepted and relied upon, and not the individual responsibility of its membership. Under this state of facts I do not consider there is the least doubt as to what the decided weight of authority declares the law to be.

Clark and Marshall, in their treatise on Private Corporations (volume 1, p. 182), say:

"By weight of authority, if an association assumes to act as a corporation, even without any authority at all from the Legislature, a person who recognizes its existence as a corporation by contracting or otherwise dealing with it as such is estopped to deny it is a corporation in an action based upon such contract or dealing, whether the action is brought by the association as a corporation against him, or by him against the association to charge them as partners. In such cases the estoppel renders it unnecessary, according to the weight of authority, to prove either a *de jure* or a *de facto* corporate existence. It is only necessary to prove that the association was acting as a corporation, and that it dealt or was dealt with as such."

Among the list of authorities cited by the authors in support of these propositions is the case of *Gartside Coal Company v. Maxwell* (C. C.) 22 Fed. 197. In the course of that opinion, delivered by Judge Brewer, now of the Supreme Court, the following language is used:

"So, on the other hand, where a person deals with what he supposes is a corporation, with what all parties think is a corporation, where he gives his credit to that supposed corporation, he cannot afterward, when it turns out that it is not validly incorporated, turn round and say: 'Well, I dealt with this supposed corporation. I thought it was a corporation. I trusted it as a corporation. I sold goods to it as a corporation. But it seems when it first attempted to become incorporated that there was some defect or irregularity in its proceedings, so that it did not become legally incorporated, and therefore you who are stockholders will be held personally liable.' I don't think it can be done."

Even though the Western Bank & Trust Company were not a *de facto* corporation, I am of the opinion petitioning creditors could not now be permitted to say: "It is not a corporation, and therefore you who are stockholders must assume a personal liability to us."

I have stated there existed no fraudulent intent in the establishment of the concern as a corporation in the banking business at Dallas. When I say this, I do not wish to be understood as speaking of the subsequent conduct of its business. The management of the affairs of the bank may have been characterized by a hurtful disregard of sound and honest banking principles. Hopeless and disastrous insolvency may have followed in the wake of such management as its inevitable consequence. But this proceeding is not brought to fix a

personal liability upon any person guilty of mismanagement of the affairs of the bank. As has been made plain, such mismanagement is not the basis of the proceeding. It is sought here to fix upon every holder of shares of the concern's stock the liability of a partner, a liability to the creditors of the concern for the whole amount of every debt due therefrom, without reference to his interest, as that interest may be represented by the number of shares owned. The record discloses: That among its stockholders are many persons living in various parts of the United States who purchased their shares of stock after the organization had been effected; that they paid par or more than par therefor as an investment in a banking corporation; that they believed a legal corporation existed; that otherwise they would not have made the investment; that they received such dividends as the board of directors declared; that a large majority of them knew absolutely nothing of the conduct of the business of the concern; and that, if wrong was done, they were entirely and absolutely innocent of knowledge thereof.

In the case of *Fay v. Noble*, 7 Cush. (Mass.) 192, the court says:

"We are not aware of any authority, certainly none was cited at the argument, to warrant the instruction that, in consequence of an omission to comply with the requisitions of law in the organization of a corporation, by which its proceedings were rendered void, persons who had subscribed for and taken stock in the company thereby became partners. The doctrine seems to us to be quite novel and somewhat startling. Surely it cannot be, in the absence of all fraudulent intent (and none was proved or alleged in this case), that such a legal result follows as to fasten on parties involuntarily for such a cause the enlarged liability of copartners, a liability neither contemplated nor assented to by them. The very statement of the proposition carries with it a sufficient refutation. No such rule can follow, unless a principle of law be established, founded on no authority, and required by no public exigency. Corporations are known and recognized as legal entities, with rights and powers clearly defined and well understood, and wholly distinct and different from those of individuals and copartnerships. Persons who subscribe for and take stock in them are subject to certain fixed and limited liabilities, which they voluntarily assume, and these liabilities are not to be extended and enlarged, so as to affect innocent parties, beyond the letter of the law. A copartnership cannot take upon itself the functions of a corporation, nor can a corporation or its members be made subject to the liabilities of a copartnership, in the absence of all statutory provisions imposing such liabilities. The personal liability of the members of a joint stock company or copartnership is inconsistent with the character and nature of a corporation, of which the law properly recognizes only the creature of the charter, and knows not the individuals." *Ang. & Ames on Corp.* 536, 537.

In the case of *American Salt Company v. Heidenheimer*, 80 Tex. 344; 15 S. W. 1038, 26 Am. St. Rep. 743, wherein it was sought to hold stockholders in a faultily organized corporation liable as partners, Associate Justice Gaines, speaking for the court, says:

"Whether that rule ought to be applied in a case in which the incorporators have knowingly and intentionally violated the law in procuring a charter under a general law we need not decide, but we are clearly of the opinion that it is not a proper rule to be applied in a case like the present, in which it appears that stockholders who are sought to be held liable as partners bought their stock after the organization had been effected and under the belief that a legal corporation existed. That under such circumstances the stockholders of the alleged corporation cannot be held liable as partners is substantially held in the following cases: *Bank v. Stone*, 38 Mich. 779; *Fay v. Noble*, 7

Cush. (Mass.) 188; Bank v. Padgett, 69 Ga. 164; Humphreys v. Morney, 5 Colo. 282; Central Bank v. Walker, 66 N. Y. 424; Coal Co. v. Maxwell (C. C.) 22 Fed. 197; Methodist Church v. Pickett, 19 N. Y. 482."

In my judgment it would be harsh and unjust to declare stockholders who became such after the concern was organized, who had nothing whatever to do with the management of its affairs, who were absolutely innocent of any wrongdoing in relation thereto, to be partners in the concern and to decree them personally liable for all its obligations, and this simply because they were stockholders and had accepted the dividends declared on their stock. The immediate and inevitable consequence of such a holding here would be to inflict ruin upon those who have not deserved it. The creditors of the concern bid fair to suffer loss, but a court of justice should not right their wrong by the commission of another wrong still more grievous.

After careful consideration, I have reached the conclusion that the petitioning creditors must fail in their contentions on two grounds: First, the Western Bank & Trust Company is a de facto corporation; and, second, even were this not so, the petitioning creditors by their course of dealing with it as such are now estopped to deny that it is a corporation.

The prayer of the petitioning creditors and of the intervening petitioners will be denied, and their petitions dismissed, at their cost.

ELKINS ELECTRIC RY. CO. v. WESTERN MARYLAND R. CO. et al.

(Circuit Court, N. D. West Virginia. August 29, 1908.)

1. EMINENT DOMAIN—PROPERTY SUBJECT TO APPROPRIATION—RAILROAD RIGHT OF WAY—USE BY ANOTHER COMPANY.

Under the law of West Virginia, the right of way of a railroad company is its private property; the rights of the public therein being only in its use. After it has acquired and is using such right of way for its road, it cannot be wholly deprived thereof for any other public use, nor can it be subjected to the burden of a further easement thereon without compensation.

2. RAILROADS—RIGHT OF CROSSING ROAD OF ANOTHER COMPANY—WEST VIRGINIA STATUTE.

Code W. Va. 1906, § 2343, cl. 7, authorizes a railroad company "to cross at grade or to cross over or under * * * any other railroad * * * at any point on its route," and provides that, if the two corporations cannot agree upon the amount of compensation or the points and manner of such crossing and connections, the same shall be ascertained and determined by condemnation proceedings. Section 2216 provides that any railroad, canal, or pipe line company, etc., may cross any other railroad, canal, or pipe line at grade, "provided its work be so constructed as not to impede the passage or transportation of persons or property along the same"; that, "in case the parties interested fail to agree upon such crossing, * * * the company desiring it may bring its suit in equity, and in such suit the court may in a proper case decree that such or any proper crossing * * * may be made upon payment of damages," to be ascertained by proceedings under the condemnation statute. *Held* that, construing such provisions together and in the light of other provisions, a railroad company has not the absolute right to cross the road of another company at grade at any point it might select, but that, if the parties could not agree on the same, the point and manner of the crossing must first be determined by the court in a suit in equity, after which the crossing may be made on payment of compensation to be determined in condemnation proceedings.

In Equity. On intervening petition of the Elkins Electric Railway Company.

By regular proceedings had in a suit instituted by the Bowling Green Trust Company against the Western Maryland Railroad Company in the Circuit Court of the United States for the District of Maryland, and in an ancillary proceeding instituted by the same plaintiff against this railroad company in this court, Benjamin F. Bush has been appointed receiver for the Western Maryland Railroad Company, and the affairs of the company since March last have been administered under the direction of these courts in the two proceedings. In the order appointing the receiver and clothing him with authority to administer the affairs of the railroad company, an injunction was awarded against all persons, restraining them from in any manner interfering with the control, management, and operation of the railroad by the receiver. On March 27, 1908, the receiver filed his petition in this court, setting forth, in substance, that the Elkins Electric Railway Company had so interfered, in violation of the terms of the injunction order, with the corporate powers of the Western Maryland Railroad, and had committed trespasses by construction of its railway on a portion of the lands and right of way of the railroad company without permission, license, or authority either by law or from the Western Maryland Railroad Company prior to the appointment of the receiver, or from the receiver since his appointment, and that such trespasses interfered with the proper management of the railroad company's property, and, that the electric railway company had upon the grounds instruments and appliances, and was threatening to unlawfully place a grade crossing at the point of trespass, which, if constructed, would seriously interfere with the property intrusted to the receiver, and a rule was asked in said petition against the Elkins Electric Railway Company, its manager, J. E. Morgan, and its engineer, P. B. Bloomfield, to show cause why they should not be attached for their contempt in disobeying the injunction order. This rule was awarded, and on April 4, 1908, the electric railway company, Morgan, its general manager, and Bloomfield, its engineer, appeared and filed their answer thereto, in which they deny that they have been guilty of any contempt of this court in any way or manner whatsoever; that they have in any manner obstructed the railroad of the Western Maryland Railroad Company, or Bush, its receiver, in the discharge of his duties as such, and they deny that they have violated the injunction order issued, or that they have constructed the grade of the electric railway over the lands of the railroad company or upon the right of way of the railroad company, or in any way have committed any actual trespass upon the lands of the railroad company, and in minute detail set forth the facts as they understand them to be. To this answer Bush, receiver, reserved the right to except or reply, and on motion of the Elkins Electric Railway Company leave was given it to file its petition in the cause at any time within ten days from that date, making necessary parties thereto, and by such petition present such allegations as would enable this court to determine its right to have the crossing brought into controversy in this cause, and leave to sue out process on said petition was also given. On April 13, 1908, the Elkins Electric Railway Company filed this petition, in which it sets forth that it is a corporation under the laws of West Virginia, with its principal office and place of business in Elkins, Randolph county, said state; that under its charter it has the right to build and operate an electric railway on a large number of the streets of the city of Elkins, and to connect the city of Elkins by an electric railway line with the city of Belington, in Barbour county, said state; that it is actively engaged in the construction of its line of railway, and has completed its roadbed to a considerable extent, set forth in said petition, in the city of Elkins, that this roadbed is completed to within a few feet of the right of way of the Western Maryland Railroad on Randolph avenue on the eastern side and on the western side for the entire length of Harrison avenue to the corporate limits of the city of Elkins, having in all about $1\frac{1}{2}$ miles of continuous trackway, excepting only the gap therein of a few feet across the Western Maryland Railroad, and, in addition to this, that it has practically completed the grading from the corporate limits of Elkins to the gap of the mountain down the river below Elkins toward Belington, and is engaged in accomplishing the grading of the line between the two cities. It is further alleged that, by the grants of its charter, it has the right to acquire all neces-

sary rights of way for its line either by gift, condemnation, or otherwise, and has the right to acquire the right to cross the right of way and tracks of the Western Maryland Railroad Company at the intersection of Randolph, Railroad, and Harrison avenues in Elkins. The petition then sets forth the power of Benjamin F. Bush, as receiver under the order of this court, to operate the part of the railroad situate in West Virginia; that petitioner has had negotiations with proper officers of the Western Maryland Railroad Company before it went into the hands of the receiver with a view to secure an amicable agreement relative to said crossing, but no such amicable arrangement could be made and was about to institute condemnation proceedings in the state court when said receiver was appointed; that petitioner took up said matter with the receiver, but he utterly refused to entertain any reasonable proposition, having for its object the acquisition of the right to cross the railroad tracks or right of way; and that, therefore, it is necessary to apply to this court to secure the same. The petition then charges that it is imperatively necessary for it to have the right to cross at grade at the point indicated; that the crossing is absolutely necessary; that a crossing below or above grade would be wholly impracticable at said point; that there is no other point that would be practicable for petitioner to cross the tracks at grade or under grade so as to meet the necessity and requirements of petitioner and its line of railway; that it is entirely practicable to have the crossing at that point; that petitioner has obtained from the city of Elkins the right to use Randolph, Harrison, and Railroad avenues for the purpose of constructing and operating its railway thereon.

Additional charges are made touching the obligation of petitioner under its contract with the city of Elkins to do certain paving upon certain avenues, which it alleges it has done, and the other fact, that at the point where the crossing is sought the railroad crosses the old turnpike, which was retained by the city as parts of said avenues, and that it is not believed that the railroad company or its predecessor, the West Virginia Central & Pittsburgh Railroad Company, acquired a right to cross the turnpike at said point, and that it is a trespasser upon the turnpike and has no legal right to be thereon, except it has the right by prescription and sufferance. It is then charged that, under the laws of West Virginia, it has equal rights with the railroad company to the use of said crossing, and that it will engage chiefly in the transportation of passengers for hire and has a greater interest than the Western Maryland Railroad Company in seeing to it that the crossing be properly constructed and kept in safe condition because it will cross the same with its cars carrying passengers at very brief intervals, while the railroad company will only pass over this crossing about four times each day with its trains carrying passengers, but that it is true the railroad company has and will possibly continue to have a large number of freight cars passing over the crossing every day, possibly as many as 10 trains of freight cars; that petitioner desires to place as well-constructed railroad crossing at the point as can be procured, and now has the same ready to place, and the same is known as a "90-pound triple railroad crossing"; that petitioner is under heavy bond with stringent conditions to have its electric railway in operation, in good faith, in Elkins by not later than the 15th day of October, 1908, and to refuse it the right to cross the tracks of the Western Maryland Railroad at this point will cause it grievous inconvenience and great financial loss. It is then averred that under section 11 of chapter 52 of the Code of West Virginia, as amended by chapter 43, p. 228, Acts W. Va. 1907, it is proper in all cases similar to this, where it is desired to cross one railroad at grade by another, to apply to a court of equity by proper bill of complaint to have fixed, and determined the place, proper connection, terms, and condition upon which the crossing may be made and the prayer of the petition is that this may be done. With the petition is filed exhibits showing the charter and amended charter of petitioner, and a map or survey showing the crossing sought. To this petition demurrers were filed by the Bowling Green Trust Company, Bush, receiver, and the Western Maryland Railroad Company, all relying on three grounds: First, that no leave or permission had been obtained by the petitioner to intervene; second, that petition did not sufficiently set out the plan, method and necessary particulars of the crossing; and, third, that no relief by way of condemnation is prayed for in said petition.

On the 5th day of June, 1908, these demurrers were considered by the court and overruled, and Bush, receiver, the Bowling Green Trust Company, and the Western Maryland Railroad Company, filed their separate answers, to which the petitioner replied generally. And the court, being of the opinion that the hearing of the cause could be expedited by so doing, directed that Patrick Cain, P. B. Bloomfield, and C. McC. Lemley, civil engineers, should go upon the ground where the crossing in controversy was located and ascertain and report whether or not such crossing was necessary, and whether or not it was practicable to establish it at that point and upon what terms and consideration the same should be established, and the amount of damages which in their opinion would be sustained by the establishment of the crossing and the terms and conditions upon which the electric railway company should be permitted to have a crossing at that point; also, that they should examine any other point or places that either of the parties might designate as a place where the electric railway company might cross the tracks either at grade, under grade or above grade, and report the advantage and disadvantage of such place or places of crossing, together with all the facts and circumstances connected therewith necessary to enable the court to determine the advisability of adopting such crossing, and, the defendants having demanded the right to take proof in support of the allegations of their answer, the court further gave said petitioner 15 days in which to take such proper proof as it might desire to take in support of the allegations of its petition, requiring notice to be given 5 days before of the time and place of taking the same, and then giving to the defendants 20 days thereafter in which to take its proof, and directing that such proof be taken in the form of depositions.

The answers filed to this petition by the defendants the Bowling Green Trust Company and the Western Maryland Railroad Company adopt substantially the averments made by the defendant Bush, receiver, in his answer thereto. This answer of Bush, receiver, very fully and minutely sets forth the objections made to the crossing at the point desired by the electric railway company. It avers that this point is where several avenues join; that it is substantially in front of a deep cut and curve in the railroad where its two tracks emerge into the yards of the railroad company at Elkins; that the crossing would be very near the switch entrances leading to the scales and to the repair shops of the railroad company, and it is charged that the crossing is impracticable, would be unusually dangerous, and exceedingly expensive. It denies that it is the only available crossing, but, on the contrary, sets forth, in substance, that at First street in the city of Elkins the track of the railroad company crosses the street above grade at a sufficient height to allow the electric railway to pass under its said track, and that the railway company has from the city the right to use this First street and other streets on the westerly side of said railroad tracks sufficient and suitable to connect up its line with Harrison avenue. It charges that, long before the railroad company went into the hands of the receiver, it had positively refused and denied the right to cross at the point desired, but had agreed to give free right of way under its property for the undergrade crossing at First street, and the receiver by his answer tenders to the electric railway company, free of cost, this undergrade crossing. It denies the construction insisted upon by the electric railway company of the West Virginia statute, and insists that under this statute a court of equity may only decree what is a proper crossing to be made under all the circumstances, and may locate the crossing or select between several proposed crossings and allow one of the same.

On July 6, 1908, the commission of civil engineers filed their report in this case. This commission was composed of Patrick Cain, engineer for the Western Maryland Railroad Company, P. B. Bloomfield, engineer for the Elkins Electric Railway Company, and C. McC. Lemley, a civil engineer in no way connected with either of the roads and selected by the court. In their report these engineers disagree. Cain and Lemley reported that, under existing conditions, a grade crossing at the point desired by the electric railway company would be impracticable, and, if allowed, would entail an unnecessary burden and expense upon both the railroad and the electric railway companies, and especially to the former for the reason that such crossing would be over two tracks in the throat or entrance to the yard of the railroad company, on a heavy grade coming into the yards and against the traffic pulling out of the yards, very dangerous to the trains coming down the grade to the depot, on

account of a short curve just east of the crossing through a deep cut, preventing sight of any obstruction on the crossing until within about three hundred and fifty feet of it. It is set forth in this report that this yard takes care of the classification of all freight coming to Elkins from the Coal & Coke, Coal & Iron and the Western Maryland Railroads; that the proposed crossing would be only a few feet, probably 15, from the point of the switches leading into the yards, and about 350 or 400 feet from the track to the scales upon which the cars are weighed; that the crossing would be located at a point over which the shifting of cars would be absolutely necessary in order to make up trains and ascertain the weight of car load shipments; that four public highways join at this crossing, as well as two private driveways; that over it is the only outlet or inlet for the railroad company to reach their repair shops, coach sheds, and that the crossing of the electric railway company at this point would increase danger to the public highways, inflict additional hardship and continual expense upon both companies and the public, create delays to the railroad and danger of accidents to the public. It is further set forth in the majority report that the installation of such crossing should be estimated at \$2,374; that the cost of two watchmen and maintenance should be estimated at \$900; that delay to freight trains required by law and by reason of the grade and inability of such trains being able to start after being stopped would be \$2,860 per year, which sums being capitalized at 5 per cent. would make a total of \$124,640. Bloomfield reports that this grade crossing is necessary and would be practicable; that the crossing as asked for should be installed at the cost and expense of the Elkins Electric Railway Company under specifications and supervision of the Western Maryland Railroad Company; that, if obliged to have a signal system, the Elkins Electric Railway Company should be willing to bear half the expense, for which system and all such other expenses necessary to operate and maintain such crossing he does not consider that any damages should be awarded the Western Maryland Railroad Company, on account at least of the operation of their railway caused by the crossing, and he thinks the railroad company should bear half the expense of the crossing and of the signal system.

Touching the undergrade crossing on First street, Cain and Lemley report that the same could be made; that the Western Maryland Railroad Company's tracks now cross First street above grade, giving about 10½ feet clearance at the highest point in the street, and by excavation of 4 feet can give 14½ feet clearance, which would be sufficient clearance to take the electric company's cars under the bridge, and that further clearance could be gotten by excavating deeper, or by putting an additional bent or a more shallow girder in place of the one now used by the Western Maryland Railroad Company over First street. They report that this crossing would probably be covered by high water a few times a year, but that it would be seven feet (which is considered ordinary high water mark) above low water, with a clearance of 14½ feet, and, as the water soon falls, there could be no serious objection to this, as most railroads are in low lands along rivers below high water mark, and oftentimes out of commission by reason of water and floods; that this undergrade crossing would have a material advantage over the grade crossing from the fact that it would eliminate all danger to the public traveling on either line of railway in so far as accidents are concerned; that it would eliminate all delays to traffic on both lines which are unavoidable on grade crossings; that, while it would change the route of the electric railway somewhat and cause the building of about four thousand feet of track, it would take the electric railway over a practical route; that a portion from Third street to First street on Davis avenue, which they would no doubt use at some time to reach the fair grounds could be used now in getting to this crossing; and that it would enable them to reach the Elkins Milling Company at First street and Railroad avenue, as well as pass by the roundhouse and machine shops of the Western Maryland Railroad Company, reaching their line again at Read street and Harrison avenue, thus giving them equally as good, if not better, route for passenger traffic and eliminate the dangers, obstructions, inconveniences, and responsibilities of a grade crossing, and put the electric railway company in just as good position to exchange passengers and freight with the railroad company. Bloomfield disagrees with this, and reports that he agrees that there is a place on First street where a crossing could be made under the Western Maryland Railroad Company's track, but that it is not practicable for the

operation of the electric railway from the fact that the electric railway company would be compelled to make a cut at First street under the Western Maryland Railroad Company's bridge to a depth of $7\frac{1}{2}$ feet to give them clearance of 18 feet, which is necessary for the operation of their railway, and would place them 7 feet under water from three to six times a year and 12.1 feet under water in case of flood like that of July, 1907; that, to overcome this, the electric railway company would have to build a retaining wall for a distance of 400 feet in order to keep the water out; that an approximate cost of this undergrade crossing to the electric railway company at First street would be, for the concrete wall \$600, for the excavation \$500, or a total of \$1,100; that they would be to the cost of building track from Third street down Davis avenue to First street, then along First street to Porter avenue, thence along Porter avenue to Main street, then along Main street to Read street, then along Read street to Harrison avenue where they would have connection with their present track, a distance of about 4,000 feet, and that this cost of construction would approximate \$12,500, including the undergrade crossing on First street under the Western Maryland Railroad Company's track; that a great disadvantage, and great expense would be incurred in the operation of the line under the Western Maryland Railroad Company's bridge on First street from the fact that there would be five extra 90-degree curves requiring extra power to operate the cars around them and extra expense of maintenance of the same, and by reason of the heavy grades they would have over that route. Lemley reports alone that an undergrade crossing could be established at the point asked for by the electric railway company, but that it would be at a very great expense, which expense he could not estimate without a survey and test made to show the material through which it would be necessary to make the required excavations. He further reports that an overhead crossing of the Western Maryland Railroad Company's tracks could be made at a large cut 350 to 400 feet east of the point where the grade crossing is asked for, but that he has no survey and no estimate of damages that would have to be paid to the owners of lands adjacent to the Western Maryland Railroad Company's right of way, nor has he any information whether the city would allow any change in the grades in the streets necessary to reach this crossing. A number of depositions of witnesses were taken and the cause submitted for hearing.

W. B. Maxwell, for petitioner, the Elkins Electric Ry. Co.

Benjamin A. Richmond and E. A. Bowers, for receiver and the Western Maryland R. Co.

DAYTON, District Judge (after stating the facts as above). The right determination of the questions involved in this controversy depends upon the construction of certain West Virginia statutes. At the threshold it may be best to set forth these statutory provisions:

Section 2343, Code 1906 (chapter 54, § 50), defines additional powers conferred by the act upon railroad corporations in 12 separate clauses of which I quote:

"Second. To take and hold such voluntary grants of real estate and other property as shall be made to it, in aid of the construction and use of its railroad, and to sell and convey the same, when no longer required for the uses of such railroad, not incompatible with the terms of the original grant.

"Third. To purchase, hold and use all such real estate and other property as may be necessary for the construction and use of its railroad, and the stations and accommodations necessary to accomplish the object of its incorporation, and to sell and convey the same when no longer required for the use of such railroad.

"Sixth. To construct its railroad across, along or upon any stream of water, water-course, street, highway, road, turnpike or canal which the route of such railroad shall intersect or touch; but such corporation shall restore the stream, water-course, street, highway, road, turnpike thus intersected or touched to its former state, or to such state as not unnecessarily to have impaired its usefulness, and to keep such crossing in repair. * * * And provided further, that in case of the construction of said railroad along highways, roads, turn-

pikes or canals such railroads shall either first obtain the consent of the lawful authorities having control or jurisdiction of the same, or condemn the same under the provisions of section forty-eight of this chapter.

"Seventh. To cross at grade, or to cross over or under, intersect, join and unite its railroad with any other railroad now built and constructed, or hereafter to be built and constructed within this state, at any point on its route, and upon the grounds of such other railroad company, with the necessary turn-outs, sidings and switches, and other conveniences in furtherance of the object of its connections, and every corporation whose railroad is, or shall be hereafter intersected by any new railroad, shall unite with the corporation owning such new railroad in forming such intersection and connections and grant the facilities aforesaid; and if the two corporations cannot agree upon the amount of compensation to be made therefor, or the points and manner of such crossing and connections, the same shall be ascertained and determined in the manner prescribed by section forty-eight of this chapter."

The section 48 (section 2340) referred to in the two last clauses provides:

"Sec. 48. If any railroad corporation shall be unable to agree with the owner of any real estate for the purchase thereof for its corporate purposes it may have such real estate condemned for such purposes under the provisions of chapter forty-two of the Code. * * * Any such corporation may take and hold under any grant or ordinance made by a municipal corporation any interest or right such municipal corporation may have in any street, alley or public ground, and may exchange therefor, in whole or in part, dedicate or otherwise secure to public use, another street, alley or parcel of ground out of real estate owned by such railroad corporation, whether acquired by purchase or condemnation; or under an agreement with such municipal corporation, may condemn land for use as such new street, alley or public ground, in the same manner as it may condemn land for its own use. * * *"

The chapter 42 of the Code referred to above defines the public use for which private property may be taken, and provides the methods of procedure in so taking it.

The Legislature of Virginia at its session of 1836-37 (Acts 1836-37, p. 108, c. 118, § 16) passed an act which became incorporated into as section 24 of chapter 56 of the Code, 1849, which provided that:

"Sec. 24. If any railroad, turnpike or canal company deem it necessary in the construction of their work to cross any other railroad, turnpike or canal, or any state or county road, it may do so, provided its work be so constructed as not to impede the passage or transportation of persons or property along the same. If any such company desire that the course of any other railroad, turnpike, canal or state road should be altered to avoid the necessity of any crossing, or of frequent crossings, or to facilitate the crossing thereof, the alteration may be made in such manner as may be agreed between the company desiring such alteration and the other railroad, turnpike or canal company, or the board of public works in the case of the state road. And if such construction or alteration as is allowed by this section, shall cause damage to any company, or to the owner of any lands, the railroad, turnpike or canal company first mentioned, shall pay such damage. But any county road may be altered by such company for the purpose aforesaid, whenever it shall have made an equally convenient road in lieu thereof."

This provision was incorporated without change in Code Va. 1860, c. 56, § 24, and in the Code W. Va. 1868, c. 52, § 11. The Legislature of West Virginia incorporated into an act of April 3, 1873 (Acts 1873, p. 213, c. 88), the law of the state governing the organization, powers, management, and operation of railroads, and in this act incorporated what is now substantially section 2343 (chapter 54, § 50) of our Code of 1906, portions of which have been hereinbefore cited. By the act of March 10, 1881 (Acts 1881, p. 212, c. 16), this section

11 of chapter 52 of the Code was amended so as to provide that, in case the parties interested fail to agree upon such crossing or alteration as is desired, the company desiring it may bring its suit in equity, etc., and with this amendment it became incorporated into our Code of 1906 as section 2216 (chapter 52, § 11). And by an act passed February 19, 1907 (Acts 1907, p. 228, c. 43), this section was still further amended so as to make it applicable to pipe line companies. As it now stands it reads as follows:

"Sec. 11. If any railroad, turnpike, or canal company, or any company organized for the purpose of transporting carbon oil or natural gas, or both, by means of pipes or otherwise, deem it necessary in the construction of its work, or any branch or siding thereof, to cross any other railroad, turnpike, or canal, or pipe line, or any state or county road at grade or otherwise, it may do so; provided, its work be so constructed as not to impede the passage or transportation of persons or property along the same. If any such company desire that the course of any other railroad, turnpike, canal, pipe line, or stateroad, or any stream which is not a public highway, should be altered to avoid the necessity of any crossing, or of frequent crossings, or to facilitate the crossing thereof, or the construction of a parallel work, the alteration may be made in such manner as may be agreed between the company desiring such alteration and the other railroad, turnpike, or canal company, or pipe line company, or the board of public works in the case of a state road, or the owners of the land to be affected by the alteration of the course of such stream. In case the parties interested fail to agree upon such crossing or alteration as is desired, the company desiring it may bring its suit in equity, and in such suit the court may, in a proper case, decree that such, or any proper crossing, or alteration, may be made upon payment of damages to be ascertained as provided in chapter forty-two of the Code, and the company desiring such crossing or alteration may thereupon proceed under said chapter to obtain the right to make such crossing or alteration. If such crossing or alterations as is allowed by this section, shall cause damage to any company, or to the owner of any lands, the railroad, turnpike, canal, or pipe line company first mentioned shall pay such damages; but any county road may be altered by any such company for the purpose aforesaid, whenever it shall have made an equally convenient road in lieu thereof."

Section 2358 (chapter 54, § 61) provides:

"Sec. 61. A bell or steam whistle shall be placed on each locomotive engine, which shall be rung or whistled by the engineer or fireman, at the distance of at least sixty rods from the place where the railroad crosses any public street or highway, and be kept ringing or whistling for a time sufficient to give due notice of the approach of such train before such street or highway is reached, under a penalty of not exceeding one hundred dollars for each neglect, one-half of which shall go to the State and the other to the prosecuting witness; and the corporation owning or operating the railroad shall be liable to any party injured for all damages sustained by reason of such neglect. Provided, that such penalty shall be sued for within three months from the time the cause of action arises, and not after. When the tracks of two railroads cross each other, or in any way connect at a common grade, the crossing shall be made and kept in repair, and watchmen maintained thereat at the joint expense of the companies owning the tracks; all trains or engines passing over such tracks shall come to a full stop not nearer than two hundred feet nor farther than eight hundred feet from the crossing and shall not cross until signaled so to do by the watchman, nor until the way is clear; and when two passenger or freight trains approach the crossing at the same time, the train on the road first built shall have precedence, if the tracks are both main tracks over which all passengers and freights on the road are transported; but if only one track is such main track, and the other is a side or depot track, the train on the main track shall have precedence; and if one of the trains is a passenger train and the other a freight train, the former shall take precedence; and regular trains on time shall take precedence over trains of the same grade not on time, and

engines with cars attached not on time shall take precedence of engines without cars, not on time."

It is, in effect, earnestly insisted in this case by counsel that the electric railway company has the right under clause seven of section 2343 (chapter 54, § 50) of the Code "to cross at grade" the tracks of the Western Maryland Railroad Company "at any point on its route" and upon the grounds of the defendant railroad company that it may select, and that this section of the law imposes upon the defendant railroad company the obligation to "unite with it in forming such intersection and to grant it facilities for the purpose," and that by the terms of section 2358 (chapter 54, § 61) it is entitled to require the defendant railroad company to bear half the expense of the making and keeping in repair of such crossing, as well as the cost of maintaining a watchman thereat.

On the other hand, it is insisted by the defendant railroad company's counsel that under section 2216 (chapter 52, § 11) of the Code the electric company is not entitled to select its place of crossing, but that in case of disagreement it is required to apply to a court of equity, and have that court of equity pass upon and determine where such crossing should be, its character, and the conditions and limitations under which it should be made, and then must resort to the court of law in the usual condemnation proceeding to have ascertained the damages that it should pay to the defendant company for such crossing. It seems clear, both by the terms of the statute and by the decisions in this state, that the right of way of a railroad becomes the private property of such company, and that the rights of the public therein extend only to the use made thereof. The statutes quoted expressly give to such company the right, by gift or purchase, to take in fee such right of way and other real estate as may be necessary for its purposes. When it has acquired such real estate and no longer needs the same for its purposes, it may by these statutes exchange or sell the same. In *Railroad Company v. Ironworks*, 31 W. Va. 710, 8 S. E. 453, it is held:

"The property of railroad corporations, so far as concerns the ownership thereof and the profit to be made of its uses, is to all intents and purposes private property, although applied to a use in which the public have an interest."

By reason of the interest which the public has in the use of such railroad property the Legislature has allowed the right of condemnation to be exercised in behalf of railroad corporations to secure such right of way. It must be conceded that, where one railroad company has secured under its charter rights the right of way and built thereon its line of road and is using the same for public uses, the Legislature could not authorize the taking wholly thereof by another railroad corporation for a like public use. The extent of its power would be to authorize the second company to place upon the land an additional burden or easement on or over it to be constructed so as "not to impede transportation of persons or property along the same" by the first corporation owning the fee title to the land. These fundamental principles were well set forth and settled by *Tucker, J.*, in *Tuckahoe Canal Company v. Tuckahoe & James River Railroad Co.*, 11 Leigh (Va.) 42, 36 Am. Dec. 374. Where railroads cross each other for the

mutual benefit of both, and do "not impede the transportation of persons and property along the" route of the first one owning and operating the right of way, the Legislature may well direct as it has in clause 7, § 2343 (chapter 54, § 50), that the railroad intersected "shall unite with the corporation owning such new railroad in forming such intersection," but this section cannot be construed as, first, authorizing the new company to take wholly the property of the old to the destruction of its right to use and operate its road; nor, second, to take such right of easement and joint use without paying just compensation. Such a construction of this statute would be to allow confiscation and destruction of vested rights in the older company which are always to be first considered. It is unfortunate that there should be such apparent conflict between clause 7 of section 2343 (chapter 54, § 50) and section 2216 (chapter 52, § 11), and it is also unfortunate that so few decisions of the Supreme Court of Appeals of this state exist construing and harmonizing them. In fact, there exist but two such decisions, and, while rendered within less than four months of each other, most unfortunate of all they are in several particulars in direct conflict with each other and muddy rather than clear the waters. These two cases found in the same volume are *Wellsburg & State Line R. R. Co. v. Panhandle Traction Co.*, 56 W. Va. 18, 48 S. E. 746; *Grafton & Belington R. R. Co. v. Buckhannon & Northern R. R. Co.*, 56 W. Va. 458, 49 S. E. 532. In the first case Poffenbarger, J., very fully, clearly, and, I think, satisfactorily, lays down the true principles to guide us in cases like this arising under these statutes. He very pertinently calls attention to the fact, as I have done, that section 2216 (chapter 52, § 11) has come down to us from the Virginia legislation of 1837, and has been re-enacted and incorporated in all the Codes since that date. I have shown, a fact arising since this decision was rendered, that it was re-enacted and extended to pipe line companies by the Legislature of 1907. He sets forth substantially: (a) That the acquisition of a crossing by one railroad over another involves a taking of private property for public use. (b) That by this section 2216 courts of equity have power to determine (1) the exact location of such crossing; (2) the manner in which it shall be made. (c) That wherever such crossing at grade is necessary it is to be granted, in the absence of agreement by the parties, under such conditions and limitations as to location and mode of crossing as such courts of equity may justly impose, in view of the interests of the parties and those of the public. (d) That, while courts of equity thus have the right to determine the location and mode of crossing, they do not have the right to grant or decree the crossing itself to be made or the right to make it, or to ascertain and fix the damages to be paid for it, but that this must be done by the law court by condemnation proceeding under chapter 42 of the Code.

The opinion in the second case is both brief and unsatisfactory, and, with the utmost deference, in my judgment, unsound. In that case one railroad company had instituted at law its proceeding against another railroad company to condemn a crossing of its own location and mode of construction, and not agreed to by the owning company. The latter brought its bill in equity to enjoin such proceeding at law until the court of equity could determine the location of such crossing and

the conditions and limitations under which it should be made. The court held that the law court had jurisdiction to condemn the crossing, and that equity had no jurisdiction to restrain or stay such proceeding at law. This conclusion is sought to be sustained on the ground that:

"It is a well-settled rule that a court of equity will not usually enjoin an action at law on grounds which may be urged as a defense to such action. Even in cases of concurrent jurisdiction the action will not be interfered with by a court of equity, unless that court can give a more perfect remedy or the case can be better tried by the procedure of that court."

That this principle is an A B C one in common-law practice will not be questioned. But in the enforcement of purely statutory requirements wherein each court has a defined duty to perform, and that of the equity court to be performed first by the inevitable necessities of the case, how does such principle apply? It cannot for a moment be held that the two courts have "concurrent" jurisdiction over the whole matter involved. It is the exclusive right of the equity court to fix the location of the crossing, and to set forth the conditions and limitations upon which it can be made at this location. It is then the exclusive right of the law court to enforce the law of eminent domain, and condemn and take the property right to this easement, and fix and ascertain the compensation to be paid therefor. Until the equity court has fixed the place of crossing and its character, how can the law court ascertain the damages to be paid for its taking? How can petitioner in such condemnation proceeding undertake to describe the crossing he is entitled to have? How can any jury determine the damage for something not identified and not known? How could a writ of error in such proceeding help the matter? Reverse and dismiss the proceeding it may be answered. Would this be better than to stay it until identity and location can be determined? What possible ground for prohibition would exist? Prohibition is allowable to prohibit a proceeding wholly unwarranted by law, or one assumed to be taken by a court absolutely without jurisdiction. The petitioner here had right to enforce a crossing, and the law court had complete jurisdiction, but only after the equity court had determined its location, conditions, and limitations. It is to be noted that while Poffenbarger, J., who wrote the opinion in the first case, concurs in this one by McWhorter, J., that injunction will not lie, he decidedly objects to its logical conclusion that, under the seventh clause of section 2343 (chapter 54, § 50), the company desiring the crossing can go on and fix its location and character, then go into the law court, and have it condemned where and as it wants it as a matter of right, regardless wholly of the rights of the company owning, in possession of, and using the land.

For my part, in view of the conflict in these two decisions by the same court and the same judges, these two being the only ones, I feel free as a federal judge under well-settled principles laid down by the Supreme Court to guide me in such cases to wholly reject the principles laid down in this case of *Grafton & Belington R. R. Co. v. Buckhannon & Northern R. R. Co.*, and hold in accordance with those of the *Railroad Co. v. Traction Co.* that the right to condemn at law a crossing as provided by clause 7 of section 2343 is inchoate, and cannot in case of disagreement of parties be enforced until the location and char-

acter of such crossing has been first determined by the equity court under the provisions of section 2216. If necessary, I would hold that, if such condemnation were attempted, the equity court would have full power to enjoin and stay the prosecution of any such proceeding at law until it had by its decree fixed the location and character of the crossing to be condemned. I have deemed this discussion necessary in order to determine the contention of the electric company that it is entitled to have the crossing of its choice as a matter of right. As to the contention that under this same clause 7 of section 2343 that provides that "every corporation whose railroad is, or shall be hereafter intersected by any new railroad, shall unite with the corporation owning such new railroad in forming such intersection and connections and grant the facilities aforesaid," and section 2358 (chapter 54, § 61), which provides, among other things, that "when the tracks of two railroads cross each other, or in any way connect at a common grade, the crossing shall be made and kept in repair, and watchmen maintained thereat at the joint expense of the companies owning the tracks," the railroad company is not entitled to damages for the crossing, it is sufficient to say, in addition to what I have already said, that these statutes confused and conflicting as they seem to be do not in my judgment uphold such contention. If they did, when it is remembered that the taking of such crossing, as we have shown, is "a taking of private property," then they would have to be held to be in contravention of the constitutional provision inhibiting "the taking of private property without just compensation therefor," and therefore void. I have grave doubt whether section 2358 was ever designed to or can be construed to apply to crossings made by electric railroads. Taking all its provisions together, requiring the sounding of whistles or the ringing of a bell required to be maintained by the engines, etc., it would seem to be applicable alone to steam roads. If it is applicable, it seems to me clear that, in ascertaining the damage to be recovered by the railroad, account must be taken of the one-half cost of maintenance and repair and of watchmen imposed by this statute, but I am not required to determine this finally at this time. If, then, this court must determine, as such seems to be the requirement of the law, the location of a crossing over defendant's tracks for this electric road, I feel constrained to say from the report of the engineers and the evidence in the case that such crossing should not be fixed or allowed at the point asked for by the electric company. Without discussing the evidence, it clearly shows that such crossing would be very dangerous to the railroad and to the public; that it would be very expensive to both roads, would very greatly impede the railroad company's necessary operations, and can be avoided. So far as crossing at First street is concerned, I think it practicable, but undesirable, far better than the one sought, however. As it is tendered free without conditions, it would require no further investigation on the part of this court to fix its character. My deliberate judgment would favor the overhead crossing some 300 or 350 feet beyond the one asked for by petitioner, and, if it is desired by the petitioner to investigate this one further, I will retain the cause for a reasonable time to enable them to do so, or, if desired, I will require report thereon to be made by engineers.

MACON GROCERY CO. et al. v. ATLANTIC C. L. R. CO. et al.

(Circuit Court, S. D. Georgia, W. D. July 29, 1908.)

COURTS — JURISDICTION OF FEDERAL COURTS — INTERSTATE COMMERCE — SUIT TO ENJOIN RATE BY CARRIER.

A federal court of a district of which the complainants are inhabitants has jurisdiction of a suit to enjoin several railroad companies, who are members of an association, from putting into effect an alleged unlawful rate on all food commodities shipped in interstate commerce within the territory in which such district is situated, although none of the defendants are citizens of the state, where they operate roads in the state and district, and are found and served therein.

In Equity. Suit for injunction. On pleas to the jurisdiction and demurrers thereto.

W. A. Wimbish, Edgar S. Watkins, and Alexander Akerman, for complainants. Henry L. Stone and Ed. Baxter, for respondent Louisville & N. R. Co. Claudian B. Northrop and Sanders McDaniel, for respondent Southern Ry. Co. and Cincinnati, N. O. & T. P. R. Co. George B. Elliott and Robert C. Alston, for respondent Atlantic C. L. R. Co. Claude Waller, J. D. B. De Bow, and John L. Tye, for respondent Nashville, O. & St. L. Ry. Co. Ed. Baxter and Sidney F. Andrews, special counsel for all respondents.

SPEER, District Judge (orally). This is an exceedingly interesting question, and, upon its proper and final determination, a great deal looking toward the settlement of controversies between the shipping public, and the great lines of transportation, must depend. The averments of the bill are of the most significant character. It is charged that through a great freight association, called the Southeastern Freight Association, the respondent corporations have entered into an unlawful combination in restraint of the business of transportation, by means of which the staple commodities, upon which the very life of the people must depend, are necessarily and largely enhanced in price. It is alleged that this is done in an unlawful manner; that the increase is to go into effect immediately; that the damage to innumerable purchasers of goods throughout the territory affected will be irreparable; that the complainants and all in like case standing have no recourse save by application to the court of equity having jurisdiction.

It is true that in this case the illegality of the alleged increase in rates must necessarily in large measure be determined by the federal law. The legality or illegality of the alleged combination in restraint of trade must be determined by the same law, and it seems to be conceded that, generally speaking, this court would not have jurisdiction of these questions finally, except under conditions which do not exist here; that is to say, the court can only for final determination entertain the federal question in the district of which the defendants are inhabitants. But to my mind this case presents this aspect, if the averments of the bill are taken as true. Here is a threatened and imminent violation of the federal law, of the gravest character to a large number of people, not to the public, but to many. The injuries, the consequences of which are described, will take effect on the 1st of August. There is no time, this being the 29th of July, for these people to have protection, or seek recourse elsewhere. They are entitled to

relief, if the averments are true. "Ubi jus ibi remedium." Wherever there is a wrong, there is a remedy. Now, if this increase of rates is unlawful, as it is alleged to be, if in point of fact these people who bring this complaint are to be made to suffer irreparable injury by the action of the respondents, they ought to have the right somewhere, before some tribunal under our system, to protect themselves from the wrong and the injury. That it is irreparable, if the charges of the bill are true, there can be no doubt. An illustration in point is the Tift Lumber Rate Case, 206 U. S. 428, 27 Sup. Ct. 709, 51 L. Ed. 1124. There was a case where similar charges—arbitrary and unreasonable, it was alleged—were imposed upon the shippers. The decree was granted upon the fullest consideration. It was determined by all the courts having jurisdiction, and by the Interstate Commerce Commission, that those rates were arbitrary and illegal. It was affirmed by the Supreme Court of the United States. The railroads, through their distinguished representatives, had in open court promised to pay back to the shippers the amounts thus exacted, in case this court would withhold the injunction, and the case should finally be determined against them. And yet now we see the shippers are driven to multitudinous proceedings in other cases, and delayed year after year, until their substantial rights will apparently be frittered away by the costs of litigation. This is a grave wrong to the shippers. It is a wrong defined explicitly by federal law, but also denounced by the common law, but the only adequate remedy is in equity. What would be the condition of these shippers before the court, if their charges are true here, if these increased rates should be imposed by the railroad companies? They must pay the exactions, however unlawful. They may then go to the Interstate Commerce Commission, perhaps thence to the Circuit Court of Appeals, and thence to the Supreme Court of the United States, with all that law's delay, which is classed by Shakespeare with "the proud man's contumely, the insolence of office, the pangs of despised love, and all the spurns which patient merit of the unworthy takes." In the meantime the combination of railroads would have the use of money thus unlawfully exacted from the people. All of this these merchants would endure, and in this southern country, which is little able to bear it. Why? Because no court has been found which can stay the wrong and prevent these calamities to the people, because there is no jurisdiction in any court created by the people which can avoid these calamitous results? I do not believe that such is the condition of our law. I think that in view of the general policy of the laws of the United States on this great subject with which our people are grappling, and the wrongs which they are attempting to redress—all I think in a spirit of fairness and justice to the great lines of railway transportation, a spirit which I am sure inspires the breast of this court—there is such a tribunal and such a remedy. I think that we have jurisdiction over these railroads, which come into the Southern district of Georgia, and carry on their business here. They are found here. They remove their cases to these courts on account of their nonresidence when parties sue them. They here bring writs and actions against resident citizens of the state. They here

sue out injunctions against state action taken to decrease their rates. But they deny the jurisdiction when its efficacious remedies are sought in behalf of the same classes against whom they often invoke the power of these courts. This is the district of the complainants' residence, and the defendants, having been found in that district, may be there sued. They cannot plead that they are nonresidents for the purposes of the litigation here, and yet come into this territory, and control the price of everything upon which the comfort and the very life of the people depend, so far as transportation is concerned, and then deny the right of those wronged to be heard. I think that the averments of the bill demand additional inquiry.

I will say now to counsel that if the facts of the case are proved, as they insist they will be, so far as the court is at present advised, it will proceed to retain this bill for injunction until they can make proper application to the Interstate Commerce Commission, and there have the question determined as to whether or not this increase is reasonable. The railroads then will have no reason for delay. They will "post with quick dexterity" for final judgment. The court will not, as at present advised, proceed to final decree in this case, at least until that trained, expert, and responsible body, charged with the special duty, shall pass upon the issue here. I will sustain the demurrer to the plea, and thus intimate that, if complainants do not in a reasonable time go to that department of the government specially charged, the court will dispose of the case. I sustain the demurrers, and overrule the pleas to the jurisdiction, construing the pleas and the averments of the demurrers and the bill together.

MACON GROCERY CO. et al. v. ATLANTIC C. L. R. CO. et al.

(Circuit Court, S. D. Georgia, W. D. August 1, 1908.)

CARRIERS — INTERSTATE COMMERCE — POWER OF COURTS TO ENJOIN ENFORCEMENT OF RATES.

The power given to the Interstate Commerce Commission to determine the reasonableness of rates and establish maximum rates by Interstate Commerce Act Feb. 4, 1887, c. 104, § 15, 24 Stat. 384 (U. S. Comp. St. 1901, p. 3163), as amended by Hepburn Act June 29, 1906, c. 3591, § 4, 34 Stat. 589 (U. S. Comp. St. Supp. 1907, p. 900), does not deprive a federal court of equity of jurisdiction to enjoin the putting into effect of an interstate rate which is shown or admitted to be arbitrary, unreasonable, and unjust and to have been adopted through a combination in restraint of interstate commerce, until such rate can be passed on by the commission, where irreparable injury would result to complainants and others affected by such rates if they should be put in force.

In Equity. Suit for injunction.

The complainants are wholesale dealers in groceries, food products, and like commodities in several towns and cities within the territorial jurisdiction of this court. The respondents are certain railway companies organized and existing under the laws of states other than Georgia, but whose lines extend throughout the state, and into the division and district of this jurisdiction. The respondents are common carriers engaged in interstate commerce. They transport grain, flour, grain products, hay, meats, corn, and many other staple commodities from Ohio and Mississippi river crossings from Nashville, Tenn., and other points made with relation thereto, to what are termed "southeastern points of destination." The latter expression includes all points of delivery within the states of South Carolina, Georgia, Florida, and a large

part of Alabama. The respondents, it is charged, are members of what is termed the "Southeastern Freight Association," and this organization constitutes an illegal combination in restraint of interstate trade, for the promotion of monopoly, and for the destruction of fair competition among carriers engaged in that trade. The respondent railway companies, it is alleged, by concurrence of action, and through the medium of this Southeastern Freight Association, can and do fix and maintain rates for transportation of freights from Ohio and Mississippi river crossings to destinations in the states of Georgia, Florida, and South Carolina. One of the respondents, the Louisville & Nashville Railway Company, has continuous lines from Cincinnati, Louisville, Evansville, St. Louis, Memphis, and Nashville to Atlanta. As one of the lessees of the Georgia Railroad, this respondent has entrance into Athens, Macon, and Augusta. The Nashville, Chattanooga & St. Louis Railway maintains and operates a through line from the Ohio river at Paducah, Ky., and from the Mississippi river at Hickman, in the same state, and at Memphis, via Nashville, to Atlanta. Another respondent, the Atlanta Coast Line Railroad Company, is also a lessee of the Georgia Railroad, and has direct connection with the Louisville & Nashville and the Nashville, Chattanooga & St. Louis. Over its own lines of railway it reaches many important destinations in south Georgia and Florida. Another respondent, the Southern Railway, in connection with the Cincinnati, New Orleans & Texas Pacific Railway, maintains and operates through lines from Cincinnati, Louisville, and St. Louis to Atlanta, Macon, Columbus, and other important points within the state of Georgia. The Nashville, Chattanooga & St. Louis Railway Company is owned or controlled by the Louisville & Nashville Railroad Company through the ownership of a majority of its capital stock. The Atlantic Coast Line Company, a holding company, organized under the laws of the state of Connecticut, owns or controls both the Louisville & Nashville Railroad Company and the Atlantic Coast Line Railroad Company.

The Cincinnati, New Orleans & Texas Pacific Railway Company is owned or controlled by the Southern Railway Company, through the ownership of stock or otherwise, and is practically a part of the Southern Railway System. The lines of the companies enumerated are all, by virtue of their location, naturally competitive. There is no other railway system with its own lines extending from Ohio and Mississippi river crossings from Nashville, Tennessee, and points made with relation thereto to destinations in the states of Georgia, Florida, and South Carolina. Because of the advantages afforded by their continuous and controlled lines, the Southern Railway System and the Atlantic Coast Line System can and do fix and maintain the rates between Nashville, Ohio, and Mississippi river crossings, and relative points to all points of destination in the southeastern territory mentioned.

It is charged that any combination, agreement, or understanding between these naturally competitive lines, whereby rates are advanced and maintained, is in suppression of competition.

In the year 1904, and prior thereto, there was much discontent with the rates of freight from eastern and western points of origin to Atlanta and other relative points, including many cities of middle and southern Georgia. Shippers and interested parties sought of the carriers a reduction of rates, and as a result a citizens' committee was appointed by the city council of Atlanta to confer with a committee of traffic officials of railway lines initial at that city. The whole body of rates from eastern and western points of origin was discussed, and a general readjustment resulted from conferences in November and December, 1904. The following reductions from Ohio and Mississippi river crossings to Atlanta were voluntarily accorded by the railroads: Class B, 2 cents per 100 pounds; class C, 2 cents; class D, 2 cents; class F, 4 cents; flour in sacks, 2 cents; fresh meats C. L., 2 cents. Similar reductions were also made to Macon, Columbus, and other points related in rates to Atlanta. It was agreed between the traffic officials of the railroad companies and the Citizens' Committee that the reduced rates were just, reasonable, and compensatory. The companies then prepared and issued, effective February 1, 1905, their freight tariff incorporating these reduced rates, in which, it is charged, each of the respondents to the bill joined and concurred. These reduced rates thus put into effect have since been maintained, under them a large and growing traffic has moved, and they were satisfactory to the shippers and remunerative to the carriers. During the years

in which they have been maintained business and trade conditions became adjusted to the present rates, and all parties interested have prospered thereunder.

Some time prior to the 1st of June, 1908, certain of these carriers began a concerted movement for an increase of the rates established as described. It was essential for the two great controlling systems to unite in the proposed increase. In order to accomplish this, the intervention of the Southeastern Freight Association was sought and employed. As a result the Louisville & Nashville, the Atlantic Coast Line, and the Southern Railway, composing the two naturally competing systems, joined in a declaration. This they filed with the Southeastern Freight Association. It declared that on August 1, 1908, they would make effective an advance in rates on fresh meats, grain products, hay, and packing house products from the producing points above mentioned to southeastern points. These commodities are classified by the Interstate Commerce Commission as "B," "C," "D," and "E." In class B are salt meats in bulk, ham, shoulders, sides, pigs' feet, beef, pork, tripe, sausages, canned meats, fish, lard substitutes, or compounds, cooking oils, products of cottonseed oil or cocoanut oil, and other related articles. On all products of this class the respondents propose an increase in the charges of transportation of 3 cents per 100 pounds. Class C imports flour, if not otherwise specified, in sacks. On the actual weight of this commodity the carriers notify the shipping public of an advance over present rates of 2 cents per 100 pounds. Class D includes such articles as beet pulp, bran, shorts, linseed cake, cerealine (used for brewing), kaffir corn, corn cobs, cotton stalks, excelsior, the fiber of cocoanut and palmetto, animal and poultry food, brewers' grain, grain in sacks, corn, oats, rye, wheat, hay, fodder, straw, husks, shucks, malt, meal of various kinds, middlings, oatmeal, palmetto or palm leaves, peas (cow, clay, or field), peanut cribble, flour, grits, bran, hulls, rice (crystal or prepared), rough rice, rice polished (bran, chaff, and middling), sea grass, sea weed or salt hay, seed cotton (car load), shavings, wood, not otherwise specified, pressed in bales. On all articles of class D the proposed increase is 2 cents per 100 pounds. In class E are to be found the important articles of flour in barrels and half barrels and grits in barrels. Class E, if the respondents' purposes are made effective, will pay an increase of 4 cents per barrel. Fresh meats will pay an increase of 3 cents per 100 pounds; grain and hay, 2 cents per 100 pounds; grain products, 2 cents; and packing house products, 3 cents.

The Southeastern Freight Association, through its chairman, Mr. E. H. Hinton, on June 26, 1908, sent out its manifesto, termed "Information Issue No. 517," which announces the purpose of the defendant companies and of the Central of Georgia Railway Company (which is not a party to this bill) to "advance present rates" on the commodities and in the amounts heretofore described. The manifesto, or "Information Issue," also expressly supersedes the Southeastern Freight Tariff and Information Issues in conflict therewith. It is careful to state that each company acts separately for itself; and with equal care states that the rates, rules, and regulations in this tariff are the "separate" rates, rules, and regulations of each of the carriers named and their connections. It will be observed, however, that there is striking unanimity in the rates. They are communicated to each of the separate lines by the chairman of the Southeastern Freight Association; and it is charged that this effectively suppresses competition, and forces all connecting carriers either to agree therein, or give up the traffic. All interested lines did concur, acting in this regard through the agency of the Southeastern Freight Association. Subsequently the Louisville & Nashville and the Southern Railway filed with the Interstate Commerce Commission their freight tariffs, embodying the advances in rates above mentioned, and gave notice that said tariffs would become effective on August 1, 1908. In each of these tariffs practically every interstate line joined as a participating carrier; the participating lines being 73 in number. The machinery by which the Southeastern Freight Association—alleged to be an unlawful combination in restraint of trade—reaches its effective conclusions, is set forth in the bill. It is charged that the advance in rates is the direct outcome of understandings and agreements in suppression of competition and in unlawful restraint of interstate trade accomplished through this machinery; and that the acts of such combination in

advancing rates are the result of a conspiracy, which is unlawful, as well at common law as under the statutes of the United States.

The proposed advance will affect commodities of prime utility and daily necessity. The complainants and all dealers in the southeastern states depend very largely for supplies of these commodities upon producing territory reached over the lines on which the advanced rates will be demanded. The complainants contend that commodities of this character are entitled to as low a rate as may be consistent with a fair return to the carrier for the transportation rendered, and that the advances will seriously disturb existing trade relations, causing losses to complainants and other dealers, and an increase in the cost of living to the consuming public. The staple articles affected are necessarily and properly sold by the complainants upon a small margin of profit, and the gains result from the large volume of business. It is estimated that the proposed advance will represent a charge or tax to the dealers in the state of Georgia of not less than \$500,000, and probably exceeding \$1,000,000 annually. The consuming public will be forced to bear some portion of the additional tax represented by the proportional increase in the price. While considerable traffic will continue, the increased rates will inevitably restrict its volume, reduce the business of complainants and other dealers, and deprive the public or some part thereof of the ability to purchase and use these commodities, to the irreparable loss and injury of complainants and others similarly situated, and to the prejudice of the public interest. The legal remedy, it is stated, is inadequate, for the reason that there will be a constantly recurring grievance incapable of pecuniary estimation. The enforcement of the right of reparation in damages will bring about a multitude and multiplicity of suits. It is not a compensatory charge to fairly meet the cost and value of the services to be performed by the defendants and other carriers, but the advance is an arbitrary and unlawful exaction. The voluntary establishment of reduced rates following the Atlanta conferences, and the maintenance of these rates for more than four years, is alleged to be an admission and declaration on the part of the carriers that such rates were reasonably high and compensatory under normal conditions. The carriers prospered until the financial panic of October and November, 1907. While there was some loss then, all lines and classes of business and industry also lost. Now, there is a decided advance in the prosperity of the country, and the net earnings of the defendants and other carriers in recent months have largely increased, in some cases showing net earnings exceeding those of corresponding months of the preceding year. But the carriers have no right to take advantage of an abnormal condition, which is necessarily transitory, nor to make advances in rates upon commodities, which are the necessities of daily life.

Following these averments, the complainants pray that an injunction pendente lite shall be issued, and that the defendants and each of them shall be temporarily restrained from putting into effect the proposed increase of rates, to be made effective August 1, 1908, from Ohio and Mississippi river crossings, and points made in relation thereto, to all points in the state of Georgia affected by said advance; and that, upon the final hearing, a decree perpetually enjoining said advance may be made effective. Discovery is prayed, in order to obtain certain evidence, in the possession of the defendants, to prove certain averments of the bill. There is a prayer for general relief, and the usual prayer for process. The bill is properly verified.

On Saturday, the 25th of July, the bill was presented for the consideration of the court. A temporary restraining order was then issued, but the hearing thereon was fixed for the ensuing Wednesday, the 29th inst., in order that the facts might be heard, and, if possible, the matter in issue determined before the date fixed for the advance of rates. The hearing began on the morning of the 29th, and was concluded about noon on the 30th. In view of the importance of the issues involved, the court took a short time for consideration.

The respondents first interposed pleas to the jurisdiction. These were overruled upon the grounds stated in the oral opinion (a report of which may be found in the record), except as to the plea of the Cincinnati, New Orleans & Texas Pacific Railway Company. Since this company had not been actually served, the court took its plea under consideration; and, if service is not promptly effected, no order affecting its interests will be granted.

The respondents filed no answer, and introduced no proof whatever, but relied solely upon a demurrer, signed by the solicitors for all of the defendants. This may have the effect of waiving their pleas to the jurisdiction, in so far as they relate to the contention that the respondents can only be sued in the circuits or districts of which they are inhabitants. The demurrer, however, denies the jurisdiction of the court as a court of equity, denies that there is equity in the bill, insists that it is not competent for the complainants to raise any question as to the rates of interstate transportation, unless some representative of the public is a party to the record, or unless the Interstate Commerce Commission has passed upon the rates. The demurrer also alleges that there is an adequate and complete remedy at law. These grounds are amplified in several paragraphs.

In support of the averments of the bill, certain affidavits and other documentary evidence were offered. A printed copy of the record in the Supreme Court of the United States in the case of *Southern Railway Company v. Tift and Others*, 206 U. S. 428, 27 Sup. Ct. 709, 51 L. Ed. 1124, was also offered, in order that the court might understand the character of the Southeastern Freight Association, and the methods by which advances affecting interstate trade were made by the railways combining to form that association. This record contained the charter and other documentary evidence, used before this court at a former hearing in the Tift Case, relating to this association. No objection was made to the use or competency of such evidence in the present hearing.

Objections were made to the competency of certain documentary evidence offered by the complainants. The court holding that the objections went rather to the sufficiency than the admissibility of the testimony, no exceptions were noted to the rulings admitting such evidence. The only exception was made to the ruling of the court sustaining the demurrers of complainants to the respondents' pleas to the jurisdiction.

The respondents declined to introduce proof of any sort. Since, therefore, the evidence presented by the complainants has not been in any manner contradicted or explained, it must be taken as true. The proof offered was substantially as follows:

The complainants first introduced certain evidence as to the conditions under which the present rates sought to be advanced came into existence. Mr. W. E. Newill testified by affidavit that he was a member of a joint conference committee, which was appointed by the mayor of Atlanta to confer with representatives of the Nashville, Chattanooga & St. Louis Railway Company, the Southern Railway Company, and other carriers. A conference took place at the Piedmont Hotel, in Atlanta, during the months of November and December, 1904. Mr. Oglesby, the chairman, for the city council and in behalf of the manufacturing and jobbing interests of Atlanta, stated their grievances to the representatives of the railroads. Among the causes of complaint were the excess rates which were charged Atlanta merchants over those charged to merchants in Birmingham, Ala. The negotiations proceeded, and on December 6th Mr. J. M. Culp, an officer of the Southern Railway, reported the result, in part as follows:

"It was the consensus of opinion that the reductions to Atlanta from the West would carry with them corresponding reductions to these points, which have been specially related to Atlanta, such as Macon, and Athens, and Augusta, and Columbus; and, that the rates from the East to Atlanta being reduced in line with the reductions from the West to Atlanta, there would be some reductions to some points in the southeast. To some of the points in the southeast, from the east, the reduction would not be as great as the reduction to Atlanta. * * * Now, to intermediate points, there are some points, competitive points, to which the rates bore a fixed relation to the rates to Atlanta, or some other point that in itself has a fixed relation to Atlanta, and those would be correspondingly reduced."

Another officer stated the concession determined upon by the officials of the railway companies:

"The reduction proposed on first class is nine cents. The reductions are not uniform throughout the first six classes; the reduction on sixth class being five cents, and on third class only three cents. The uniform reduction on meat,

grain, and flour is two cents per 100 pounds. The rates proposed from Cincinnati, Louisville and the other Ohio river crossings on the first six classes are proposed on the first six classes from Baltimore. * * *

Mr. Culp, of the Southern Railway, then added that a revision of rates in line with these reductions would be made throughout the commodity list, and said:

"I don't think there is any doubt but what there will be a reduction made on a considerable number of those commodities. * * *

Mr. H. F. Smith, the representative of the Nashville, Chattanooga & St. Louis Railway, then stated before the conference committee:

"I would answer that, with the permission of my associates, by saying that those interested in the Atlanta rates reached a compromise with those not having direct interest in the Atlanta rates. I refer to other carriers, carriers whose paramount interest was with other communities. These figures that we submit here to you were considered by those other interests, representing those other communities, and concurred in."

The bases upon which the rates were put in as the result of the Atlanta conference Mr. Newell further testified were fully considered by the highest officials of the roads at their representative meeting. It was estimated that the amount of flour, hay, grain, and mill feed coming to Atlanta alone was about 12,000 cars of 20 tons each per annum. The new rates were made effective February 1, 1905.

Extracts from "Poor's Manual of Railroads," which it was testified is an authoritative treatise on the subject, were then introduced. These all tended to show that the defendants were grouped, as the bill alleged, into two great systems, the one controlled by the Southern Railway Company, and the other by the Atlantic Coast Line Company, and that the lines of the defendants extended throughout all the territory described in the bill.

Mr. H. T. Moore testified in an affidavit that he is the traffic manager of the Atlanta Freight Bureau, and is familiar with freight rate tariffs. He has examined the freight rates which were of force prior to January 1, 1905, and the Atlanta conference, the rates made effective thereafter on February 1, 1905, which are the present existing rates, and the rates proposed to become effective on August 1, 1908. He makes a comparison of these rates from certain Ohio river crossings, viz., Cincinnati, Evansville, and Louisville, to Albany, Cordele, Dublin, Macon, Valdosta, Atlanta, Athens, Columbus, and Rome, all of which will be affected by the proposed increase. To the city of Macon for the commodities included in Class B the rate prior to 1905 was 37 cents per 100 pounds; the present rate is 35 cents, and the proposed rate is 38 cents, showing an advance of 3 cents per 100 pounds above the freight now paid by the complainants, and 1 cent per 100 pounds above that paid in 1904. For classes O and F the rates will revert to those paid in 1904, but these will be an advance above the present rates of 2 cents, 2 cents, and 4 cents for the respective classes. For Valdosta merchants there will not only be advances of 3, 2, 2, and 4 cents for classes B, C, D, and F, above the present rates, but for classes B, C, and D an increase of 1 cent per 100 pounds above those paid before the Atlanta agreement. For Atlanta merchants the increase over the present rates will be 3 cents for Class B, 2 cents for C, 2 cents for D, and 4 cents for F, and for Class B the proposed advance is 1 cent per 100 pounds in excess of the freight paid in 1904. For Athens merchants there will be the same increase of 3, 2, 2, and 4 cents above present rates, and 1 cent for Class B, and for Columbus and Rome merchants the same advances. In shipments of fresh meats for all of these cities the increase is 3 cents per 100 pounds above present rates, and 1 cent per 100 pounds above those effective in 1904. The freight on flour in sacks is increased 2 cents above the present cost, and for Valdosta 1 cent per 100 pounds over that in 1904. There are the increases which the complainants contend are illegal.

A report of certain proceedings before the Railroad Commission of Georgia was presented, and extracts were read, showing the relative gross and net incomes of the Southern Railway for the months of March, April, and May, 1908, as compared with the earnings for the same months of 1907. Mr. J. M. Culp of the Southern Railway was questioned by Mr. Callaway of the Railroad Commission of Georgia. For March, 1908, he said the net earnings were

\$1,067,000, and for March, 1907, \$813,000, showing two hundred and odd thousand dollars increase. For April, 1908, the net earnings showed an increase of \$339,000 over those for April, 1907, and for May an increase of \$90,000. These results he said were accomplished by a drastic reduction of expenses; that the year ending June 30, 1907, while the greatest gross year, was not the greatest net year of the company, and that it was exceeded by the year 1908. Mr. Culp then stated that the net earnings of the railway in Georgia showed a decrease in July, 1907, of \$89,500; in August, \$90,300; in September, \$51,500; in October, \$92,000; in November, \$68,000; in December, \$82,500; in January, 1908, \$76,000; in February, \$55,000; in March, the small decrease of \$1,146; and in April an increase of \$24,000. These statistics it is contended show that the financial conditions which grew out of the recent panic are rapidly improving, that the earnings of the defendants are increasing, and do not justify the imposition of such burdens on complainants and the public as are attempted by the proposed advances.

Cumulative evidence was offered on this line, in the nature of extracts from the financial news published by the "Atlanta Journal," giving the quotations of the stocks of the different defendant companies for the 15th day of each month, beginning with July 15, 1907, and ending July 15, 1908. A brief summing up of the statements in this affidavit shows that the quotations of Atlantic Coast Line preferred stock on July 15, 1907, was 98; in August, 77½; September, 82; October, 70½; November, 64½; December, 65½; January 15, 1908, 72½; February, 63; March, 65; April, 73; May, 90; June, 90; and July, 92. For Louisville & Nashville preferred the quotations for these months ran, respectively: 117, 104, 108, 100½, 93½, 90, 100½, 89½, 96½, 99, 109½, 107½, and 108½. For Southern Railway common stock: 20½, 16½, 15½, 11½, 12, 12½, 10½, 9½, 11, 13½, 17½, 17½, 17½. For Southern Railway preferred: 56, 55½, 46, 37½, 39½, 35, 31½, 29½, 39½, 44½, 45½, 45½. These figures indicate that, while the stocks of these companies showed great depression during the late fall and winter under the effects of the panic throughout the country, their value during the last three months has rapidly increased to a normal condition.

In further proof of their contention that the proposed increases are arbitrary and not justified by business conditions, extracts were introduced by the complainants from "The Commercial & Financial Chronicle," published by William B. Dana Company of New York, and sworn to be a reliable financial journal, whose statements are accepted as correct by stockbrokers and the public generally. By this the range of prices and the sales of the stocks of the respective defendants were shown for different periods in 1907 and 1908. For the Atlantic Coast Line Railroad the lowest price of 59½ for 1908 was on March 2d; while the highest price of 96 was on July 21st. For 1907 the price was as high as 133½ in January, but it went to as low as 58 in November. On Friday, July 24, 1908, the lowest price was 94, and the highest 95, while for the week ending on that day 4,035 shares were sold. For the Louisville & Nashville Railroad Company these statistics show that the lowest price of its stock for 1908, 87½, was on February 19th, and the highest price of 113 was on May 19th. For 1907 it went as high as 145½ in January, but dropped to 85½ in November. During the week ending July 24th the prices ranged from 107½ minimum to 111½ on July 23d, while 12,000 shares were sold. For the Nashville, Chattanooga & St. Louis the lowest price of stock for 1908, 97½, was on January 2d, and the highest price of 120 was on July 24th. For 1907 it went to 147 in January, but fell to 97 in December. One hundred shares were sold for the week ending July 24th. For Southern preferred the lowest price for 1908, 25½, was on March 5th, and the highest of 50½, on July 21st. For 1908 the lowest, 29½, was in November, and the highest, 94½, as in the case of the other companies, was in the opening of that year in January. During the week stated 36,800 shares of what is termed "common stock," and 10,075 shares of preferred stock, were sold. This data all tends to show a gradual increase of the stocks from November of last year, when they reached their minimum value. For all of these companies save one the maximum prices of their stocks were reached during the week prior to this hearing, and the last week for which the statistics of this journal have been compiled. For the Louisville & Nashville,

while the maximum of 113 was reached in May, yet on July 23d the price was 111%, and on July 24th, 110, only a few points below the maximum attained during this year.

As significant of the general improvement of financial conditions throughout the country the complainants submitted data showing the bank clearings of the large cities in different sections. Thus New York, Philadelphia, and Pittsburgh are classed among the "Middle Group." The figures for this group show a decrease of 9.1 per cent. in the returns for the week ending July 18, 1908, from those of the same week in 1907. The "New England Group," including Boston, Hartford, New Haven, and other cities, shows a decrease of 3.5 per cent.; the "Western Group," including Chicago, Cincinnati, Cleveland, and others, a decrease of 2.7 per cent.; the "Pacific Group," including San Francisco, Los Angeles, Seattle, Portland, and others, a decrease of 13.2 per cent.; another "Western Group," including Kansas City, Minneapolis, St. Paul, and Lincoln, a decrease of 3.8 per cent.; and the "Southern Group," including St. Louis, New Orleans, Louisville, Atlanta, Savannah, Macon, Columbus, Memphis, Nashville, Mobile, Birmingham, and practically all our large Southern cities, a decrease of 7.6 per cent. For the entire country, the average decrease in clearing house returns over last year is 7.8 per cent.

Illustrative of the earnings of the defendant railways, the certificate of the secretary of the Railroad Commission of the state of Georgia was introduced. The Western & Atlantic Railroad, of which the Nashville, Chattanooga & St. Louis Railway is a lessee, and the Louisville & Nashville Railroad has trackage rights, from July, 1907, to May, 1908, inclusive, made a net profit of \$633,907.76, and for the same months of 1906 and 1907 \$592,475.31, and for the same months of 1905 and 1906 \$625,792.06.

Mr. W. E. Small, general manager of the A. B. Small Company, one of complainants, testified that he is a wholesale dealer in hay, grain, flour, meats, and other articles on which the advances in rates are threatened. He has made a careful estimate of the extent to which the advances will affect his business on the basis of the volume of business transacted by the company in 1907. The increased rates which his company will have to pay per annum, if the advances are made effective, will be \$4,619.72. He estimates that the total amount of advances which would have to be paid by the merchants in the city of Macon would be \$85,000, and in the state of Georgia \$750,000, per annum. Following the Atlanta conference in 1905, and the subsequent decrease of freights, he says that a large traffic has moved, and conditions have become so adjusted to the trade that to change the present rates would disturb trade conditions and existing contracts based on those rates, and cause a serious loss both to consumer and dealer. The margin or profit to the dealer in the commodities affected is very small, and, while it would be possible for him by increasing the price to absorb a part of the increase in freight rates, and pass the same along to the consumer, it would be impossible, at least until conditions adjusted themselves, to absorb the entire increase in these freight rates, and in this manner a large loss would ensue to the dealer and consumer. He states that the largest part of the supply of commodities to this state comes from points beyond the Mississippi and Ohio rivers, and is affected by the threatened advance. While it is true that following the financial panic in the fall of 1907 there was a general business depression, trade in the commodities affected is rapidly assuming a normal condition, and in the opinion of the deponent a vast amount of tonnage will move from the West to the state of Georgia.

To the same effect was the testimony of Mr. R. C. Corbin, the manager of the Macon Grocery Company in the city of Macon. He estimates the loss of the company at \$6,000 per annum, and of Macon merchants at \$35,000 per annum, and of merchants throughout the state at \$500,000.

Mr. A. C. Wooley, of A. C. Wooley & Co., testified that in 1907 his company received 7,800,000 pounds of the products on which the proposed advances are sought to be made, and that he estimates the additional cost per annum at \$1,560. Mr. Thomas E. Rogers, of Kelly Bros. Company, estimates the amount received by his firm at 13,685,927, at an increased cost of \$2,737.18. Mr. Cone M. Maddox, of J. J. Maddox Company, states the quantity at 5,000,000, and the amount at \$1,000. Mr. R. W. Davis, of R. W. Davis & Co., at \$1,000; Mr.

E. L. Adams, of Adams, Whitney Company, at \$457.77; Mr. W. S. Duncan, of W. S. Duncan & Co., at 60,669,693 pounds, and \$12,133.93; Mr. F. B. Coleman, of McCord, Stewart & Co., at 23,429,536 pounds, and \$4,685.81; and Mr. A. P. Morgan, of A. P. Morgan Grain Company, at 34,500,000 pounds, and \$6,900. The complainants then closed.

W. A. Wimbish, Edgar S. Watkins, and Alexander Akerman, for complainants.

Henry L. Stone and Ed Baxter, for respondent Louisville & N. R. Co.

Claudian B. Northrop and Sanders McDaniel, for respondent Southern Ry. Co. and Cincinnati, N. O. & T. P. R. Co.

George B. Elliott and Robert C. Alston, for respondent Atlantic C. L. R. Co.

Claude Waller, J. D. B. De Bow, and John L. Tye, for respondent Nashville, C. & St. L. Ry. Co.

Ed Baxter and Sidney F. Andrews, special counsel for all respondents.

SPEER, District Judge (after stating the facts as above). It is most significant that, while there were in attendance on the hearing at Mt. Airy, a large number of counsel and railway officials of great experience, extensive knowledge, and high rank, no sort of effort was made to contradict or explain any of the evidence offered by the complainants. The court was furnished neither with affidavits, oral testimony, nor explanations relating to the grave and serious complaints set forth in the complainants' bill and supported by proof. The respondents were content to rely on their demurrer, and the argument was restricted to the following points: First, that the court had no jurisdiction; second, that the Interstate Commerce Commission has no jurisdiction with regard to these rates; and, third, that, if the new rates were put into effect, it would merely restore the rates which existed prior to 1905, and that such rates are reasonable. The last point is a question of fact, not raised by answer or in any appropriate form. It does not appear in the record, nor, if the pleadings and proof justified a consideration of this assertion, would it appear material to the present inquiry at this stage of the case.

A condensed statement of the case will, it is thought, suffice to ascertain the rights and responsibilities of the parties as they appear from the record. It is insisted that the court is without jurisdiction to stay the enforcement of rates confessedly imposed by a confessedly unlawful combination in restraint of trade which will in all likelihood withdraw and withhold for many years from the resources of complainants many thousands of dollars thus exacted, and during all of this time give the use of such sums to the respondents, with a consequent disorganization of business, increase in the price of living, diminution in the profits of the manufacturer and producer, decrease in the purchasing capacity of the salary or wage earner, and a possible paralysis of that recuperative movement which elevates and brightens the hopes of the people at this time. This contention is based upon the assertion that a circuit court of equity of the United

States has no jurisdiction to accord the relief, or any effective part of the relief sought by this bill. The proposition of the respondents is based upon a bold and unqualified denial of any judicial power in this country to restrain any rate, however enormous it may be, levied for transportation in interstate commerce, no matter how flagrantly in violation of the interstate commerce law, or the penal statutes of the United States, that imposition may be. The position of the respondents is made clear by the following colloquy between the court and their counsel:

"Judge Speer: You stated yesterday these shippers cannot sue in the state courts?

"Mr. H. L. Stone: They cannot sue anywhere until the Commission has passed upon it. * * *

"Judge Speer: You might then increase the rate 50 per cent. or to any amount and the shipper has no redress?

"Mr. Stone: We may assume many impossibilities.

"Judge Speer: Then the whole power is with the railroads, and the people are absolutely helpless?

"Mr. Stone: Not at all, sir; I do not concede that. Congress has prescribed these particular regulations to regulate commerce, and they must be regulated accordingly, and not otherwise. A rate, so far as it is initial is concerned, is left to the carriers by Congress. Congress could prescribe rates itself, if it was desired to do so, if it was thought wise for all of these carriers to observe. It delegated to the Commission the power on complaint, after full hearing, to substitute a rate of freight for the one fixed by the carriers. * * * In the meantime Congress has provided in its wisdom that those rates thus initiated and put into effect by the carrier itself, not by Congress, and not by the Commission, should be the only legal rate, and that no more, no less, or different rate can be collected by the carrier. * * *

"Judge Speer: You collect say from a Georgia shipper this increase of rate; his only right of redress is a suit against your railroad?

"Mr. Stone: After the Commission has held the rate to be unreasonable, and fixed the amount of his damages, and allowed the carrier a certain time in which to pay it. Then he can go into court. * * *

"Judge Speer: Then you contend that the only district in which (the carrier) may be sued is in the district of which he is an inhabitant?

"Mr. Stone: That is in a suit for an award of damages. There is no provision in the interstate commerce act that the shipper may file an injunction suit in a district outside of that in which the carrier has his principal operating office, or in which he is an inhabitant.

"Judge Speer: Then the American people are in the attitude in relation to the railroads that the railroads can levy any rate, whatever they choose to levy, no matter how extravagant they may be, and no individual has any redress until he has prosecuted his case before the Interstate Commerce Commission, and until he has then prosecuted it further before a United States court having jurisdiction; that is to say, where the railroad is an inhabitant. In the meantime the railroad company can keep his money, and the money of everybody in like standing?

"Mr. Stone: Unquestionably, sir; and, if there is any fault with that system, the complaint should be made to Congress for amendments to the acts, and not to the court."

It follows that, if the proposition of respondents on this subject is maintainable, all that the genius of executive statesmanship, the assiduity and learning of jurists, and the patriotic purposes of Congress have attempted toward the settlement of the vast controversies involved in the regulation of interstate commerce will be profitless and indeed impotent. While this is true, the varied, conspicuous, and combined mentality of those distinguished corporate specialists, who, like

the Choros of the Greek tragedy, clustered about the Choryphæus of the drama, played in the humble schoolhouse of this mountain village, was able to point out not one controlling precedent for a contention so vital to the future of the country. Precedents, it is true, were cited, but at a glance they are distinguishable from the case before the court and the decisions of the Supreme Court of the United States and the other courts which uphold the jurisdiction assailed. The first and the most important of these is the case of the Texas & Pacific Railway Company v. Abilene Cotton Oil Company, 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553. What seems the cardinal error of the learned counsel for the respondents in his attempt to apply this precedent to the case at bar is that he fails to distinguish between an action in a state court at common law and a suit in equity in a Circuit Court of the United States. The distinction is discoverable, and we believe is generally understood. In the Abilene Case the Oil Company brought an action at law to recover \$1,951.83. This sum had been exacted over the protest of the company for the shipment of car loads of cotton seed. Among other defenses the railway company defended on the ground that the shipments were interstate, and were, therefore, governed by the act of Congress to regulate commerce. The rate had already been established, and it had not been pronounced unreasonable by the Interstate Commerce Commission. The trial court of first instance made findings of fact: (1) That this was an interstate shipment; (2) that the defendant complied with the interstate commerce law, except that the rates were excessive; and (3) that the rate charged by the defendant was that established under the interstate commerce law. But it held that the plaintiff could not recover. It was a Texas case, and the Court of Civil Appeals of that state reversed the decision of the trial court, and found but one question essential for its decision. That was "whether, consistently with the act to regulate commerce, there was power in the court to grant 'relief' upon the finding that the rate charged for the interstate shipment was unreasonable, although such rate was the one fixed by the duly published and filed rate sheet, and when the rate had not been found to be unreasonable by the Interstate Commerce Commission." The court then proceeded to grant what it termed "relief," which was a judgment for the excessive freights charged. The Supreme Court in a very clear and strongly reasoned opinion by Mr. Justice White reversed this conclusion. Throughout the opinion, the observations of the learned justice were directed exclusively to actions at law for damages, and attempts to obtain pecuniary reparation; in other words, to actions at common law, and indeed, to such actions in state courts. Again and again he reiterates the inimical effect upon the interstate commerce laws enacted by Congress of the action of "courts and juries" in different states. He sums up the conclusion of the court, as follows:

"In other words, we think it inevitably follows from the context of the act that the independent right of an individual originally to maintain actions in courts to obtain pecuniary redress for violations of the act conferred by the ninth section must be confined to redress of such wrongs as can, consistently with the context of the act, be redressed by courts, without previous action by the commission, and therefore does not imply the power in a court to primari-

ly hear complaints concerning wrongs of the character of the one here complained of" [i. e., a claim for damages at common law].

The cases cited by the learned associate justice in support of his conclusions also clarify the differentiating view between that case and the case at bar. *Swift v. Philadelphia, etc., Ry. Co.* (C. C.) 64 Fed. 59, was an action at law to recover damages. So, also, in *Gulf, Colorado, etc., Ry. Co. v. Hefley*, 158 U. S. 98, 15 Sup. Ct. 802, 39 L. Ed. 910, the carrier refused to deliver, because the shipper would not pay a higher established schedule rate than that specified in the bill of lading. The judgment of a state court enforcing the penalty was reversed upon the ground that the state statute was repugnant to the act to regulate commerce. In *Texas & Pacific Ry. Co. v. Mugg*, 202 U. S. 242, 26 Sup. Ct. 628, 50 L. Ed. 1011, also cited by the associate justice, a recovery at law of the excess freights above the quoted rate was allowed by the Texas court. The Supreme Court reversed this judgment. The upshot of the *Abilene Case* and of all the decisions cited by the learned justice sustains the counsel for the respondents in his unreserved proposition that the shippers have no relief whatever at common law in the courts of a state against exactions, however unwarrantably made by the carriers of interstate commerce. Let us see, however, whether this dominating principle is applicable to a case like that before this court, where a number of shippers seek to prevent, by resort to the strong and flexible powers in equity of courts of the United States, the imposition of rates declared and admitted to be unreasonable, and confessedly (for the demurrer confesses it) imposed in violation of the anti-trust law, denouncing combinations in restraint of trade and commerce.

The *Abilene Cotton Oil Company Case* which we have been discussing was decided February 25, 1907. On May 27th of the same year the Supreme Court had under review from this court the case of the *Southern Railway Company v. Tift*, 206 U. S. 428, 27 Sup. Ct. 709, 51 L. Ed. 1124, otherwise known as the "Lumber Rate Case." In the *Tift Case*, in the Circuit Court, the identical objection for want of jurisdiction with which the complainants are here confronted was presented in several hearings. There, too, when the bill was filed, the rate had not been enforced. As in the case at bar, it had been merely threatened. The case may be found reported in 123 Fed. 789, and the decision in the second and final hearing in 138 Fed. 753 (2 Federal Anti-Trust Decisions, p. 733). Said the court in the first of those cases:

"It is, however, insisted that this power of the court cannot be exercised until the Interstate Commerce Commission has acted, but that Commission is expressly denied the power of injunction, or any judicial power. This it has been conclusively held remains with the courts. *Interstate Commerce Com. v. C., N. O. & T. P. R. Co.*, 167 U. S. 479, 17 Sup. Ct. 896, 42 L. Ed. 243. How, then, can it be said that the original and plenary power of the court of equity in such matters must be postponed to await the action of the Interstate Commerce Commission? It is true that the statute regulating interstate commerce permits a resort to the common-law action for damages for violation of its provisions, and it is urged that this remedy is exclusive. This does not follow. In the nature of things, there must be a vast variety of controversies in which the remedy at law on an action brought by the individual wronged is utterly inadequate to afford relief either to the individual, or to multitudes who are in similar case with him. It is often in the power of a railroad company to

greatly injure, or wholly destroy, one's business, or a general business of a particular class. In such case injunction would be the appropriate remedy. So an injunction is granted to prevent illegal discrimination, and illegal exactions in excess of rates fixed by law. This is upon the ground, in part, that, the injury being a constantly recurring one, there is no adequate remedy at law. 1 High on Injunc. § 616, etc. * * * It may safely be declared that a Legislature will never be presumed to have denied by implication those general powers of a court of equity, which have been ingrafted in our jurisprudence 'for the correction of that wherein the law, by reason of its universality, is deficient.' Because one special remedy has been afforded it does not follow that the general powers of equity are annulled."

The case of *United States v. Union Pacific R. Co.*, 160 U. S. 1, 16 Sup. Ct. 190, 40 L. Ed. 319, was cited, and the language of the court quoted as follows:

"It is not enough that there is a remedy at law. It must be plain and adequate, or in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity."

Numerous other authorities were cited in support of these propositions. It follows that the challenge to the jurisdiction could not have been more definitely made, or more definitely decided. We have seen that jurisdiction was maintained. An appeal was then taken to the Supreme Court of the United States. Now, there is nothing about which that great court is more sensitive than an unauthorized exercise of jurisdiction on its own part, or on the part of any of the "inferior courts" created by Congress. It has often held that it is the duty of such courts *sua sponte* to raise the question of jurisdiction, even though the parties should fail to do so. No failure of jurisdiction can escape the perspicacity of that august tribunal. Its holding, then, in the *Tift Case* seems conclusive of this controversy. Said Associate Justice McKenna for the court (*Southern Ry. Co. v. Tift*, 206 U. S. 437, 27 Sup. Ct. 711, 51 L. Ed. 1124):

"In the case at bar * * * there are assignments of error based on the objections to the jurisdiction of the circuit court. These might present serious questions, in view of our decision in *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, upon a different record than that before us. We are not required to say, however, that because an action at law for damages to recover unreasonable rates which have been exacted in accordance with the schedule of rates as filed is forbidden by the interstate commerce act, a suit in equity is also forbidden to prevent a filing or enforcement of a schedule of unreasonable rates, or a change to unjust or unreasonable rates."

What fairer or more obvious distinction has been indicated by the Supreme Court? In the *Abilene Cotton Oil Company Case*, in an action at common law, they denied jurisdiction. That was a different record from this before them, but because of that decision they were not required to say that "a suit in equity is also forbidden to prevent a filing or enforcement of a schedule of unreasonable rates, or a change to unjust or unreasonable rates." If the court had been so required, it would have made the requirement effective. The absence of jurisdiction and the requirement are one and the same thing. Since the great tribunal was not so required, there is no law to forbid a suit in equity "to prevent a filing or enforcement of a schedule of unreasonable rates, or a change to unjust or unreasonable rates."

The demurrer here admits the case before us to be a suit of that precise character. The learned counsel who argued this question had much to say of the difference between the record in the Tift Case and the record in the case now before the court, and much to say of the remarkable care of counsel to keep out of the record in this case certain features which appeared in the record of the Tift Case. It will be difficult, however, to eliminate the fundamental question of jurisdiction, which was raised in both, and which the Supreme Court would have raised if the parties themselves had not raised it. It is true, as stated by the learned counsel for the respondents, that something was said about the stipulation in the Tift Case by Associate Justice McKenna. But the stipulation only related to reparation, and to the admission of evidence. No stipulation, however, could have given the court jurisdiction. This has been repeatedly held. The jurisdiction of the court in equity and its jurisdiction as a court of the United States is thus immovably fixed. It is true that, because the railroads there promised to pay back to the shippers the sum total of the excess charges, the court did not grant the injunction, but it is not unsafe to say that save for that stipulation the injunction against the increase would have been promptly granted. The case was sent to the Interstate Commerce Commission, and its assistance invoked. Upon this the Supreme Court observes (page 437 of 206 U. S., page 711 of 27 Sup. Ct. [51 L. Ed. 1124]):

"The Circuit Court granted no relief prejudicial to appellants on the original bill. It sent the parties to the Interstate Commerce Commission, * * *

etc.

But, if we were without the assistance of the paramount authority of the Supreme Court, abundant support of the jurisdiction may be found in the decisions of the Circuit Courts and the Court of Appeals of our own circuit. In the case of *Blindell v. Hagan et al.* (C. C.) 54 Fed. 40, that brilliant lawyer and jurist, the late Judge Billings, while holding that the anti-trust law alone did not authorize the bringing of injunction suits, or suits in equity by parties other than the government, yet he maintained the jurisdiction of the Circuit Court to enjoin a combination of persons from interfering with the rights of a party, in order to prevent a multiplicity of suits at law, and for the reason that damages at law for interrupting business and interstate profits of pending enterprises must be conjectural, and not susceptible of proof. Quoting from *Fonblanque's Equity*, at page 3, the learned judge said:

"The foundation of this jurisdiction of equity is the probability of irreparable mischief, the inadequacy of a pecuniary compensation, and the prevention of a multiplicity of suits."

An appeal was taken to the Circuit Court of Appeals, Circuit Judges Pardee and McCormick and District Judge Toulmin presiding, and that court maintained the jurisdiction on the general principles of equitable jurisdiction.

In the case of *Gulf, C. & S. Ry. Co. v. Miami Steamship Company*, 86 Fed. 421, 30 C. C. A. 156, the Circuit Court of Appeals of the Fifth

Circuit, Circuit Judges Pardee and McCormick and District Judge Swayne presiding, declared:

"We do not doubt the general jurisdiction of the Circuit Court as a court of equity to afford preventive relief in a proper case against threatened injury, about to result to an individual from any unlawful agreement, combination, or conspiracy, in restraint of trade."

Judge McCormick for the court, in a strong and carefully considered opinion, refers to the case of *In re Debs*, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092. There the Circuit Court had rested its jurisdiction mainly on the anti-trust law, but the Supreme Court—to use the language of Judge McCormick—"entered into no examination of that act, preferring to rest its judgment on the broader ground of the general jurisdiction of a court of equity to prevent injury in such cases." "The Supreme Court," however, he continues, "was careful to observe that it must not be understood from its putting its judgment on the broader ground that it dissented from the conclusion of the Circuit Court in reference to the scope of the act."

We understand, although the opinion has not been reported, that a similar conclusion has been reached by Judge Cornelius H. Hanford of the District of Washington in a case of a threatened advance of rates from points on the Pacific Coast.

In a recent case, *Kiser Co. v. Central of Georgia Ry. Co. et al.*, 158 Fed. 193, decided by Judge Newman at Circuit in the Northern District of Georgia, an analysis of the *Abilene Cotton Oil Case* and of the *Tift Case* was given by that eminent jurist. He remarks:

"From what is said in both cases the ruling would seem to be that general power over interstate rates, to be charged by common carriers, is given to the Interstate Commerce Commission, and that for the courts to undertake to determine what are reasonable or unreasonable rates would interfere and conflict with the exercise of this power by the Commission, although instances might arise in which it would be proper for a court of equity to enjoin the enforcement of unreasonable rates, or a change to unjust or unreasonable rates. * * * This action of a court of equity will not interfere with the final exercise by the Interstate Commerce Commission of the full powers granted to it by the act of Congress of 1887 * * * or under the act of June, 1906, 'to determine and prescribe what will be a just and reasonable rate, charge, or charges, to be hereafter observed as a maximum to be charged.' This seems to be the clear meaning of these decisions. It appears, therefore, that the court might properly enjoin carriers from establishing or increasing to an unreasonable rate, at the same time leaving the matter in such shape as that the Interstate Commerce Commission may ultimately determine whether the contemplated increase is just or reasonable."

The learned judge held that the restraining order should remain in force a reasonable length of time to allow complainants to present the controversy to the Interstate Commerce Commission, and that the case should be stayed until a determination by that body as to whether the proposed increase in rates was reasonable and proper, and as to what was a reasonable rate.

This was the course taken in the *Tift Case*, and, as we have intimated in the ruling on the pleas to the jurisdiction, the same direction will be given now. We have no doubt that the Interstate Commerce Commission will promptly take hold of the controversy. But it is said that

the Commission can do nothing until the rates have been put into effect, and the money of the shippers collected. This is a very comfortable doctrine for the respondents. It is not, however, borne out by the conduct of the Commission in previous cases (as we understand, in the Pacific Coast Lumber Rate Case), or by the language of the act regulating commerce. Act Feb. 4, 1887, c. 104, 24 Stat. 383 [U. S. Comp. St. 1901, p. 3164]. Section 13 provides how, and by whom, complaints can be made and served, but it also declares that:

"Said Commission * * * may institute any inquiry on its own motion in the same manner and to the same effect as though complaint had been made."

The jurisdiction of the Commission is then fixed to pass upon the proceeding here. But must the Commission wait until the rate is collected? Not so. The act of Congress, known as the "Hepburn Act," amendment of Act June 29, 1906, c. 3591, § 4, 34 Stat. 589 (U. S. Comp. St. Supp. 1907, p. 900), provides:

"That the Commission is authorized and empowered, and it shall be its duty whenever after full hearing upon a complaint, made as provided in section 13 of this Act, or upon complaint of any common carrier, it shall be of the opinion that any of the rates or charges whatsoever, demanded, charged, or collected by any common carrier or carriers subject to the provisions of this act [to act thereon, etc.]."

In addition to this, by the same section, the Commission is empowered after hearing on a complaint to establish through rates and joint rates "as the maximum to be charged," etc. Since then the Commission has the power to make the inquiry of its own motion. It is scarcely probable that it would refuse to do so at the request of shippers, directed to appear before it by a court of the United States. Since they have the power to fix the maximum rate, they can readily determine whether the increase which is threatened or "demanded," and which but for the injunction would this day have been "charged" by these respondents, is justifiable. This is a practical solution of the difficulty. To quote anew the language of the Supreme Court in the Tift Case, it is not "prejudicial" to the respondents. The Commission has the power to advance the hearing, and promptly dispose of it. Its action would thus confound the unqualified assertion of the learned counsel for the respondents here that no person who is threatened with injury of this character, no matter how ominous or odious may be the exaction, is lawfully entitled to a hearing anywhere before any tribunal, until the exaction is enforced, and his money is taken.

The rates which the defendant companies now propose to increase were fixed after careful conference by agreement with bodies of the people representing shipping interests. Under them the railroads and the country had attained a prosperity as hopeful as either had ever known. The temporary depression which ensued was not ascribable to the insufficiency of these rates. Great bodies of the people indeed insisted that they were too high, and the agitation which resulted doubtless contributed in some measure to the business depression which followed. From this the country is rapidly recuperating. The reports of stock sales and bank clearings in evidence show this to be true. It should be remembered that nothing offered by the complainants has

been in any sense contradicted or disproved. In view of the character of the discussion before the court, it is perhaps appropriate to say that the vast majority of our thoughtful people have no unkind feeling toward the railroads. Indeed, they have manifested a warm and cordial sympathy with those truly great men, of whom many hold high station in these great companies, and who toil with constancy for the betterment of their properties, and as a consequence for the welfare of the country. Significant of this disposition, by a decided majority the people have recently nominated for Governor of our state a railroad man, whose upright character, and whose complete familiarity with these and kindred topics, may give assurance that corporate, and as well private and public, interests will be lawfully conserved. And yet, while the ink is scarcely dry on his letter of acceptance, Georgia and three other Southern states, all barely convalescent from the wasting fever of panic, are threatened with an advance of rates, some of which (as it appears from the uncontradicted proof) will make the charges of transportation for the necessities of life greater than they have been in the memory of a generation. No policy could be more disastrous to the efforts of conservative government. Nor are the courts less entitled than the people to consideration from the representatives of the railway companies. When lately in North Carolina and Alabama their rates were assailed, they sought the protection of these courts. In proper cases it is always afforded them. It may be well if more temperate and considerate bearing shall obtain in their management and representation, even in those cases where they do not prevail.

In accordance with these views, an interlocutory decree will be granted, declining to dissolve the temporary restraining order now of force, and continuing the same in full effect until the further order of the court. The decree will also provide in effective terms that the complainants, and others who may have the right to intervene, shall within 10 days make complaint to the Interstate Commerce Commission; ask that body (if necessary) that it may take the initiative in this investigation, if need be, fix the maximum rates, and give such other aid and assistance to the parties in controversy and to the court as in the judgment of the Commission may seem in accordance with the law and the rights involved.

THE M. E. LUCKENBACH et al. (two cases).

(District Court, S. D. New York. May 7, 1908.)

COLLISION—OVERTAKING TUG WITH TOW—FAULTS OF OVERTAKING VESSELS.

The tug Luckenbach overtook and passed the tug Staples at night in Narragansett Bay. The tugs were on nearly parallel courses, and the Luckenbach passed to the right of the Staples. Each had a long tow. After passing, the Luckenbach changed her course across that of the Staples, and the rear barge of her tow ran between the Staples and her first tow; the hawser coming into collision with the Staples, sweeping away her upper works, and doing serious injury to her master and mate. *Held*, on the evidence, that the Luckenbach was in fault for close shaving, for changing her course when passing, for not giving the signals required by rule 8 of the inland navigation rules (Act June 7, 1897, c. 4, 30 Stat. 101 [U. S. Comp. St. 1901, p. 2882]), and for attempting to pass without obtaining the consent of the Staples, and that the barge was also in fault for sheering to port as she was passing.

[Ed. Note.—Overtaking vessels. See notes to *The Rebecca*, 60 O. C. A. 254.]

In Admiralty.

Butler, Notman & Mynderse and Baker & Thurston, for libellants.

Carl S. Petrasch and J. Parker Kirlin, for claimants as to personal injuries.

Peter S. Carter, for claimants as to personal effects.

ADAMS, District Judge. These actions were brought by Theodore B. Almy and Joseph Fingliss, respectively master and mate of the tug Cora L. Staples, to recover for personal injuries suffered in a collision between their tug and the hawser of the barge West Point, in tow of the tug M. E. Luckenbach, in Narragansett Bay about 4 o'clock A. M. of the 25th of January, 1907. The Staples was bound from the ocean to Fall River, Massachusetts, with 3 coal laden barges, the Sagua, the Parks and the Boyd, in tow on hawsers of about 125 fathoms each. The total length of the tow was about 3500 feet. The Luckenbach, a larger and more powerful tug, was proceeding through the ocean and bay to Providence, Rhode Island, with two coal laden barges, the Thomas and the West Point, in tow on hawsers. The total length of the tow was more than 2500 feet. The speed of the Staples and tow was about 4 knots; that of the Luckenbach and tow was from 6 to 7 knots. Both tows entered Narragansett Bay through the eastern passage, leaving the islands known as the Dumplings on the port side, then proceeding westward of Rose Island and to the eastward of Gould Island and then on a course of about north-east by north in order to Clear Sands Point Light, on the eastern shore of Prudence Island. It was above the last named light that the collision occurred. The night was clear and cold. The tide fair, less than half a knot in strength.

The libellant Almy alleges the circumstances and the faults to have been as follows (and the allegations of Fingliss with respect to the collision were practically the same):

"About 4 A. M. the 25th of January 1907 the tug Cora L. Staples and the aforesaid barges were proceeding up Narragansett Bay through the channel between Prudence Island and Rhode Island off Sandy Point and heading on the regular course toward the light south of Hog Island. The tide was flood, the night was dark but fairly clear, and the regulation lights of said tug and barges were properly placed and burning brightly; each of said barges, in addition to her side lights, carried a bright white light at the stern. Said tow was proceeding at ordinary full speed and making about 4 miles an hour. The navigation of the Cora L. Staples was in charge of a duly licensed mate who was standing in her pilot house steering. A vigilant lookout was also stationed and attentive to his duties; all of the barges in tow of said tug were in charge of competent masters who were at their stations and attentive to their duties.

Third: Libellant further alleges upon information and belief that while said tug Cora L. Staples and her tow were proceeding as aforesaid the lights of a tow which afterwards proved to be the tug M. E. Luckenbach, proceeded against herein, with two barges in tow, the last of which was the barge West Point, were observed astern of the Staples tow, running at a high rate of speed and rapidly overtaking the latter.

The tug M. E. Luckenbach and her barges continued to overtake the Staples tow at a high rate of speed, passing on the starboard side of and about 150 to 200 feet therefrom; said tug M. E. Luckenbach gave no signals whatever to the tug Cora L. Staples or her tow while overtaking or passing said vessels. Until the tug M. E. Luckenbach was about off the bow of the barge Sagua the tug Cora L. Staples maintained her course and speed, but then the navigators of the Cora L. Staples observed that the M. E. Luckenbach was crowding somewhat toward the course of the Staples tow, and the engines of the Cora L. Staples were thereupon slowed to facilitate the safe passage of the Luckenbach tow. The tug M. E. Luckenbach and her tow continued on with unabated speed and when the M. E. Luckenbach was about abreast of the Cora L. Staples the speed of the latter was still further reduced and her helm starboarded and the tug M. E. Luckenbach was hailed from the Staples in order to ascertain the former's intended course, but no reply was received. When the M. E. Luckenbach was ahead of the Cora L. Staples the course of the Luckenbach was directed to port across the course of the Staples tow; the first barge in tow of the Luckenbach passed across the bow of the Cora L. Staples and about 75 feet distant therefrom. Your libellant on information and belief alleges that those in charge of the Staples tow then observed the last barge in tow of the tug Luckenbach, to-wit the West Point, take a rank sheer to port towards the stern of the Cora L. Staples, whereupon the engines of the Cora L. Staples were put full speed ahead and her helm put hard-a-starboard in order to avoid the threatened collision, and numerous danger blasts were given on her steam whistle to warn those in charge of the tug Luckenbach and the West Point of the impending danger. Orders were also given on board both the Cora L. Staples and the barge Sagua to cut the hawser between the said tug and barge, but before these directions could be carried out the barge West Point, running at a high rate of speed, crossed the hawser between the tug Staples and the barge Sagua, the hawser attached to the bow of the West Point striking with great force against the starboard quarter and deck-house of the tug Cora L. Staples, ripping off the roof, breaking her mast and tearing out the pilot-house and smokestack and your libellant states that he was aroused by the blowing of the danger whistle on the Cora L. Staples and on going on deck was struck in the back by the hawser of the West Point which at about that instant came over the rail of said tug Cora L. Staples; that he was knocked down and severely injured. That immediately after this happened the Cora L. Staples was enveloped in steam and it was discovered that her pilot-house was carried away and the pilot, Joseph Fingliss, missing."

* * * * *

"Fourth: Your libellant further alleges upon information and belief that the aforesaid disaster and the damages resulting therefrom were not caused or contributed to, by any fault or neglect on the part of the tug Cora L. Staples or any of her barges or of the persons in charge of said tug or bar-

ges, but were wholly due to, and caused by, the following among other faults and neglects, viz:

As to the tug M. E. Luckenbach:

- (1) In that said steamtug although overtaking the tug Cora L. Staples and her tow, did not keep out of the way of the aforesaid overtaken vessels:
- (2) In that although said tug and her tow were overtaking the Cora L. Staples and her tow, the tug M. E. Luckenbach gave no signals to said overtaken vessels indicating her desire or intention to pass libellant's tow:
- (3) In that said tug attempted to pass the Cora L. Staples and her tow without having obtained by the interchange of appropriate whistle signals the consent of the overtaken vessels to such a course of navigation:
- (4) In that said tug recklessly and negligently starboarded her helm and directed her course across the course of libellant's tow before the barge West Point was clear of the tug Cora L. Staples, thereby drawing said barge toward libellant's tow and contributing to said collision:
- (5) In that said tug attempted to pass ahead of and across the course of the tug Cora L. Staples and her tow instead of passing under the stern of said vessels and on the port side thereof:
- (6) In that although those in charge of the navigation of said tug knew or should have known that said tug Cora L. Staples and her tow were bound for Fall River, said tug Luckenbach attempted to pass on the starboard instead of the port side of libellant's tow:
- (7) In that said tug and her tow attempted to pass the tug Cora L. Staples and her barges in dangerous proximity thereto and failed to allow a sufficient margin of clearance between said vessels:
- (8) In that said tug proceeded at an excessive and dangerous rate of speed:
- (9) In that no sufficient or proper lookout was maintained on board the said tug:
- (10) In that said tug did not stop and reverse when danger blasts were blown by the Cora L. Staples:
- (11) In that said tug was in charge of incompetent persons, and in such other and further particulars as the libellant may be able to point out upon the trial:

As to the barge West Point:

- (1) In that said barge although overtaking the tug Cora L. Staples and her tow did not keep out of the way of said overtaken vessels:
- (2) In that the person in charge of said barge negligently and improperly starboarded the helm of said vessel, thereby directing her course to port and across the hawser between the tug Cora L. Staples and the barge Sagua:
- (3) In that the barge did not carry a port helm until clear of the Cora L. Staples:
- (4) In that the course of said barge was directed to port towards the course of libellant's tow:
- (5) In that no proper or sufficient lookout was maintained on said barge:
- (6) In that said barge was in charge of incompetent persons who were not attentive to their duties, and in such other and further particulars as the libellant may be able to point out upon the trial."

The claimants' allegations against the Staples were as follows:

"Sixth: The claimants further answering the said libel and complaint allege upon information and belief:

That on the 24th day of January, 1907, the steamtug 'M. E. Luckenbach' was in charge of a competent master, officers and crew, and had a competent lookout kept; that her proper regulation masthead or towing lights, her side lights and her stern light, were properly set and burning brightly, and she had in tow the barge 'R. R. Thomas' astern on a hawser of about 200 fathoms, and astern of said barge was the barge 'West Point,' on a hawser of about the same length, each barge being in charge of a competent master, with a competent lookout kept, with their regulation side lights properly set and burning brightly, and the stern light on the barge 'R. R. Thomas' was properly set and burning brightly so that the barge 'West Point' could see the same to steer by. Said barges were loaded with coal and bound to Providence, Rhode Island.

That about 12 o'clock, midnight, of said 24th day of January, when said tug 'Luckenbach' and her tow had just come around Rose Island Light, and after passing said light,—the course of the steamtug was to be northeast by north until the tow passed Sands Point Light,—and while proceeding on her course, and when between Rose Island Light and Gould Island, four lights, bearing on about a range with Sands Point Light, were seen, and at first the person in charge of the navigation of the tug 'Luckenbach' was unable to distinguish which among the five lights was the light on Sands Point Light-house, but it was afterwards discovered that the four white lights were the lights on the barges in tow of the tug 'Cora L. Staples.' The steamtug 'Luckenbach' was then steering her regular course of northeast by north which brought these lights on the port bow. The speed of the steamtug 'Luckenbach' at that time was about six (6) knots an-hour.

After proceeding for some time the tug 'Luckenbach' passed the stern barge of the 'Staples' tow, when it was about between Gould Island Light and Fisk Rocks. At that time there was plenty of room and plenty of water, and the tug 'Luckenbach' was still steering northeast by north, and when passing the stern barge of the tow of the 'Staples,' she was passing with a safe margin. The 'Staples' was steering a parallel course with the 'Luckenbach' and making between three and four knots an hour. That at the time the tug 'Luckenbach' and her first barge got abreast of the tug 'Staples' they were still below Sands Point Light. After passing Dyer's Island, having plenty of water to the eastward, the course of the 'Luckenbach' was changed a half a point to northeast half north, and she continued on that course until she was abreast of Sands Point Light, a distance of about a mile and a quarter, when the tug was put back on her original course of northeast by north, and the tug continued on that course, heading northeast by north by compass. The course of northeast half north was changed before the tug got up to the tug 'Staples,' and when the 'Luckenbach' passed the 'Staples' they were a good distance apart, and the 'Luckenbach's' tow was kept in line and following after the tug. When the 'Luckenbach' had starboarded half a point the change widened the distance between the two tows until the 'Luckenbach' reached Sands Point Light, and the change of course back to northeast by north did not in any way lessen the distance between the tows, but put them back on the parallel course they were on previously.

The person in charge of the navigation of the tug 'Luckenbach' occasionally looked back from the window of the pilot house to see that the tow was following properly in line, and the tug exhibited two lights at her stern for the head barge to steer by, and the head barge exhibited a white light astern for the stern barge to steer by.

The person in charge of the navigation of the tug 'Luckenbach' believed that everything was right and that the tows were passing safely until he heard several short whistles astern, but whether they came from the tug 'Staples' or from the 'Luckenbach's' barges he was unable to determine. He immediately looked out of the port pilot house window and saw the masthead lights of the 'Staples' over quite close in line with the 'Luckenbach's' barges, and closer than when both tows were running parallel, and the red lights of the 'Luckenbach's' barges could be seen about in line with the stern of the tug 'Luckenbach.' The lights of the 'Staples' were quite close to the line of the 'West Point,' but the 'West Point' was so far astern of the 'Luckenbach' it was impossible to judge how close she was to the 'West Point,' and it was thought that the 'Staples' was going under the stern of the barge 'West Point' to head up towards Fall River. Then the lights of the 'Staples' disappeared and the captain of the 'Luckenbach' ordered the mate, who was in charge of the wheel, to slow down at once, putting the tug under one bell. The captain then took charge of the 'Luckenbach' and the mate went down aft to shorten the hawser, and signals were given to the barges to shorten their hawsers. At that time it was not known on the 'Luckenbach' that a collision had happened. When the mate had hauled in the hawser from the first barge he went into the pilot house and it was then decided that something had happened, and the tug was turned around and went back, and when it had gone back a short distance a Fall River Steamer was seen throwing a search light

around, and the tug 'Luckenbach' went around the stern of the steamer, which was headed to the northward and westward. The escaping steam of the tug 'Staples' which was lying in that neighborhood, was heard, and she was discovered heading down the river in the opposite direction from that in which she had been towing, and, under the orders of the captain of the 'Luckenbach' a line was given to the 'Staples,' and she was hauled up alongside, but no lights were visible on the decks of the tug 'Staples'. By that time the tug 'Luckenbach's' barges had anchored. When the tug 'Luckenbach' got alongside of the 'Staples' it was discovered that the pilothouse, mast, and smoke-stack of the 'Staples' had been taken off of her, by said 'Staples' going under the hawser between the first and second barges in tow of the tug 'Luckenbach'. The libellant, captain of the tug 'Staples' came into the pilot house of the 'Luckenbach,' and thereafter the 'Luckenbach' proceeded to Fall River, and on her way she passed the barge 'West Point,' and found that said barge was not damaged. No whistles were blown at any time, except as hereinbefore mentioned.

Seventh: That the said accident was not caused through any fault, neglect or want of care on the part of the persons in charge of the navigation of the said steamtug 'M. E. Luckenbach' or the barge 'West Point,' but was caused solely through the negligence or want of care on the part of the libellant herein, or the persons in charge of the steamtug 'Cora L. Staples' and the barge 'Sagua,' as follows:

1st: In that said steamtug changed her course so as to go under the towline between the barges in tow of the tug M. E. Luckenbach:

2nd: In failing to keep a good and proper lookout:

3rd: In failing to keep her course and speed so as to be able to control the tug and her tow, and keep them away from the tow of the tug M. E. Luckenbach:

4th: That the persons in charge of the navigation of the Staples knows that the barge Sagua, by reason of her build, did not steer well, and also that the Staples was not a good steerer, did not exercise the care that the circumstances required of them to prevent sheering or change of heading on the part of the barge and tug, while the tug M. E. Luckenbach was passing:

5th: That the tug did not stop and reverse when her navigators finally saw the danger of getting across the hawser of the barge West Point:

6th: In such other and further respects as the claimants will point out on the trial of this action."

The principal controversy in the case is whether the disaster was due to a change of course on the part of the Luckenbach and tow to the port, or a change on the part of the Staples and tow to the star-board.

The testimony is very conflicting, each side vigorously contending that the other was in fault in this respect. The natural course of the Luckenbach in the vicinity of Sands Point Light was N. E. by N. and that of the Staples the same until the said light is abeam, then a change to N. E., on a flood tide is necessary. Each claimed to have been on its proper course shortly before the collision, that is the Luckenbach remained on N. E. by N. course and the Staples had changed to a N. E. course when passing the said light, and had gone half or three-quarters of a mile when the collision happened.

There is no question but that the Luckenbach was the overtaking vessel and it is urged by the Staples that she committed a grave fault in attempting to pass to the right of the Staples instead of to the left. It can not be doubted that if the latter course had been adopted, the accident would have been avoided, but the Luckenbach claims that she did not, and could not, know that the Staples would change her

course to go to Fall River. It seems that the Luckenbach's contention in this respect should be sustained, and the determination of the controversy rest upon other points.

Under the positions of the vessels, the burden was upon the Luckenbach, as the overtaking vessel, to show not only the prudence of her own conduct but the negligence of the other vessel. The *Aureole*, 113 Fed. 224, 232, 51 C. C. A. 181.

It is urged by the libellant that this burden of the Luckenbach is increased by her admitted failure to give a signal of her intention to pass, under rule 8, which provides:

"Rule VIII. (Act June 7, 1897, c. 4, 30 Stat. 101 [U. S. Comp. St. 1901, p. 2882.]) When steamvessels are running in the same direction, and the vessel which is astern shall desire to pass on the right or starboard hand of the vessel ahead, she shall give one short blast of the steam-whistle, as a signal of such desire, and if the vessel ahead answers with one blast, she shall put her helm to port; or if she shall desire to pass on the left or port side of the vessel ahead, she shall give two short blasts of the steam-whistle as a signal of such desire, and if the vessel ahead answers with two blasts, shall put her helm to starboard; or if the vessel ahead does not think it safe for the vessel astern to attempt to pass at that point, she shall immediately signify the same by giving several short and rapid blasts of the steam-whistle, not less than four, and under no circumstances shall the vessel astern attempt to pass the vessel ahead until such time as they have reached a point where it can be safely done, when said vessel ahead shall signify her willingness by blowing the proper signals. The vessel ahead shall in no case attempt to cross the bow or crowd upon the course of the passing vessel."

On the other hand, it is urged that the rule is intended to deal with narrow waters and seems to contemplate a case where a dissent has been sounded in a narrow place. I do not think that the rule was designed for narrow waters only but for any waters where an attempt to pass would involve danger of collision. It was certainly the duty of the Luckenbach to signal her intention and to receive an assent to the proposed passing and the duty of the Staples to express a dissent when she became aware that a dangerous manoeuvre was being attempted by the Luckenbach. No signals were given by either vessel until just before the collision when the Staples blew alarm whistles. The Luckenbach at the time was far ahead and the signals were useless. The Luckenbach was clearly in fault with respect to signals.

To recur to the question of a change of course, I find the facts to be that upon the converging courses, the tows were and had been in danger of collision for some little time. Originally they were both N. E. by N. It was the duty of both to continue such course until a deviation became justifiable. It is contended by the Staples that she continued that course until she reached the vicinity of the Sand Point Light, when she changed to N. E., bringing Hog Island about ahead, and that at the time of the change the Luckenbach was still astern of the Staples' last barge. The establishment of the contention is principally dependent upon the testimony of Fingliss at the wheel of the Staples, supported by the statement of the deckhand in the pilot house, who said he did not look for 3 or 4 minutes after Fingliss told him there was a tow coming up behind and then the Luckenbach was about abreast of the second barge.

The statements of the witnesses for the Staples, more in detail, were as follows:

The libellant Almy, the master of the Staples, after describing the vessels in his tow, said that the towing bitts on the tug were about 15 feet forward of the after line of the house; that he had gone off duty at 12 o'clock and to his room on the after end of the house; that the entrance thereto was through a room on the port side aft; that after reaching his room he went to sleep and was awakened by hearing several sharp, quick blasts of the whistle and got up and ran out to see what was the matter; that he saw a large black object, which afterward proved to be the West Point, a little on his port quarter; that he looked forward without seeing anything noticeable, and went around the stern to the starboard side and when he reached there a "great big hawser" came over the starboard quarter and struck him in the small of the back; that previous thereto he had seen that the tiller of the rudder, which was visible to him through the covering grating, intended for, but then not occupied by, the Staples' hawser, was hard to starboard directing the tug's heading to the port; that the hawser knocked him down and then carried off all the upper works, with the mainmast and the smokestack, sweeping from aft forward and carrying the wreckage to the port side; that the Sand Point Light, at the time, was abaft the tug; that the West Point after getting on the port quarter passed the Staples to the westward; that the blow knocked him unconscious and when he came to he found himself way over on the port side; that the steamer Cretan came to their assistance from the port side and afterward picked up the mate; that the Luckenbach after anchoring its tow came alongside and took him to Fall River, where he was taken home and remained about 5 weeks under a physician's care; the Staples was also taken to Fall River.

The libellant Fingliss, who was at the wheel, said he had already obtained the Fall River course when he first knew of the approaching tow; that the Sand Point Light was then slightly abaft his beam and after he changed he saw the tow coming at the stern, the Luckenbach then not having lapped the last barge of his tow; that he then saw the red light of the two barges in tow and those of the Luckenbach about 150 feet away from his tow; that the other tow was rapidly overtaking him and getting closer, estimated the distance at 100 feet to the westward and he sent his deck hand out to hail the Luckenbach and he did so but could get no answer; that the Luckenbach's tow proceeded on and seemed to be crowding him so he starboarded his wheel, when looking back he saw the last barge of the other tow take a sheer across the bow of his first barge and he heard a starboarded and gave from 10 to 16 rapid blasts of his whistle but the collision happened and on stepping out on deck on the starboard side he felt the hawser against his legs and in an instant he went overboard backward to port; that he saw the barge going by to the eastward of the tug, as he was sustaining himself by the wreck of the pilot house; that he was subsequently picked up by the steamer Cretan after having been in the water about an hour and a half and found that he was seriously injured; that before he went overboard he gave a last glance

at the compass and found the tug was heading about north, having swung from N. E.; that he was then taken to Fall River by the Cretan and left there; that the Luckenbach crowded upon his course and his first barge passed 40 or 50 feet away. On cross examination he said that when he first saw the tow, he saw three red lights, one on the tug and one on each of the barges; that when he first saw the other tow it was about 100 feet astern of his tow; that when the Luckenbach came abreast of him, he judged she was from 75 to 100 feet away.

The deck hand testified that he went on duty at 12 o'clock and after spending a half of an hour taking out some ashes, he went to the pilot house where he remained until the accident standing on the port side, while the mate was on the starboard side; that after the course was changed at Sand Point the mate looked out of the window and said "There is a tow coming up here"; that he did not look behind for three or four minutes after the mate's remark, then he looked and saw the Luckenbach was at about the second barge of his tow; that when the Luckenbach was abreast of his tug, under orders from the mate he went out, hailed the Luckenbach without getting an answer and went back to the pilot house; that the first barge of the tow got very close and the mate changed somewhat to the port under a starboard wheel; that the first barge passed clear 40 or 50 feet away and he noticed the second barge making a sheer for about the middle of his hawser and she sheered across the hawser between the Staples and the first barge; that he was sent back to cut the hawser; the hawser and something swept him off the pilot house deck to the main deck; that while he was running back on the upper deck he saw the West Point a little on the port quarter of the Staples aft; that the hawser first struck the stern and then swept forward; that when he saw the sheer of the West Point she showed, and continued to show, her green light. The mate on being recalled for further cross examination said that when he noticed that the other tow was lapping he did not think there was going to be a collision but that it was doing something that was not right.

Another witness for the libellants was the master of the barge Sagua, the leading barge in the Staples' tow. He said that when about abreast of Sand Point Light, he saw the Luckenbach astern of the last barge in his tow; that the tow was then on a N. E. course heading for the light on Hog Island, and was about three-quarters of a mile off Sand Point, so that the Luckenbach could very easily have passed on the port side; that she passed on the starboard side not, as he thought, more than 100 feet distant; that the first barge of the other tow was nearer, if there was any difference, than the tug; that when the Luckenbach was about opposite the Staples, he heard some one on the Staples calling out but could not hear what was said; that shortly after the Luckenbach passed the Staples, the former began to haul across the latter's bow; that about the time the stern barge of the other tow was abreast she was quite close so that the witness thought she was going between his barge and the Staples; that he instructed one of his crew to go forward and out the hawser but before he reached there, she ran into the hawser and it parted; that the West Point was so close in passing that she seemed to be sheering all the time; that he saw her hawser go over the

Staples and clean her off; that she passed on the port side of the Staples and the Luckenbach tow kept right on; that the collision happened when they were one-third to one-half way between the two lights; that they shortly after anchored, and later pulled in the hawser leading from her bow; that after the West Point's sheer, the hawser fell loose on his bow and it was found to have been parted and stranded; that it was not true that the Staples sheered to starboard and crossed the Luckenbach's hawser.

Opposed to these statements is the testimony of the master and the mate of the Luckenbach, and the master of the West Point.

The mate at the wheel, who relieved the master at midnight, said that when they reached a point off Rose Island, he noticed a number of bright lights a little on his port bow, bearing on Sand Point so that he could not distinguish the light there; that he was then on a course of N. E. by N. and shortly noticed that he was overtaking the lights and began to pass the Staples' tow about Fish Rock, just above Gould Island and about a half of a mile from the lower end of Prudence Island, the Staples' tow then being about on the same course that he was pursuing; that he was passing at a distance of 100 to 150 yards; that he kept the same course until he was about Dyers Island, when he changed $\frac{1}{2}$ point to the eastward, to N. E. $\frac{1}{2}$ N., to give the other tow plenty of room; that he continued on that course until he reached Sand Point, when the Staples was about abreast of the Luckenbach, the same distance off, and he changed back and steadied on a N. E. by N. course; that he shortly after called the master who was in his room aft of the wheel house.

The master said, on being called, that he looked out of a window in the after part of his room, which was located in the building on the upper deck; that this building contained the master's room and the pilot house; that he saw his tow coming along, the other tow and Sand Point Light, 500 or 600 feet below him; that his tow was then from a quarter to a half of a mile off shore; that his own tow was following reasonably straight behind, the first barge showing both lights and the stern barge the green light; that the Staples was then about abreast of his head barge and from 100 to 150 yards away; that the tows were then on about the same course and no danger was apparent; that his attention was arrested by some whistles and he directed the mate to slow down; that he then went into the pilot house to take charge and immediately upon looking out of the window, saw nothing of the lights of the Staples, but could see her; that he did not hear any noise or crash and did not know anything had happened; that he did not think there had been a collision, and could hardly account for the tug getting so much under the Luckenbach's stern as to cover up her lights; that upon going back he found what proved afterward to be one of the Philadelphia steamers, the Cretan, swinging a search light around, next was the Fall River steamer swinging her search light around, and next he was hailed by some one on the Staples who said: "We are wrecked, come and get hold of us"; that he then approached the Staples which was heading about west, on her starboard side, on

account of wreckage on the port side; that as far as he knew it was slack water, because his barges which had been anchored heading up stream, did not swing around; that he should say that the collision took place not 50 yards above Sand Point; that the master of the Staples said to him, that he did not know how it could happen unless his head barge took a rank sheer causing the Staples to sheer in toward the Luckenbach's tow, that he had had trouble with the barge since leaving Jersey City, she was a heavy barge and possibly something of that kind happened; that the after part of the Staples was all covered with wreckage while the forward part was all clear, the masts were swept from starboard to port; that the damage had indicated that the hawser had struck on the starboard side somewhere about the forerigging; that his speed was 6 to $6\frac{1}{2}$ knots; that when he came into the pilot house the boat had not quite reached a point where it was usual to haul around to the westward to go to Providence; that point of changing, from N. E. by N. to N., is marked by the range light on Bristol Ferry Point with Hog Island. On his cross examination, it appeared that he testified before the Local Inspectors that when he first went into the pilot house that Sand Point Light was a quarter of a mile astern of abeam of the Luckenbach, so that the light would be two or three points on her port quarter and a good half or three quarters of a mile off.

The master of the West Point said he came on watch at 12 o'clock and overtook the Staples and tow on the way up toward Prudence Island; that another man was at the wheel and apparently steering correctly; that the witness was on duty and had been on deck till about 10 minutes before 4 o'clock at which time they began to overlap the other tow and were passing it about 150 yards off; that both tows were heading nearly the same, "they were heading in a little closer" but the witness did not think there was any danger in the situation and he went forward underneath the top deck and was there until he heard whistles, when he ran up on deck and saw the other tug "almost right across our hawser" and saw her starboard light; that it appeared to him that she was already in contact, heading to the starboard of the Luckenbach almost across her bow; that he was excited but saw the smoke-stack and mast of the Staples go over the side and she drifted down to the starboard of the Luckenbach; that it appeared to him that his hawser struck the Staples' bow and took her smoke-stack and mainmast last; that when he came up "it seemed that our head barge was a little bit on our starboard bow * * * about half a point as near as I could judge in the excitement"; that when he came out he thought they were a little below Sand Point Light. On the cross examination he said that his barge might have sheered a little but not much; that he did not recollect having testified before the Inspectors as follows:

"Q. Did your barge cross over between the Staples and her first barge? A. Well, that I don't know; it might probably have done so, she must have I suppose."

The transcript of the Inspectors' minutes, however, showed that he did so testify.

Another witness for the claimants was the master of the barge Thomas, the leading barge in the Luckenbach's tow. He said that he was steering his barge when passing the Staples and tow and passed them 100 to 150 yards away; that he left the pilot house in charge of another wheelsman to go forward to arrange about anchoring and then he saw both of the West Point's side lights; that when he reached the forecastle head he heard some toots from the Staples and looking over the port side he saw only two green lights, close together, and three masthead lights; that he then heard some cracking and people hollering and then all the lights went out excepting one green light, which he took to be on the West Point.

It will be noticed that the Luckenbach's testimony shows that while the tows were passing, she changed half a point to the eastward to give the other tow plenty of room; that when in passing the tugs were about abreast and she changed back to her former course; that when the master looked astern the first barge was showing both lights to him; while the last barge was showing her green only; that he next saw the lights of his barges and the Staples all crowded together; that the master of the West Point noticed that the tows were getting closer while on their general courses; and he admitted that he was excited when making his observations.

I think that the preponderance of the testimony is decidedly in favor of the contention of the libellants that there was no change of course on the part of the Staples after the Luckenbach commenced her endeavor to pass to the starboard. Whether there was any change on the part of the Luckenbach other than from N. E. $\frac{1}{2}$ N. to N. E. by N., described above, is not so clear, but, in any event, that change was enough to bring the tow of the Luckenbach in dangerous proximity to the Staples and the former should be condemned for close shaving as well as for the change of course just mentioned. She was also in fault for not giving a signal when overtaking and for proceeding without an assent to a proposed method of passing.

It is not contended that the Luckenbach had a lookout. It is not necessary, however, to go beyond the foregoing to establish faults on her part but it is probable that such faults were not the sole causes of the disaster, because it is likely that unless the West Point sheered to port, the change to port on the part of the Staples would have avoided the collision, but all efforts in the extremity were rendered useless by the sheer of the West Point. It is impossible to determine the extent of such sheer, as that would depend upon the distance the tows were apart, and the estimates vary from 75 feet to 450 feet, but it appears it was sufficient, in connection with the close shaving of the Luckenbach to produce the collision. The testimony on the part of the Staples that the West Point sheered considerably is confirmed by the statements of the master of the Luckenbach, and of the master of the Thomas, who said they saw the West Point's green light immediately prior to the collision. The latter said that it was the only light of those previously seen that appeared after the collision.

There will be a decree in favor of the libellants against the Luckenbach and West Point, with an order of reference.

In re TUPPER.

(District Court, N. D. New York. July 17, 1908.)

1. JUDGMENT—LIEN—REAL ESTATE.

Under the New York law, a judgment becomes a lien on real estate on the date it is docketed in the county where the real estate is situated and remains a lien for 10 years, irrespective of the issuance of an execution, a levy, sale, or advertised sale.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1332.]

2. BANKRUPTCY—ACTS OF BANKRUPTCY—PETITION.

A petition, charging that defendant had transferred her interest in certain real estate by way of security by permitting a judgment to be docketed against her in the county where the real estate was situated, was insufficient, without an allegation that this was done with intent to hinder, delay, or defraud her creditors or any of them; the act of bankruptcy defined by Bankr. Act July 1, 1898, c. 541, § 3, subd. 1, 30 Stat. 545 (U. S. Comp. St. 1901, p. 3422), declaring that a transfer of property with intent to hinder delay or defraud creditors shall constitute an act of bankruptcy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 118.]

3. SAME—PREFERENCE.

A bankruptcy petition, charging that defendant transferred her interest in certain property by way of security by permitting a judgment to be docketed against it, but, failing to allege that this was done by defendant with intent to prefer the judgment creditors, did not charge an act of bankruptcy under Bankr. Act July 1, 1898, c. 541, § 3, subd. 2, 30 Stat. 545 (U. S. Comp. St. 1901, p. 3422), declaring that a transfer by a debtor, while insolvent, of any portion of his property with intent to prefer such creditors over other creditors, shall constitute an act of bankruptcy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 118.]

4. SAME—"PREFERENCE"—"TRANSFER."

Bankr. Act July 1, 1898, c. 541, § 60, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), declares that a person shall be deemed to have given a "preference," if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before adjudication, procured or suffered a judgment to be entered against himself in favor of any person or made a transfer of any of his property, the effect of which will be to enable one creditor to obtain a greater percentage of his debt than other creditors of the same class. Section 1, subd. 23 (30 Stat. 545 [U. S. Comp. St. 1901, p. 3420]), declares that a "transfer" shall include the sale and every other and different mode of disposing of or parting with property or the possession of property absolutely or conditionally as a payment, pledge, mortgage, gift, or security. Section 3, subd. 3 (30 Stat. 5406 [U. S. Comp. St. 1901, p. 3422]), provides that a person shall commit an act of bankruptcy if he has suffered or permitted any creditor to obtain a preference through legal proceedings and not having, at least five days before a sale or final disposition of any property affected by such preference, vacated or discharged the same. *Held*, that where a debtor, while insolvent, permitted certain creditors to recover and docket a judgment against her in the county, in which she had an equity in real estate, and such judgment was permitted to remain a lien until one day before the expiration of four months from the date it was so docketed, and on the expiration of such time it would have become an absolute security for the debt, it constituted a preference and an available act of bankruptcy.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 6, pp. 5498-5499; vol. 8, pp. 7759, 7064-7070, 7819.]

5. SAME—"FINAL DISPOSITION."

Bankr. Act July 1, 1898, § 3, subd. 3, c. 541, 30 Stat. 546 (U. S. Comp. St. 1901, p. 3422), provides that a person shall have committed an act of

bankruptcy by having suffered or permitted, while insolvent, any creditor to obtain a preference by legal proceeding and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged it. *Held*, that the term "final disposition," as so used, did not mean a gift of the property to some third person or a voluntary transfer to the creditors in satisfaction of a preferential judgment, but included every other method than that specified of passing the control and dominion of the property of the insolvent debtor to another or others either absolutely or as security to the preferred creditor to the exclusion of his other creditors.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 3, p. 2798.]

Geo. S. Raley, for bankrupt.
Henry W. Williams, for creditor.

RAY, District Judge. About March 7, 1908, and prior to March 8, 1908, the First National Bank of Glens Falls, N. Y., a creditor of the above-named Abbie Tupper to the amount of \$2,987, besides interest, filed a petition in involuntary bankruptcy against her praying that she be adjudged a bankrupt.

The petition sets out all necessary facts with sufficient detail and exactness, unless it be that it fails to charge an act of bankruptcy. The alleged bankrupt interposes a demurrer challenging the sufficiency of this allegation, which is as follows:

"(7) That within four months preceding the date of the filing of this petition, viz., on the 8th day of November, 1907, the said Abbie Tupper, while insolvent, committed an act of bankruptcy, in that she did, on said date, suffer and permit the said Pardo & Hogan to obtain a preference through legal proceedings, and did not, at least five days before the final disposition of the property affected by such preference, vacate or discharge said preference. That said Abbie Tupper, at said time, was and now is the owner of a house and lot at No. 122 Crandall street, in the village of Glens Falls, of the reasonable worth and value of \$2,500 incumbered only, prior to said date, by a mortgage of \$1,500, leaving an equity owned by said Abbie Tupper, in said real estate, of \$1,000. That on said 8th day of November, 1907, the said James Pardo and Daniel J. Hogan recovered a judgment in the Supreme Court of the state of New York for the county of Warren, in which county said real property is located, and that the said judgment roll in said action was duly filed in the Warren county clerk's office, and said judgment duly docketed therein, on said day. And that, under the laws of the state of New York, the said judgment thereupon became a lien against the aforesaid real estate, viz., the equity of said Abbie Tupper in the said property at No. 122 Crandall street, Glens Falls, N. Y.

"(8) That said judgment of Pardo & Hogan has not been paid, satisfied, vacated, or discharged. That the same constitutes an illegal and unlawful preference in bankruptcy, in favor of said Pardo and said Hogan, of the property of said Abbie Tupper, and to the detriment of your petitioner. And that such preference will become absolute, and will be unavoidable by a trustee in bankruptcy on the 8th day of March, 1908, unless this petition is filed between said date and five days previous thereto."

The act of bankruptcy charged is: That on the 8th day of November, 1907, the said Abbie Tupper, while insolvent, suffered and permitted James Pardo and Daniel J. Hogan, creditors, constituting the firm or copartnership of Pardo & Hogan, to obtain a preference through legal proceedings and did not, at least five days before the final disposition of the property affected by such preference, vacate or discharge such preference; that said Abbie Tupper then was and

still is the owner of a house and lot in Glens Falls, Warren county, N. Y., worth \$2,500, then incumbered by a mortgage of \$1,500, leaving her equity thereon of \$1,000; that on the said 8th day of November 1907, the said Pardo & Hogan recovered a judgment in the Supreme Court of the state of New York against said Abbie Tupper and duly filed the judgment roll and docketed said judgment in the county of Warren, N. Y., where said real estate is situated, and such judgment thereupon on such day became a lien on such real estate; that the said judgment has not been paid, satisfied, vacated, or discharged; that the same constitutes an unlawful preference, in bankruptcy, by way of a lien in favor of said Pardo & Hogan upon the property of the alleged bankrupt to the detriment and injury of the petitioner; and that such lien would become absolute and unavoidable by a trustee in bankruptcy March 8, 1908.

There is no allegation in the petition that an execution has been issued on such judgment and returned unsatisfied, or that any execution has been issued, or any levy made on such property, or that it has been advertised for sale on execution, or that any attempt has been made to enforce such judgment. Under the laws of the state of New York, such a judgment becomes a lien on real estate on the day of its docket in the county where the real estate is situated, and remains a lien for 10 years, entirely irrespective of the issuance of an execution, a levy, or a sale, or an advertised sale.

By section 60 of the bankruptcy act (Act July 1, 1898, c. 541, '30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]):

"A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

That the enforcement of this judgment against this judgment debtor will have this effect is not questioned, and, indeed, it cannot be. That Tupper has given a preference is very clear, for she has suffered a judgment to be entered against herself in favor of these creditors.

By subdivision 25 of section 1 of the act:

"Transfer shall include the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift or security."

It follows that allowing a judgment to be taken and docketed, thereby creating a lien and a security for the debt, may constitute a transfer, for it would be or might be a disposition of real property by way of security. Aside from the mode of enforcement and the right to redeem after a sale and the time of redemption, it is in New York just as effectual by way of security for a debt as a recorded mortgage. It constitutes a lien on the property good as against all claims, except purchase money and unrecorded mortgages given in good faith and for a valuable consideration whether execution is issued or not. It follows that a debtor may give his creditor security on his real es-

tate by allowing and permitting him to obtain and docket a judgment, within the meaning of the bankruptcy act. Section 3 of the act defines and enumerates "acts of bankruptcy." Even if Tupper has transferred her interest in this real estate by way of security by permitting this judgment, there is no allegation that it was done with intent to hinder, delay, or defraud her creditors or any of them. Hence the petition does not charge the first act of bankruptcy enumerated in the act. So if she has transferred her interest in this property by way of security by permitting this judgment and lien, there is no allegation in the petition that it was done with intent to prefer Pardo & Hogan over her other creditors. Hence the second act of bankruptcy is not alleged. There can be no pretense that either the fourth or fifth act of bankruptcy is alleged.

The third act of bankruptcy reads:

"Having suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference."

This act of bankruptcy is not committed by suffering or permitting, while insolvent, a creditor to obtain a preference through legal proceedings merely. The act of bankruptcy is not committed until the person suffering or permitting the obtaining of the preference by legal proceedings, suit, and judgment has failed "at least five days before a sale or final disposition of any property affected by such preference to vacate or discharge such preference." It has been held that this act of bankruptcy is not committed until a sale is at least advertised or the property affected by the preference is to be finally disposed of and the fifth day prior to the proposed sale or proposed final disposition of the property affected has arrived. In the case of personal property, a sale or proposed sale on execution issued on a judgment is, of course, the sale or final disposition intended, as there is no right of redemption. In the case of real estate, an advertised sale on execution or an actual sale would, in my judgment, be a final disposition, notwithstanding there is a right of redemption. In the case of real property, under the law of the state of New York the docketed judgment becomes an absolute lien so soon as docketed in the county where the real property is situated and is "a disposition of the property," in a sense, for it has been by operation of law pledged as a security for the debt or amount of the judgment; but under the terms of the bankruptcy act such a lien, such a disposition of the real property, does not become final until the expiration of four months from its docketing in the county where the real property is situated. In this case, under the provisions of the bankruptcy act, the real property affected by the preference, judgment suffered and permitted, would not have passed absolutely under the lien of this judgment, and so have been finally disposed of as security for the debt until March 8, 1908. On the 7th of March, 1908, the petition was filed. This real property affected by this judgment, this preference—for it was such and made so by section 60a of the act—was to be effectually and finally disposed of so far as the alleged bankrupt was concerned,

aside from the right to redeem from the lien by payment thereof, on the 8th day of March, 1908, by operation of law. An execution and levy and an advertised sale thereunder were wholly unnecessary to a final disposition of this property. On the 8th day of March, 1908, but for the filing of the petition in bankruptcy, the real property would have passed irrevocably and absolutely under the lien, and, as Tupper had become and was insolvent, it was not in her power to pay or discharge it. As to the effect of this, see *Scheuer v. Smith*, etc., 112 Fed. 407, 50 C. C. A. 312.

Not so with personal property, for there there is no lien until execution is issued and generally levy made, and, even then, the lien ceases if within definite periods a sale is not advertised, and hence there is no final disposition of such property proposed until the same is advertised for sale.

It seems to me that effect is to be given to the words "or final disposition of any property affected by such preference." "Final disposition" is not a gift of the property to some third person or a voluntary transfer to the creditor in satisfaction of the preferential judgment, as that would be merely a sale in payment. Congress had in mind, when it enacted this law, the fact that there are different ways or modes of disposing of property, of enforcing executions, judgments, and liens, and it referred to the ordinary method of disposition by way of sale, and then used the words "or final disposition" to cover every other method of passing the control and dominion of the property from the debtor, insolvent person, to another or to others either absolutely or as security to the preferred creditor to the exclusion of his other creditors. The purpose of the law is that no one creditor shall be preferred over the others by an insolvent person, but that all creditors shall share equally except as to honest liens created more than four months prior to the filing of a petition in bankruptcy. It was not intended that a creditor should obtain a lien on all the real estate of an insolvent person by a judgment filed and docketed, and then lie still, without issuing execution or making a levy and advertising the property for sale for four months and until such judgment had become unimpeachable under the bankruptcy act or otherwise, thereby gaining a preference, an absolute security for the debt, and it might be to the extent of the entire property of the insolvent person, and thus excluding other creditors from any share in the estate. It has been held that an advertised or even a proposed sale is not in all cases necessary under subdivision 3 of section 3. In *re Harper* (D. C.) 105 Fed. 900, 5 Am. Bankr. Rep. 567; In *re Miller et al.* (D. C.) 5 Am. Bankr. Rep. 140, 104 Fed. 764; *Scheuer v. Smith & Montgomery Book etc., Co.*, 7 Am. Bankr. Rep. 384, 112 Fed. 407, 50 C. C. A. 312.

In *Re Miller et al.*, supra, judgment was obtained and execution issued. The personal property of the judgment debtor was then subject to a lien and bound by the judgment. Code Civ. Proc. N. Y. §§ 1405, 1410. The insolvent person, alleged bankrupt, on being questioned as to his property, informed the sheriff that a third person had money belonging to him, and a part of that money was paid over by such person to apply on the judgment and was so applied. No levy was made and no sale was advertised. A part of the property of the

insolvent passed to the judgment creditor however. It was a final disposition of property affected by the preference. Here the real property of Tupper, but for the filing of the petition in bankruptcy, would have passed absolutely under the lien of the judgment the next day, March 8, 1908. It would have been finally disposed of so far as the petitioner and other creditors of Tupper were concerned. Nothing but an adjudication in bankruptcy will save it from that lien and a disposition thereof thereunder for the sole benefit of Pardo & Hogan. In the eye of the law of the state of New York, it is the property of Pardo & Hogan for the satisfaction of and to the extent of their debt.

In *Re Harper*, supra, judgment was entered and execution issued, but no levy was made or sale advertised. Garnishment proceedings were commenced to reach property in the hands of a third person belonging to the alleged bankrupt. The garnishee filed an answer admitting \$3,255.78 due Harper. Under the practice in Illinois, the garnishee could turn over to the judgment creditor so much of this amount as might be necessary to pay the judgment. Held, that an act of bankruptcy had been committed under subdivision 3 of section 3. The money had not been turned over, but such proceedings had been had that an absolute lien thereon had been created. But for the filing of a petition in bankruptcy, the money in the hands of the garnishee would have gone in satisfaction of the judgment provided the judgment debtor did not pay it. It is this case in principle. Here, but for the bankruptcy proceedings, the land or its proceeds will go to the judgment creditor if the judgment debtor does not pay it. But he is insolvent, as the petition alleges and the demurrer concedes, and cannot discharge the lien without applying his other property, if any, to the payment of this preference, or borrowing the money. It was possible and easy for Tupper to vacate or discharge the preference obtained by the docketing of this judgment. All she had to do, being insolvent, was to file a voluntary petition in bankruptcy and the judgment would fall under sections 67c and 67f and 60b. The material parts read:

"(c) A lien created by or obtained in or pursuant to any suit or proceeding at law or in equity, including an attachment upon mesne process or a judgment by confession, which was begun against a person within four months before the filing of a petition in bankruptcy by or against such person shall be dissolved by the adjudication of such person to be a bankrupt if (1) it appears that said lien was obtained and permitted while the defendant was insolvent and that its existence and enforcement will work a preference, or (2) the party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy, or (3) that such lien was sought and permitted in fraud of the provisions of this act.

* * *

"(f) That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may

pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid."

Section 60b:

"If a bankrupt shall have given a preference, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person. And, for the purpose of such recovery, any court of bankruptcy, as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

See *Wilson v. Nelson*, 183 U. S. 196, 197, 22 Sup. Ct. 74, 46 L. Ed. 147.

This she did not do and has not done. She has by such nonaction assented to the judgment and preference. The fair inference is that she assents to the lien and desires to aid and take part in preferring these creditors over her other creditors. It may be a fair inference that she has "transferred" while insolvent by way of security, in one of the modes referred to in subdivision 25 of section 1, this real property to these judgment creditors with intent to prefer such creditors over her other creditors. May not her intent to prefer by this mode of transfer and the intent of Pardo & Hogan to obtain and receive and retain a preference be fairly inferred? It is not necessary, under subdivision 3 of section 3, that Tupper should have done affirmative acts, and, even under subdivision 2, mere silent acquiescence and failure to act while the property is being transferred by legal proceedings may be sufficient. I have not deemed it necessary to refer to the numerous cases where a sale of personal property was involved, and where it was held that, usually, an execution, levy, and advertised sale is essential. Those cases do not govern this.

While I am of the opinion that an act of bankruptcy is charged in this petition, the petitioner, if so advised, may file an amended petition, nunc pro tunc, setting up these acts and charging the first, second, and third acts of bankruptcy so as to cover the entire case in all its phases.

The demurrer is overruled, with the privilege of amending, as suggested.

UNITED STATES v. GIORDANI.

(Circuit Court, S. D. New York. June 1, 1908.)

1. SHIPPING—STATUTORY REGULATION—CARRIAGE OF DANGEROUS SUBSTANCES.

Rev. St. § 4476 (U. S. Comp. St. 1901, p. 3052), making it a misdemeanor to pack or put up for shipment or to knowingly ship or attempt to ship on vessels any gunpowder or other dangerous substances enumerated, unless packed and marked as required by the preceding section, construed in connection with the other cognate sections of the statute, and especially section 4400 as amended in 1882 and 1895 (Act Aug. 7, 1882, c. 441, 22 Stat. 346, and Act March 1, 1895, c. 146, 28 Stat. 609 [U. S. Comp. St. 1901, p. 3015]), applies to shipments on foreign private steam vessels carrying passengers from ports of the United States to any other place or country.

2. SAME—CONSTRUCTION AND SCOPE OF STATUTE.

Rev. St. §§ 4475, 4476 (U. S. Comp. St. 1901, p. 3052), relating to the packing for shipment, shipment, or delivery to a vessel as stores of gunpowder or other dangerous substances, were enacted in the exercise by Congress of its constitutional power to regulate foreign and interstate commerce, and are applicable only to shipments or intended shipments on vessels engaged in such commerce.

3. SAME—GUNPOWDER.

The provisions of such sections relating to the packing and shipment of gunpowder include within their meaning metallic cartridges containing gunpowder.

On Demurrers to Indictments and Motions to Quash.

Henry L. Stimson (Goldthwaite H. Dorr and Phillips Moore, of counsel), U. S. Atty.

Perry Allen, for defendant.

CHATFIELD, District Judge. The defendant has been indicted for (1) knowingly and unlawfully attempting to ship as merchandise, upon a steamer called the *Graecia*, certain casks containing rifle cartridges, each cartridge containing 70 grains in some cases, and in others 40 grains, of gunpowder (the quantity of cartridges is considerable, but that does not enter into the question here involved); and (2) for knowingly and unlawfully attempting to ship gunpowder and other articles of like character, not duly packed and marked—that is to say, certain cartridges—both indictments being laid under the provisions of section 4476, Rev. St. (U. S. Comp. St. 1901, p. 3052). The second indictment describes the offense in the following language:

"Unlawfully, willfully and knowingly did attempt to ship gunpowder and other articles of like character not duly packed and marked, to wit, thirty-six casks and barrels containing cartridges, the said casks and barrels marked C M G

M and labeled with cement labels, and which said casks and barrels containing the said gunpowder and cartridges were not distinctly marked on the outside with the name and description of the articles contained therein."

It is impossible to determine certainly from this language whether the gunpowder and other articles referred to consisted entirely of cartridges, or whether the casks and barrels contained gunpowder and cartridges, inasmuch as the word "other" would indicate articles distinct from the gunpowder. But from an inspection of both indictments, and from the use of the words, "to wit, thirty-six casks and barrels containing cartridges," it would seem, for the purposes of this demurrer, that the indictment can be assumed to mean 36 casks and barrels of cartridges containing gunpowder, and that the words in the indictment, "containing the said gunpowder and cartridges," are intended to be used in an inclusive sense, being equivalent to "containing cartridges filled with gunpowder," rather than to refer to two separate articles. As will be shown later, the defendant contends that cartridges are not included in the statutory term "gunpowder." But, if both gunpowder and cartridges were intended by the pleader, this objection would fall; the insertion of the word "cartridge" being superfluous on indictment.

The question whether this indictment is sufficiently definite therefore can be dismissed, and for the present consideration, from the standpoint of the various sections of the Revised Statutes, the construction of the language most favorable to the defendant will be taken. The defendant has demurred upon the ground that the indictment shows that the Graecia is a foreign vessel, and because of that fact the defendant claims that the provisions of section 4476, under which this indictment is brought, do not apply to the transaction in question. The defendant has also made a motion to quash, in order to present to the court the proposition that this court can take judicial notice of the scientific proposition that metallic cartridges are not dangerous articles for the purpose of shipment by a common carrier, and will not explode from heat even in the case of fire.

The language of section 4476, as at present in force, is as follows:

"Sec. 4476. Every person who packs or puts up, or causes to be packed or put up, for shipment, any gunpowder, nitro-glycerine, camphene, naphtha, benzine, benzole, coal-oil, crude or refined petroleum, oil or vitriol, nitric or other chemical acids, oil or spirits of turpentine, friction-matches, or other articles of like character otherwise than as directed by the preceding section, or who knowingly ships or attempts to ship the same, or delivers the same to any such vessel as stores, unless duly packed and marked, shall be deemed guilty of a misdemeanor, and punished by fine not exceeding two thousand dollars, or imprisonment not exceeding eighteen months, or both."

It will be seen that the act forbidden is shipping or delivering for shipment "to any such vessel" gunpowder, or other articles of like character as stores unless duly packed and marked in accordance with the requirements of section 4475, which specifies the manner of such packing and marking. The entire contention upon this demurrer, therefore, turns upon the meaning of the words "any such vessel." Section 4476 is part of chapter 2 of title 52 of the Revised Statutes. This title is headed, "Regulation of Steam Vessels." The original enactment is contained in the Laws of 1871, and this original statute will be referred to later, as it seems to throw light upon the meaning of the language used. The first section of title 52 is section 4399, and is as follows (Act Feb. 28, 1871, c. 100, 16 Stat. 440 [U. S. Comp. St. 1901, p. 3015]):

"Sec. 4399. Every vessel propelled in whole or in part by steam shall be deemed a steam vessel within the meaning of this title."

Section 4400, as amended by the laws of 1882 (Act Aug. 7, 1882, c. 441, 22 Stat. 346) and 1895 (Act March 1, 1895, c. 146, 28 Stat. 699 [U. S. Comp. St. 1901, p. 3015]), is as follows:

"Sec. 4400. All steam vessels navigating any waters of the United States which are common highways of commerce or open to general or competitive navigation, excepting public vessels of the United States, vessels of other countries, and boats propelled in whole or in part by steam for navigating canals, shall be subject to the provisions of this title. And all foreign private steam vessels carrying passengers from any port of the United States to any other place or country shall be subject to the provisions of sections forty-four hundred and seventeen, forty-four hundred and eighteen, forty-four hundred and twenty-one, forty-four hundred and twenty-two, forty-four hundred and twenty-three, forty-four hundred and twenty-four, forty-four hundred and seventy, forty-four hundred and seventy-one, forty-four hundred and seventy-two, forty-four hundred and seventy-three, forty-four hundred and seventy-nine," etc.

Section 4401 contains the following:

"Sec. 4401. All coastwise sea-going vessels, and vessels navigating the great lakes, shall be subject to the navigation laws of the United States, when navigating within the jurisdiction thereof."

It will thus be seen that, no matter what the scope of the original enactment, certain statutes, as at present worded, refer to vessels of foreign countries other than men of war. The *Graecia* would be a vessel of this class, and, if section 4476 had been expressly enumerated in section 4400, this particular demurrer could not have been interposed.

But the defendant contends that, inasmuch as section 4400 mentions by number some sections of the Revised Statutes as applicable to foreign vessels when navigating waters of the United States, by necessary exclusion, the other statutes not mentioned by number must be held not to apply to such foreign vessels. The law of 1871 (Act Feb. 28, 1871, c. 100, 16 Stat. 440 [U. S. Comp. St. 1901, p. 3049]), from which the title in question was carried into the Revised Statutes, provided, in section 1, for a license to "any vessel propelled in whole or in part by steam" upon compliance with the provisions of the act. Section 2 provided for safeguards against fire on "every steamer so propelled." Section 3 contains provisions for further protection of the same sort for vessels carrying fifty or more passengers. Section 4 forbade the carrying of loose hay, naphtha, explosive fluids, and such articles on any steamer carrying passengers, and also said:

"Nor shall gunpowder be carried on any such vessel except in case of special license, as hereinafter provided."

Further, oil, turpentine, etc., could be carried if put up "in good metallic vessels," etc. Section 5 said "all gunpowder," etc., when packed for shipment, shall be securely packed, etc., "and the package, box, cask, or other vessel containing the same shall be distinctly marked on the outside with the name or description of the article," etc., "and every person who shall pack or put up, or cause to be packed or put up for shipment, any gunpowder," etc., "otherwise than as aforesaid, or shall knowingly ship or attempt to ship the same, or shall deliver the same to any such vessel as stores, unless packed and marked as aforesaid, shall be deemed guilty of a misdemeanor," etc. Other sections regulating steam vessels and inspection follow, until we come to section 41, which says:

"Sec. 41. That all steamers navigating the lakes, bays, inlets, sounds, rivers, harbors, or other navigable waters of the United States, when such waters are common highways of commerce, or open to general or competitive navigation, shall be subject to the provisions of this act: Provided, that this act shall not apply to public vessels of the United States or vessels of other countries, nor to boats, propelled in whole or in part by steam, for navigating canals."

Plainly, under the original law, a foreign vessel like the *Graecia* was entirely outside of the provisions of this law, and could not be affected by the language of section 5 above quoted. This particular section 5 became in the Revised Statutes of 1874 sections 4475 and 4476.

Let us examine this law again to see just what the words "to any such vessel" must refer. They clearly do not mean the "vessel," pack-

age, cask, etc., containing the substance, although this is immediately preceding. They cannot refer to a vessel using petroleum for fuel, which is the nearest use of the word "vessel" prior to section 5, for the words under discussion are obviously general in their application to the act. But in the early part of section 4, and frequently throughout that section, are found the words "any such vessel," "such steamer," referring directly to the first portion of that section, which, as has been said, governs the shipment of explosive, burning, and dangerous articles, on "any steamer carrying passengers." Here seems to be the clue to the meaning of the phrase in question, and, turning again to the Revised Statutes of 1874, we see that section 4472 is the embodiment of the first portion of the section 4 of the law of 1871 just referred to. Need we go further in our search? It will be noted that section 41 of the original law followed and limited all of the preceding sections, and was stronger in the manner of statement, although apparently no broader in scope than section 4400 of the Revised Statutes before amendment by chapter 146 of the act of March 1, 1895, and chapter 44 of the Laws of 1882. The words, "this act shall not apply to vessels of other countries," are less capable of evasive argument than "all steam vessels * * * except vessels of other countries, shall be subject to the provisions of this title," but evidently both statements are intended to effect the same result. By the amendment of 1882 (chapter 441) "foreign private steam vessels carrying passengers from any port of the U. S. to any other place or country" were made subject to the provisions of sections 4472 and 4473 of the Revised Statutes, and it would seem to necessarily follow that, if under the law before this amendment a delivery "to any such vessel" was found to refer to the "passenger vessels" subject to the provisions of section 4472, then by the same reasoning under the present law "any such vessel" referred to in section 4476 would mean any "passenger vessel" covered by section 4472, as amended, and thus in the present case to the Graecia. The act made a misdemeanor is one occurring on land and in the United States. The amendment to section 4472 and section 4473 was all that was necessary, therefore, to extend the provisions of section 4476 to the foreign vessels intended, and the exception in the early part of section 4400 was necessarily amended thereby without the particular mention of section 4475 in the amendatory act. A footnote to section 4472 in the official edition of the Revised Statutes refers us to sections 4278 and 4280 and sections 5353 and 5355. This reference is instructive, and will be considered in connection herewith, inasmuch as it brings in the provisions of other titles of the Revised Statutes, and at the same time, in section 4280, recognizes the constitutional limitation upon the police powers of the general government and its jurisdiction over interstate and foreign commerce. Sections 4278, 4279, and 4280, as well as sections 5353, 5354, and 5355, relate to the shipment of goods from a foreign country to the United States, or from the United States to a foreign country. Section 5353 in particular forbids and imposes a penalty upon the act of delivering or causing to be delivered nitroglycerine, etc., "on board any vessel or vehicle whatever, employed in conveying passengers by land or water

between any place in a foreign country and any place within the United States." It can readily be seen that the act of a citizen of a foreign government delivering nitroglycerine to a foreign steamer for importation into the United States would be what is known as an extraterritorial crime. If the delivery be made upon an American vessel, and the person is afterward apprehended within the jurisdiction of the United States, or if extradition is agreed upon between the nations for the commission of such an act, the application of the statute is plain. It is unnecessary to consider here the extremely difficult question that might arise over an attempt to extradite the citizen of a foreign country for delivery in that country to a foreign vessel, even if the goods reached the United States.

But this discussion serves to point out the distinction urged by the government as to the meaning of section 4476. The prosecution contends that packing for shipment, upon any such vessel, refers to an act, so far as shipment out of the United States is concerned, occurring upon land. That shipping, or attempting to ship, or delivering to a vessel for shipment, as specified in section 4476, is likewise when concerned with a shipment out of the United States a transaction that occurs upon land, and that the crime can be committed with reference to any vessel, domestic or foreign, and whether subject to the inspection laws of the United States or not. There are two objections to this contention. One is that the statute (section 4476) plainly refers to a packing for shipment or delivery for shipment "to any such vessel," and (except as we have been able by the former reasoning in this opinion to apply section 4476 to the foreign vessels referred to in the amendment of 1882) the general prohibition of section 41 of the Law of 1871 and of section 4400 of the Revised Statutes (before amendment) would exclude this construction. The second objection is more serious. Authority to legislate on this subject can be derived from the Constitution only under the interstate and foreign commerce clause (article 1, § 8, subd. 3), or under the provisions giving to the United States maritime and admiralty jurisdiction (article 3, § 2, subd. 1). A happening on land, such as packing for shipment or an attempt at delivery, could not be within maritime and admiralty jurisdiction, unless the act had gone so far as to be actually a delivery "on board." The cases of *Cleveland Terminal R. R. v. Steamship Co.*, 208 U. S. 316, 28 Sup. Ct. 414, 52 L. Ed. 508, and *Johnson v. Chicago & Pacific Elevator Co.*, 119 U. S. 388, 7 Sup. Ct. 254, 30 L. Ed. 447, illustrate the meaning of this argument. If the act in question had gone to the extent of a delivery on board, it would certainly have been controlled under the former statute by the exception as to "vessels of foreign countries," and under the present statute must be brought within the scope of the amendment of 1882. If the shipment or delivery is subject to the jurisdiction of the United States, it would seem, therefore, to be only under the foreign commerce clause of the Constitution, and the construction of the statute assuming control over any such packing or shipment, as distinguished from its intended delivery to a vessel for export, would probably render the entire section unconstitutional. The sending of firecrackers, not properly packed and marked, by a local express com-

pany, to a sailor on a ship at a wharf, would not be under the jurisdiction of the United States unless the shipment was for export, or unless the ship in its maritime character was the basis of the jurisdiction. So it can be seen that an attempt to include all such packing or shipments would interfere with the jurisdiction of the states, and lay the statute open to the objection of unconstitutionality. Trade-Mark Cases, 100 U. S. 82, 99, 25 L. Ed. 550; Employers' Liability Cases, 207 U. S. 463, 501, 502, 28 Sup. Ct. 141, 52 L. Ed. 297.

The further objection that cartridges are not "gunpowder," but a manufacture of brass and gunpowder, does not seem to be well founded. Not only does the United States government so classify cartridges in its regulations for the carrying of explosives under authority of section 4422 of the Revised Statutes, but the facts that no chemical or physical change of substance has occurred, and that the brass envelope (while it protects) does not affect the substance in any way, show that this classification is correct.

In making a comparison of the act of 1871, *supra*, with the sections of the Revised Statutes, it will be noticed that sections 4400 to 4476, especially the section from 4470 to 4476, follow the same general scheme and take up the various matters for treatment in the same general order as did the statute of 1871. It has not been considered necessary, therefore, to go through separately and in detail in this opinion the language of those sections of the Revised Statutes. Nor is it considered necessary to attempt a determination of the scope of section 4401. In the Law of 1871 this section was inserted under paragraphs relating to navigation, and by its language would seem to refer to the handling and management of the vessels rather than to their construction and inspection. In the revision and codification of 1874, this particular section was brought forward and placed in its present position. From 1874, therefore, down to 1882, the position of this section in the title, and a liberal construction of the word "navigation," might have brought coastwise steamers within the subsequent sections of the title. But that question need not arise here. The amendment of 1882 has definitely covered the situation, and makes such a construction of section 4401 unnecessary to sustain the present indictment. It is also unnecessary to consider questions relating to the delivery of gunpowder and explosives to freight steamers, especially in view of the provisions of section 4422 of the Revised Statutes, *supra*, which provides that:

"Upon the application of any master or owner of any steam vessel employed in the carriage of passengers for a license to carry gunpowder," etc.

Both indictments, therefore, outlining a charge which would be an offense under the portion of the statutes relating to the shipment of gunpowder, and inasmuch as neither indictment contains a charge that the cartridges are dangerous articles of like character, it is unnecessary to consider the proposition upon which the motion to quash is based, *viz.*, that cartridges are not dangerous or inflammable as freight, and the demurrers will be overruled. The conclusion reached by the court upon these demurrers seems to be exactly similar

to the decision of the United States Supreme Court in the case of *Deslions et al. v. La Compagnie Générale Transatlantique*, Owner of the Steamship *La Bourgogne* (decided May 18, 1908) 210 U. S. 95, 28 Sup. Ct. 664, 52 L. Ed. —. Upon pages 21 and 22 of that opinion, various sections of title 3 of the Revised Statutes are held applicable to foreign steam vessels as a result of the same course of reasoning, and in the same manner by which the decision in this case has been reached, and while the point under examination was not the same, nevertheless the decision is believed to be authority for the result reached herein.

The demurrers will be overruled, and the motion to quash denied.

THE DORCHESTER.

(District Court, E. D. Virginia. July 3, 1908.)

1. COLLISION—LOOKOUT—DUTY OF STEAM VESSEL.

The duty of a steamship to see that her lookout maintains constant observation and the utmost diligence is especially imperative in favor of a sailing vessel, which under the rules has the right of way.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, §§ 140, 141.]

2. SAME—SUIT FOR DAMAGES—EVIDENCE.

The testimony of two witnesses introduced by a steamship which sank a small schooner in a collision in the night, one of whom was an employé of the owners, that they found and examined what was supposed to be a part of the wreck, and from such examination judged that the schooner's lights were not properly set, held of little weight as against the positive testimony of the owners and navigators of the schooner to the contrary, where the claimed examination was wholly *ex parte*, and no notice of the finding or the inspection was given to the other parties in interest.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, § 272.]

3. SAME—STEAM AND SAILING VESSELS—FAILURE TO KEEP PROPER LOOKOUT AT NIGHT.

A collision occurred a short distance within the mouth of the Elizabeth river on a clear and calm night between a steamship coming out from Norfolk and a small schooner passing in; the schooner being sunk and her cargo lost. The schooner was sailing with all sails set in a light wind and kept her course and speed. She carried proper lights, which were seen by passengers on the steamship when nearly a mile away, but were not seen by the master or lookout until too close to avoid the collision. Held, that the steamship was solely in fault in failing to maintain a proper lookout.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, §§ 140, 141.]

In Admiralty. Suit for collision. On libel, cross-libel, and petition for personal injuries.

This libel, cross-libel, and petition grew out of a collision between the *Dorchester* and the schooner *Fannie S. Groverman*, which occurred in the waters of and near the mouth of Elizabeth river, on the early morning of the 13th of September, 1907. The facts are briefly these: The schooner, a "sharp sailed two-masted bugeye," about 60 feet in length, gross tonnage 13 tons, net 7 tons, and the *Dorchester*, an ocean-going steamship 282 feet long, came into collision about 10 minutes past 12 on the morning of the 13th of September, 1907, a short distance above Deepwater Pier of the Jamestown Exposition. The bugeye, owned by the libellant and one of his brothers, was en route to

Norfolk loaded with watermelons, manned by the two Robins and a younger brother, Ross Robins, and had on board the petitioner, John B. Lawson, the owner, whose watermelons were being carried for hire from his home in Gloucester county, Va. The Dorchester was one of the line steamers of the Merchants' & Miners' Transportation Company bound from Norfolk to Providence, R. I.

Each of the vessels contend that the collision was solely the fault of the other, and that they in all respects complied with the rules of navigation governing them, and were properly and efficiently manned and equipped before and at the time of the collision, having competent lookouts and proper lights properly set and burning brightly. The bug-eye says: That she was proceeding under full sail from near Deepwater Pier on a port tack, bound up the river with a gentle wind from the south, in smooth water, the night starlight and good for seeing lights; that, when some two miles off, the lookout sighted the steamship, first observing her red light, and then both lights for a while; that the bug-eye continued all the while on the port tack, keeping her course and speed, and, when about a quarter of a mile from the Dorchester, the latter put her searchlight on her, and in a few minutes the collision occurred, the steamer striking the bug-eye about amidships, cutting her in two, and causing a total loss of the vessel and cargo, and greatly endangering the lives of her passenger and crew. The Dorchester, on the other hand, says: That while proceeding down Elizabeth river, about a mile below Boush Bluff Lightship, her lookout saw and reported a very faint green light about a point on the starboard bow; that the master of the Dorchester looked, but could see no light, and, upon examining with his glass, observed about a point or a point and a quarter on the starboard bow a faint outline of sails, but could not make out the direction in which the vessel was heading, though he presumed she was running in a southerly and westerly direction, and instantly gave the signal to stop the engines, ordered his wheel hard astarboard, threw on the searchlight, and observed the schooner heading at about right angles across the bow of the ship, still about a point on the starboard bow; that he then ordered his wheel full speed astern, and blew danger signals; that, when he first saw the schooner, she was 600 or 800 feet away, and some 400 feet when he blew the danger signals; that the time which elapsed between the order to stop and back was about 10 seconds, and at the time of the collision the engines had stopped, but the ship was still making some headway.

W. W. Old & Son and James F. Duncan, for libellant and petitioner.
Hughes & Little, for respondent.

WADDILL, District Judge (after stating the facts as above). This collision being between a steamship and a sailing vessel, the rules of navigation applicable are embraced in articles 21, 22, and 23 of the Inland Rules. Act June 7, 1897, c. 4, 30 Stat. 101 (U. S. Comp. St. 1901, p. 2883). These rules briefly prescribe: That, where steam vessels and sailing vessels are approaching in such direction as to involve risk of collision, the former shall keep out of the way of the latter; that the sailing vessel in such case shall keep her course and speed; and that the steam vessel shall, if the circumstances of the case admit, avoid crossing ahead of the sailing vessel, and such steam vessel shall, on approaching the sailing vessel, if necessary, slacken her speed, or stop, or reverse. The requirements of these rules are positive. They must at all times be strictly adhered to, and those failing to observe them do so at their peril, unless excused by the provisions of articles 27 and 29, known as the "Prudential and Special Circumstances Rules" (Act June 7, 1897, c. 4, 30 Stat. 102 [U. S. Comp. St. 1901, p. 2884]), which latter articles, upon the evidence in this case as viewed by the court, afford no excuse for this collision. Steamship

Co. v. Low, 112 Fed. 161, 166, 171, 50 C. C. A. 473; The Richmond (D. C.) 114 Fed. 208, and cases cited; The Elizabeth (D. C.) 114 Fed. 757.

There was no apparent reason for this collision, and the same could not well have occurred without the negligence of one or other of the navigators of the vessels. There was ample sea room, a deep-water channel at the point of collision of at least 1,000 feet wide. The weather was good, the wind light, the sea calm, a good night for seeing lights, and everything was propitious for safe navigation. Under such circumstances, if the lights of the schooner were properly set and burning, and she maintained her course and speed, it was the duty of those in charge of the *Dorchester* to have seen her in ample time to have avoided and made the collision impossible. Hence the crucial point for determination is: Whose fault and what brought about this collision?

The evidence presents a sharp conflict, which is not unusual in this class of cases; but the court, because of the testimony of the large number of intelligent and disinterested witnesses, passengers upon the steamship, is less embarrassed in reaching what appears to be a correct conclusion than frequently occurs. That the lights upon the bug-eye were properly set and burning at the time of and preceding the collision is conclusively established. The navigators of the bug-eye, and the passenger on board, testified fully on this subject, and the former that the lights were of the kind in general use on vessels of this class. As many as four passengers on the *Dorchester* testified that they saw and observed the lights on the schooner. Three of them prior to the placing of the searchlight upon the vessel, which occurred when they were about a quarter of a mile apart, and two of them when the vessels were from a mile to three quarters of a mile apart, observed the schooner's red light brightly burning. These witnesses give full accounts of the circumstances of the collision and of seeing the lights at the time they testify to; that the schooner did not change her course, and several did not observe the slowing down of the steamer until after the collision, and some say that about that time she slightly went to port. These witnesses from the steamship were largely made up of the members of the Rhode Island State Commission at the Jamestown Exposition returning home, men of prominence, the Speaker of the House of Representatives, members of the Legislature, and other prominent citizens, and the court has no difficulty in ascertaining, upon full consideration of their evidence, and that of the witnesses on the bug-eye, and from the steamship, that this collision was attributable to the fault of the navigators of the steamship, in failing sooner to see and observe the presence of the bug-eye, which could readily have been done had the lookout upon this ship properly performed his duty. Indeed, there was no excuse for his claim that he did not see this little vessel until within a quarter of a mile of it, when others not charged with the duty of observation saw it three times as far away. On such a night, the vessel could and should have been seen, and that it was not can only be attributed to the failure to keep an efficient lookout, which, doubtless, arose from

the fact that immediately before the accident there had been a change of lookouts, and the one who had just taken charge had not concentrated his mind on his duty. The law imposes upon the lookout the exercise of unremitting vigilance. His position is one of great responsibility, requiring constant observation and the utmost diligence, having regard not only to the safety of his own vessel, but of others who lawfully navigate the sea, and this duty is especially imperative in favor of vessels having the right of way; the steamship being charged not only with avoidance of a collision, but the risk of collision. *The Manhasset* (D. C.) 34 Fed. 408; *The Michigan*, 63 Fed. 280, 288, 11 C. C. A. 187; *The Vedamore*, 137 Fed. 844, 70 C. C. A. 342.

The respondent seeks to throw the fault on the bugeye because of a defect in the arrangement of the lights, and in support thereof attempted to show that an examination of what purported to be the wreck of the forward part of the bugeye proved that the same were improperly set, in that her lights did not have inboard screens projecting at least three feet forward from the lights, so as to prevent them from being seen across the bow. Article 2, subsec. "d," and article 5, of Inland Rules, *supra*. Two witnesses were introduced by the respondent, one of them an employé of the steamship company, who claimed to have examined what purported to be the bow of the bugeye, and testified that they judged from the portion of the wreck produced that the lights were not properly set. The court has not been impressed with this evidence, which was *ex parte* so far as the alleged examination of this wreck is concerned. It may or may not have been the wreck of the bugeye in collision. The fact that the name of the sunken vessel was upon it is not at all conclusive, especially as the so-called inspection was not made in the presence of other parties in interest, who did not know that any part of the wreck had been recovered, and, if it was the purpose to use the same as evidence against the libelant, at least notice of the inspection should have been given, to the end that the danger of fabrication of evidence would be removed. It would seem to be but a reasonable requirement to impose upon persons seeking to get the benefit of this class of testimony the obligation of giving notice to others to be affected thereby, and it is only what those so introducing the same should be more than anxious to do. *The R. R. Kirkland* (D. C.) 48 Fed. 760; *The Richmond* (D. C.) 114 Fed. 211. This testimony, thus introduced, falls far short of establishing the defect in the manner of setting the lights, particularly in view of the evidence of the owner and crew of the bugeye that the same were properly set. The fact that the ship's navigators and lookout may not have seen the same or did not make their observation earlier, does not disprove the existence of the lights. In *The Richmond* (D. C.) 114 Fed. 211, it is said:

"The positive testimony of those on the schooner, in a position to see the lights, and know of their condition, will not be lightly rejected because other persons, whose duty it was to have seen them, either fail to observe or happen not to see them. Negative evidence of this character cannot be accepted to outweigh positive evidence. The failure to observe the light cannot be said to disprove its existence"—citing *Stitt v. Huldekoper*, 17 Wall. 384, 21

L. Ed. 644; *The Thingvalla*, 48 Fed. 764, 1 C. C. A. 87; *The Michigan*, 63 Fed. 280, 11 C. C. A. 187; *The Alice B. Phillips*, 81 Fed. 415, 26 C. C. A. 467; *Green v. Compagnia Generale*, 102 Fed. 650, 42 C. C. A. 580.

The conclusion reached by the court, upon the whole case, is that the collision was the result of the negligence of the *Dorchester*, and that the bug-eye, her crew and her passenger, the petitioner herein, were free from fault, and not in any way responsible therefor.

This brings us to the question of the amount of damages which should be allowed to the parties respectively. The libellant's loss, as testified to by him, is as follows: Schooner, \$900; freight money, \$15; clothes, \$60; watch, \$40; cash, \$25. The court thinks that a proper award to him on his own account, and those in whose behalf he sues, would be \$940, which allows \$800 for the schooner. The undisputed evidence was that the petitioner's cargo of watermelons were worth \$300. For this sum he should be paid, leaving for consideration the more important question of the allowance for the personal injury sustained by him, which is more difficult than usual, owing to the character of the injuries. Libellant was a man 58 years of age with a family, of good health, owning a farm on which he made a living for himself and those dependent upon him, and apparently a good one. The injury he sustained was to his throat, which experts testified had become very serious. He had almost entirely lost his voice, and continued to grow worse from the time of the injury until the time of the trial, and the testimony was that the affection was permanent and dangerous in its character, especially that, aside from the loss of his voice, it tended greatly to weaken the petitioner physically, with a possibility of strangulation. It is believed that the sum of \$4,000 is a reasonable award. The petitioner first filed his claim for \$6,000; but, at the time of the hearing, he asked leave, by reason of having grown worse, to amend the same so as to claim for his injury \$9,000. The conclusion reached upon the amount makes it unnecessary to pass upon the right to amend, which was contested by the respondent.

A decree may, accordingly, be entered in behalf of the petitioner, Lawson, for this sum, as well as for the item of \$300 aforesaid, and the sum of \$940 to the libellant.

THE WILLIAM S. KIRBY.

(District Court, E. D. Virginia. July 30, 1908.)

COLLISION—SCHOONER GOING ADRIPT IN STORM—LIABILITY FOR COLLISION.

A schooner, loaded with lumber, made fast to Pier A Newport News, while unloading, was broken loose in the night by an unusually severe storm. The evidence showed that she was properly fastened and well manned, and that her crew did everything possible to hold her. After going adrift, her breast chain caught on a pile at another pier, where she was held, being unable in the storm to get loose, and she was also more securely made fast by the crew. She rode safely until 9 o'clock in the morning without danger to herself or to other vessels, but at that time, the tide having turned, there became danger of collision between her and two launches fastened to such pier, and at about 1 o'clock such collisions occurred, in which the launches were injured. It appeared that those on

board did all that was possible to protect their respective vessels, but that, owing to the severity of the storm, libellant, who was the owner of the launches, was unable to get out to them to render assistance or remove them. *Held*, under the evidence, that the schooner was chargeable with no fault which rendered her liable for the damage, but the loss must be attributed to the unusual weather conditions and borne by libellant.

In Admiralty. Suit for collision.

Ashby & Read, for libellant.

Riddleberger & Roper, for respondent.

WADDILL, District Judge. This libel is to recover damages caused by a collision which occurred on the 24th day of January, 1908, in the harbor of Newport News, Va., between the schooner William S. Kirby and two launches owned by the libellant, while all were lying at the breakwater pier. The collision was of an unusual character. All the evidence in the case, which was considerable, was taken orally before the court, and involved three questions: First, the cause of the original breaking loose of the Kirby from the pier to which she was moored; second, the conduct of her officers and crew after she broke loose, while adrift; and third, the manner of her anchorage, and the conduct of her officers after her anchorage. It appears that the schooner, loaded with lumber, was made fast to the southern or eastern side of Pier A, at Newport News, for unloading, and on the night in question a severe storm arose, on account of which she broke loose from her mooring and was turned adrift. The schooner was properly manned and equipped, among other things, with a hawser 240 feet long. It is undisputed that she was made fast to the pier properly, and in the usual manner, for the purpose of unloading. When the storm arose, those in charge of the schooner endeavored to fasten her to the wharf more securely, and used every means at hand to accomplish that end. The storm was an unusual one, coming from a point which greatly endangered vessels at anchor or fastened to Pier A, and while so moored by ropes fastened to cleats on the schooner, and thence run to cleats on the pier, the starboard beam cleat of the vessel broke away, or was drawn out, and immediately the crew got the lines clear, and made them fast around the samson post to hold the boat. This post, which was to all exterior appearances sound, after awhile snapped off right close to the deck, casting loose all the ropes wound round it. This second breaking resulted in the vessel's tearing loose forward, and finally, owing to the terrific storm then prevailing, and which continued unabated, she broke away aft. Every effort was made to add to and strengthen the remaining ropes to hold her in position; but in a storm of that severity, with a boat laden as she was, and fastened aft and not forward, the strain was too great, which caused the hawser to snap. Considerable testimony was adduced as to the quality of the ropes used in making fast to the pier, and to the samson post; but the same has no special weight here, because it was not the rope, but the samson post, which broke, from what might be termed a latent, rather than a patent, defect. There was some evidence, also, that the post was set in and fastened to the deck

of the vessel, instead of to the keel; but that contention is not sustained, the preponderance of the testimony being that the same was placed as they usually are—that is, through the deck to the keel of the vessel. The court's conclusion is, upon the facts and circumstances of this case, that the Kirby should not be held responsible for the effects of a storm which broke the vessel from her mooring.

As to the collision which happened next day about noon, after various other causes had intervened, which in the opinion of the court were the direct cause of the accident, the question is: Did the schooner do anything to cause injury to other vessels after she got adrift for which she should be held liable? There was only a very short drift before the vessel was again made fast. The undisputed testimony is that her crew immediately threw her anchor out. Whether it dragged or not is not material, because by the turning of the vessel after she broke loose from Pier A she curiously enough got hung up by the breast chain of her bowsprit catching over the end of the piles in front of the breakwater, and that stopped her drift. Such an intervention would not happen often. It was one of the mysterious things which sometimes occur. Here was a vessel lashed to Pier A, and properly and safely made fast, suddenly turned adrift, and her breast chain catches over in another pier, holding the schooner taut, so that it withstood and rode out a long continued and unusually severe storm. She was thus suspended by this chain from 3 or 4 o'clock in the morning, until the following day at 9 o'clock, without anything being injured or endangered from her position. After being caught in this position, those in charge of her made fast also to one of the stanchions of the breakwater, which the court thinks was an act of prudence. The schooner was apparently not in a position to hurt other craft, and thus fastening her helped to make the vessel safer, and prevent it from again breaking loose, and drifting into shipping in the harbor. In the view taken by the court, the real cause of the damage arose from the fact that the launches were in too close proximity to the schooner thus suspended by her chain to the pier and made fast to the stanchion. From 4 o'clock to 9 o'clock that morning there was no danger to any vessel. At 9 o'clock, the tide having turned, the two small boats, for damage to which this libel is filed, and the government boat, were all in a position of danger; but during the morning the government boat was taken out by a number of men, leaving libellant's two launches there. This dangerous condition continued until about 1:30 in the afternoon, when the two launches were also gotten out; they having in the meantime received the injuries sued for.

The real question to be determined is whether the damage to the small boats, brought into close proximity to and dashed against the schooner by the action of a violent storm, as before described, should be paid by the owner of the Kirby, or should fall upon the owner of the launches; and to ascertain this the court has to take into consideration all the facts and circumstances surrounding the entire matter, and the obligations all parties interested owed to each other to do their full duty so as not to damage each other's property. It may be

conceded that, unless those in charge of the Kirby neglected to do something which they ought to have done after the little boats got in a position of danger from fouling or colliding with the Kirby, then, clearly, the owner of the Kirby would not be liable. The serious danger to these launches did not arise until 9 o'clock in the morning. Their owner knew of the danger at that time, as did the master of the Kirby. It was patent after the tide turned, and from the force of the wind which threw the vessels together. They were not only presumed to know of it, but they actually knew it. The crew of the Kirby, the government officer in his boat, and Mr. Spencer, were all trying to do the best they could to protect their respective boats and to aid each other in securing them, and from 9 o'clock in the morning until 1 o'clock in the afternoon their perilous position was manifest to everybody present.

Unquestionably the officers and crew of the Kirby owed their first duty to the protection of their own vessel. They were not in their then position by their own choice, but by the violence of the storm prevailing. They did not anchor in this position, and as a matter of fact, at the time the vessel was driven there, there was no danger, and, having been caught by the breast chain, they were powerless to extricate themselves, and were at the mercy of the wind and tide. After the danger developed at 9 o'clock in the morning, every one did what they thought proper and believed to be best for their safety and relief, and it is hard to realize that in the city of Newport News, a port of considerable extent and large shipping, there was no seaman or other person obtainable who had skill sufficient to get out these launches; but the fact that it was not done leads the court to assume that it was not possible to do it, and that Mr. Spencer had exhausted every remedy in his power to save his property. The weather was too severe for him to go out on the breakwater. He tried to get there on his hands and knees, but could not proceed on account of the ice and sleet, and there was no other way apparently, certainly without a boat, for him to get to his launches, that he could devise. But it does not follow that because he was in this unfortunate predicament, and his property in peril, the loss subsequently accruing should fall on the owner of the schooner, rather than on himself. The court does not think there was any negligence between 9 and 1 o'clock on the part of the persons in charge of the Kirby to justify visiting the loss sued for upon the Kirby, as distinguished from the owner of the boats which were damaged. The crew of the Kirby owed their first duty to their own vessel, though it does not appear there was much they could have done to save the launches, in the circumstances. The Kirby and the launches were both in danger, and they took no risk in attempting to help others, but devoted their attention to their own ship. Any other course might have been disastrous to both, and, in any event, they so acted in such an emergency, and should not be held responsible, under the circumstances, for what, at best, would be but an error of judgment. Mr. Spencer was surrounded by his friends, and to expect the crew of the Kirby to do more than Mr. Spencer could for his own property would be to impose upon them a burden

which the law does not require. In other words, it is simply a question in this case, upon whom the loss shall fall; and in the opinion of the court it should stay where it fell, on the owner of the launches.

A decree may be entered dismissing the libel, with costs.

In re STROBEL.

(District Court, E. D. New York. August 4, 1908.)

BANKRUPTCY—TIME FOR PROVING CLAIMS—MATTERS IN LITIGATION.

Where one scheduled as a creditor by a bankrupt as to a part of the amount insisted upon his rights as a secured creditor under a chattel mortgage which was held void because recorded in the wrong county, and as to another part claimed ownership of property in possession of the bankrupt, as bailor, but which was adjudged to be the property of the estate, both decisions being made more than a year after the adjudication, his claims were sufficiently before the court to render it unnecessary for him to file formal proofs before the referee, and may be allowed as general claims after the expiration of the year fixed by the statute for filing proofs of claim.

In Bankruptcy.

See 163 Fed. 380.

Benjamin F. Edsall, for trustee.

Albert C. Aubery, for bankrupt.

Dittenhoefer, Gerber & James (A. J. Dittenhoefer and Frank Trenholm, of counsel), for Bachrach.

CHATFIELD, District Judge. The point at issue is simple in statement, but exceedingly important in application. Act July 1, 1898, c. 541, § 57, 30 Stat. 560 (U. S. Comp. St. 1901, p. 3443), as amended, specifies many details as to "proof and allowance of claims," and subdivision "n" is as follows:

"Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication; or if they are liquidated by litigation and the final judgment therein is rendered within thirty days before or after the expiration of such time, then within sixty days after the rendition of such judgment: Provided, that the right of infants and insane persons without guardians, without notice of the proceedings, may continue six months longer."

A "proof of claim" is defined by subdivision "a" of section 57 to be "a statement under oath, in writing, signed by a creditor," with various details as to the kind, nature, and amount of the debt. It will thus be seen that a "proof of claim" is defined by the act to be a paper, and to be an affirmative personal paper writing made by the creditor, as distinguished from any admission of the bankrupt, or secondary evidence from other documents. The language of subdivision "n" could not well be stronger, and the statute certainly seems to imply that no claim shall be proved, by the filing of a proof of claim defined in subdivision "a," after 12 months have elapsed since adjudication.

In the present case the bankrupt was adjudicated upon October 21, 1905. No appeal from the adjudication was taken, no claims now

under consideration were liquidated by litigation, wherein a final judgment was rendered within 30 days after the expiration of 12 months since adjudication, nor is any claim affected by the rights of infants or their guardians. The question is directly raised through the debts of the bankrupt to one Bachrach, whose claims are as follows: First. \$7,454.58, with interest from August 25, 1904, which amount was embodied in a chattel mortgage made null and void by filing in the county of New York, instead of in the county of Kings, where the bankrupt resided. Second. \$3,500, merchandise debt alleged to have been due Bachrach at the date of the petition in bankruptcy. Third. \$3,015.76, which amount Bachrach is now under bond to pay, with interest, into the estate under order of this court.

This last amount can in no wise be considered a claim against the estate, under the determination of this court and of the United States Circuit Court of Appeals for this circuit in *Re Leonard Strobel, Indv., etc., Bankrupt* (decided Feb. 28, 1908, and March 9, 1908) 160 Fed. 916. By these decisions it has been conclusively determined that the amount in question was due for property erroneously taken by Bachrach from the receiver in bankruptcy, the value of which he was ordered to restore. The other two items—that is, the amount represented by the void chattel mortgage, and the claim for general merchandise—may be treated alike, so far as this application is concerned.

The bankrupt in his schedules has recited as debts owing by him the \$7,454.58, with interest, involved in the chattel mortgage transaction, and the \$3,500 indebtedness for merchandise. The creditor Bachrach has claimed by a verified petition, in writing, in this proceeding both the amount due under the chattel mortgage and the claim for the \$3,500, the latter claim having been made by this creditor in the guise of a petition to have his alleged right to the merchandise itself determined, and it was upon this application that the court decided his claim to be merely an indebtedness, unsecured in any way. This latter question has been in litigation, and has ultimately been determined in favor of the estate within a very recent time, and not until over two years had elapsed subsequent to adjudication. Upon this condition of affairs, the trustee in bankruptcy has objected to the filing with the referee of a claim under section 57n of the statute, and the referee has returned the same, upon the 15th day of July, 1908, whereupon the creditor Bachrach has applied to this court for an order directing that the referee receive the proof of claim, and allow the same to the amount which may be proven.

It appears from the record that no dividend has been declared, and that the trustee has not as yet received from the receiver the fund which may be in the receiver's hands, and as to which an accounting has been delayed by the applications pending before the court. The trustee cites the following cases, which must be considered: *In re Stein* (D. C.) 94 Fed. 124; *Bray v. Cobb* (D. C.) 100 Fed. 270; *In re Shaffer* (D. C.) 104 Fed. 982; *In re Rhodes* (D. C.) 105 Fed. 231. Of these cases the last one is the only one directly setting forth the doctrine urged. The creditor Bachrach relies upon the case of *In re Fagan* (D. C.) 140 Fed. 758, 15 Am. Bankr. Rep. 520.

There would seem to be little room for doubt as to the intent of Congress in making use of the language contained in the statute. Section 56b provides that creditors holding claims which are secured shall not be entitled to vote, except for the amount in which the claim exceeds the security, and section 57e provides that the claims of secured creditors shall be allowed for such sums only as to the courts seem to be owing over and above the value of their security. The Congress had apparently in mind promptness in the settlement of bankrupt estates. The statutory limitation of one year for the filing of claims is expressed in definite language, and no ambiguity of meaning can be ascertained. The statute begins to run at adjudication, and, except in a few specified cases (with which we have nothing to do), is terminated 12 months after adjudication, and neither the court nor the referee has the power to extend this period of 12 months, so far as the presentation of a properly verified claim to the referee is concerned. The cases cited bear out this interpretation of the law, and there are but two questions to be considered: First, is the filing of a duly verified petition containing the necessary facts required in a proof of claim (such petition having been presented to the court and made a part of the record in the proceeding) equivalent to the filing of a proof of claim; the amount of the indebtedness being admitted by the bankrupt and included in his schedules, and the attacks upon the claim having been confined to objections that the claimant did not have a valid chattel mortgage, and was not the owner of the merchandise to which he had asserted title and for which he now claims that the bankrupt is indebted, and a determination having been made adverse to himself on the proposition of ownership? And, second, does the statute forbid the allowance of a claim unless filed in the manner prescribed?

The situation as to the mortgage is further complicated by the fact that the mortgagee included his alleged rights under the mortgage as a ground for his claim of title to the goods which he has been ordered by the court to return to the estate. If these claims had not been intermingled, the situation in reference to the chattel mortgage would be simple. Mr. Bachrach knew before the expiration of the 12 months that his rights to a chattel mortgage had been lost through a mistake in filing, and, if nothing else had been involved, he would have been bound to file his claim for the indebtedness represented by the alleged chattel mortgage, within the statutory period; but, inasmuch as the claim of ownership to the goods was partially based upon his rights under the alleged chattel mortgage, Bachrach would seem to have been acting under a mistake of law, and therefore the question with reference to either item is whether a creditor is precluded from asserting any claim against a bankrupt estate, when, under a mistaken idea of the law, he has insisted upon his rights as a secured creditor, or as owner of property ultimately determined to be a part of the bankrupt's estate, until the 12 months have gone by.

Suppose reclamation proceedings should be brought and determined in favor of a creditor, and an appeal should be taken on behalf of the trustee, and that appeal (running over the period of 12 months) should result in reversal and a determination adverse to the reclaiming cred-

itor; or, again, suppose a chattel mortgage, apparently valid, is attacked by the trustee, and the mortgagee should be successful, whereupon the trustee appeals, and the appeal, then running beyond the period of 12 months, should result in reversal, and the mortgagee be adjudicated to have but an unsecured debt against the bankrupt's estate. Had Congress the right, under the Constitution, to provide that a creditor could not receive any share of the estate, equally with the other creditors, unless he should give up the decision or judgment already rendered in his favor, and admit the contention of the trustee who had appealed, and who thus had compelled the creditor to run the risk of a reversal and the entire loss of his property, if such reversal was not ordered by the Appellate Court within 12 months after adjudication? Can the Congress, by fixing such an apparent statute of limitation, deprive an individual of his property, either by compelling him to throw up his hands upon an appeal from a determination in his favor, or else to yield all claim as a general creditor?

If such should be held to be the meaning of the statute, it would seem to this court to be unconstitutional, and inasmuch as all claims properly before the court and upon the record must be considered in the declaration of dividends, or in the carrying out of a composition, and inasmuch as the assets of the estate cannot be considered available until the title of the trustee thereto has been finally determined, it would seem to be necessary to hold that section 57n could not have been intended in such a sense as to make the statute unconstitutional, and must therefore be limited to claims as to which the filing of a proof of claim is necessary, and where the creditor is in a position to file the necessary proof with the referee, or to elect not to do so. Further, in the particular instance the decision has been against Mr. Bachrach, and the appeal was taken by him; but his rights would seem to be the same, and the Congress had not the power under the Constitution to compel him to give up the rights of appeal allowed to litigants in such matters, by forcing him within a certain time to yield his claim for security, in order to save even what rights he might have if defeated on that appeal. As a matter of equity, there would seem to be no necessity in such a case as the present for the filing of a specific and additional proof of claim. The proofs already on record and actually before the referee, while filed in court and not with the referee originally, are sufficient as proof of a claim, when coupled with the orders of this court following the decision upon the appeals, and deciding that Mr. Bachrach is but a general creditor for such amount as may be allowed.

The bankruptcy statute has no time limit upon the allowance of claims, nor upon the payment of dividends, and in the present instance the referee will be directed to allow the claim of Mr. Bachrach for such amounts, up to \$7,454.58, and interest, and up to \$3,500, as the referee may determine after hearing proof as to the amount of these claims, and whatever testimony may be offered in objection thereto.

The recent cases of *In re Peck* (D. C.) 161 Fed. 762, and *In re Noel* 150 Fed. 89, 80 C. C. A. 43, following the idea of *Keppel v. Tiffin Savings Bank*, 197 U. S. 356, 25 Sup. Ct. 443, 49 L. Ed. 790, show

that section 57n of the bankruptcy statute is not to be applied in all cases, and seem to justify the conclusion reached by this court.

The motion will be granted, as indicated.

UNITED STATES v. COBB.

(District Court, D. Maryland. March 31, 1906.)

1. SHIPPING — CARRIAGE OF GOODS — HARTER ACT—ENFORCEMENT BY CRIMINAL PROSECUTION.

The provisions of the Harter act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946]), making it unlawful for the manager, agent, master, or owner of any vessel to insert in bills of lading provisions by which they are relieved from liability for negligence, or to refuse to issue bills of lading containing certain statements, and making any one violating such provisions liable to a fine, makes it a criminal statute; and one violating either of such provisions is subject to indictment and prosecution therefor.

2. SAME—INDICTMENT—DESCRIPTION OF OFFENSE.

In an indictment for issuing a bill of lading containing provisions in violation of the Harter act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946]), which avers that such bill was issued by defendant, and which sets out a copy of such bill, from which it appears that defendant's name was signed thereto "per" another, it is unnecessary to allege that it was so signed by defendant's authority, which is a matter of proof.

3. SAME—BILL OF LADING—LEGALITY.

A bill of lading covering a shipment of walnut logs from a port of the United States to a foreign port construed, and held to reasonably comply with the requirements of section 4 of the Harter act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2947]), and not to contain any provisions in violation of sections 1 and 2 which would sustain an indictment against the agent issuing the same.

On Demurrer to Indictment.

John C. Rose and Morris A. Soper, for the United States.

Jno. J. Donaldson and Wheeler, Cortis & Haight, for defendant.

MORRIS, District Judge. The indictment sets forth that a certain John L. Alcock was engaged in the business of exporting lumber from the port of Baltimore to the port of Hamburg, Germany, and the defendant Cobb was the agent of a line of steamships called the "Hamburg-American Line," engaged in transporting merchandise between ports of the United States and said port of Hamburg, Germany, and that on April 17, 1905, at Baltimore, Cobb, as agent of said line of vessels, issued to said Alcock a bill of lading for 31 walnut logs to be carried from Baltimore to Hamburg, and did insert in said bill of lading certain clauses and agreements whereby the said vessels and the owners thereof were relieved, and were intended to be relieved, from liability for loss and damage from negligence, fault, failure in proper loading, stowage, custody, and proper delivery of the said 31 walnut logs committed to their charge, which said clauses were "Contents and Condition of Contents of Packages Unknown," "Shipper's Load and Count," that "the carrier shall not be liable for loss or damage oc-

casioned by breakage"; "that the carrier shall not be concluded as to the correctness herein of quality, quantity and contents"; "that the carrier shall not be liable for risk of craft, hulk or transshipment"; that said Alcock did then and there demand of said Cobb as agent as aforesaid a bill of lading omitting the said clauses, and stating therein the marks necessary for the identification and the quantity of said merchandise, and said Cobb refused to issue such a bill of lading contrary to the statute. By subsequent counts based upon each of the before-mentioned clauses the insertion of each of the clauses by Cobb contrary to the demand of Alcock is charged as a distinct offense. In the seventh and last count of the indictment the bill of lading is set out verbatim as it was actually issued, with a like charge as in the first count.

The demurrer assigns as causes for demurrer:

"(1) That the indictment and each and every count thereof is insufficient in law.

"(2) That each and every count fails to allege facts constituting an offense against the laws of the United States.

"(3) That the insertion in the bill of lading of the clauses mentioned did not constitute an offense against the United States.

"(4) That each and every count fails to allege that the defendant was manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports.

"(5) That it appears by the seventh count that the bill of lading alleged to have been issued by the defendant was not issued by him, but was signed by one 'C. W. S.', and that it is not alleged that said 'C. W. S.' was thereto duly authorized by the defendant or by the Hamburg-American Line.

"(6) That it appears from the bill of lading that it did, in fact, state the marks necessary for identification and quantity of said merchandise.

"(7) That each and every count is in other respects informal, insufficient, and defective."

The indictment must rest upon the first and the fourth and fifth sections of the Harter act. Act Feb. 13, 1893, c. 105, 27 Stat. 445, 446 (U. S. Comp. St. 1901, p. 2947). The first section declares, in substance, that it shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading any clause whereby it, he, or they shall be released from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect. Section 4 enacts that it shall be the duty of the owner or owners, masters, or agent of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to issue to shippers of any lawful merchandise a bill of lading stating the marks necessary for identification, number of packages, stating whether it be carrier's or shipper's weight, and apparent order or condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and such document shall be prima facie evidence of the receipt of the merchandise therein described. Section 5 enacts that for a violation of any provisions of

the act the agent, owner, or masters of the vessel guilty of such violation, and who refuses to issue on demand the bill of lading provided for, shall be liable to a fine not exceeding \$2,000. The amount of the fine and costs for such violation shall be a lien upon the vessel whose agent, owner, or master is guilty of such violation, and such vessel may be libeled therefor in any District Court of the United States within whose jurisdiction the vessel may be found. One-half of such penalty shall go to the party injured by such violation and the remainder to the government of the United States.

It is first urged in support of the demurrer that the language of the act is not appropriate and sufficient to declare the doing of anything forbidden by it, or the failure to do anything commanded by it, an offense to be punished by criminal indictment; that the language indicates that the penalty is to be recovered in a civil suit by a *qui tam* action; that the Harter act is not a criminal statute, but deals only with civil rights and duties. There can be no doubt that Congress has the power to regulate transportation between the United States and foreign ports, and has the power to make the acts which by law it forbids, as between shipper and carrier, criminal acts. Considering that this legislation of Congress declares it to be unlawful for the carrier to insert certain clauses in any bill of lading relieving the carrier from responsibility for negligence, and declaring it to be unlawful to refuse to state therein certain matters intended to be for the protection of the shipper, and considering the fact often declared by the courts that the shipper in accepting the bill of lading which the carrier is willing to issue acts under a practical compulsion and is not at liberty to accept or decline the proposed contract as one who is a free agent, it is quite clear, I think, that the intention of Congress was to come to the relief of the shipper by affording him an effective remedy. The intention, it is apparent, was to make it an act punishable by fine for the carrier to refuse to issue to the shipper such a bill of lading as the act of Congress declared was lawful and was a compliance with the duty of the carrier. The language used is:

"For any violation of any provisions of the act, the agent, owner, * * * guilty of such violation and who refuses to issue on demand the bill of lading herein provided for shall be liable to a fine not exceeding two thousand dollars. * * * One-half of such penalty shall go to the party injured by such violation, and the remainder to the Government of the United States."

Under our system, the approved proceeding for enforcing the liability to a fine imposed upon any one who has been guilty of a violation of law is by indictment, conviction, and sentence in a criminal court. To be liable to a fine is to be punishable by a fine, and to enact that an unlawful act is punishable by a fine is to declare that it is contrary to the public justice of the enacting sovereign. *U. S. v. Reisinger*, 128 U. S. 398-402, 9 Sup. Ct. 99, 32 L. Ed. 480.

Section 5 also provides that:

"The amount of the fine and costs for such violation shall be a lien upon the vessel whose agent, owner or master is guilty of such violation, and such vessel may be libeled therefor in any District Court of the United States within whose jurisdiction the vessel may be found."

This requires that the recovery by libel against the vessel be limited to the amount of the fine and the costs adjudged against the agent, owner, or master of the vessel, and requires that the criminal proceeding against such agent, owner, or master be first prosecuted, and that it has resulted in the imposition of a fine by the sentence of the court. *The Strathairly*, 124 U. S. 558-580, 8 Sup. Ct. 609, 31 L. Ed. 580. In the present case there is no particular steamer of the Hamburg-American Line named, so that there could not be a libel filed, but the owners and agents of a line of steamers are, it seems to me, within the provisions of the act, and, if guilty, liable to a fine.

It is further urged by counsel for the defendant that no indictment will lie under the Harter act for inserting in the bill of lading any clauses which the first section declares to be null and void and of no effect. I cannot assent to this proposition. It is a violation of the first section of the provisions of the act to insert in any bill of lading any clause relieving the carrier from liability for loss arising from the negligence of the manager, agent, master, or owner of the vessel, and the fact that such a clause is declared to be null and void and of no effect does not alter or affect the guilt of the one who unlawfully inserts the clause in the bill of lading. The lawful bill of lading as declared by the act is one which does not contain any such clause, and one who on demand refuses to issue a lawful bill of lading—that is to say, one without such clauses—is declared by the act to be liable to the fine.

It is also urged that the bill of lading shows that it was not issued by the defendant, but was signed by one "C. W. S.," and that it is not alleged that said "C. W. S." was thereto duly authorized. It does not appear to me that such an allegation is required. It is charged that the bill of lading was issued by the defendant, and as set out in the indictment the defendant's name is signed to it. It is matter of proof to show that his name was signed by some one duly authorized.

It is next to be considered whether or not the specific refusals charged in the different counts of the indictment or any of them are by the Harter act declared to be unlawful and punishable. Do any of the clauses which it is charged the defendant insisted upon inserting in the bill of lading purport to relieve the carrier "from liability from loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery," of the property committed to his charge? Or do any of the refusals charged in the indictment constitute a violation of the duty imposed by the act on the carrier to issue a bill of lading which shall state with reference to the merchandise shipped "the marks necessary for identification," "the number of packages or quantity, stating whether it be carrier's or shipper's weight," or the "apparent condition of such merchandise or property delivered to and received by" the carrier. The bill of lading actually issued is set out in the seventh count of the indictment. From the bill of lading it appears that the merchandise was received at Reading, Pa., to be carried to Baltimore, and thence by the Hamburg-American Line to Hamburg, Germany, and to be there delivered as consigned. The language in the bill of lading issued is as follows:

"Pennsylvania Railroad Company in Connection with Other Carriers on the Route. Received at Reading, Pennsylvania, from John L. Alcock and Company, the following property in apparent good order, except as noted, contents and condition of contents of packages unknown, marked, numbered, consigned, and destined as indicated below:

"Consignee and Destination: To order John L. Alcock & Company, Hamburg, Germany. Party to be Notified: Nottebohn & Co., Hamburg, Germany. Marks and Numbers: Articles: One (1) car load of logs (31 walnut logs) shipper's load and count P. R. R. 8722, shipper's weight 56,700 lbs. (subject to correction) to be carried to the port (A) Baltimore and thence by Hamburg American Line to the port (B) Hamburg, Germany, or so near thereto as steamer may safely get, etc., etc., and to be there delivered in like good order and condition as above consigned, etc., etc., upon payment immediately on discharge of the property of the freight thereon at the rate from Reading to Hamburg of 26½ cents * * * per 100 lbs. gross weight."

Among the other provisions are the following:

"No carrier is bound to carry said property by any particular train or vessel. * * * That this shipment until delivery at the port (B) (Hamburg, Germany) second above mentioned, is subject to all the terms and provisions of and all the exemptions from liability contained in the Act of Congress of the United States approved the 13th of February, 1893, and entitled 'An act relating to the navigation of vessels,' etc."

This bill of lading is dated at Baltimore the 17th day of April, 1905, and is signed "G. H. Cobb, D. S., Agent on Behalf of Carriers Severally, but not Jointly, per C. W. S." Does this bill of lading with reference to the property shipped, to wit, 31 walnut logs, reasonably gratify the requirements of section four of the Harter act? Does it state the marks necessary for identification? Other than the description given in the bill of lading, it is not charged that there were any marks on the logs by which they could be identified. Is the number of packages or quantity given stating "whether it be carrier's or shipper's weight"? This requirement would seem to have been gratified as fully as was reasonably possible by the statement "one car load of logs, 31 walnut logs, shipper's load and count, P. R. R. 8722, shipper's weight, 567,000 lbs. (subject to correction)."

Section 4 requires the bill of lading to state whether the weight is shipper's or carrier's. As to logs' weight, this is not so important in respect to the right delivery of the property as the number of the logs, and, as the purpose of section 4 of the act is the protection of the shipper, if with respect to articles usually computed by weight it is required to be stated whether it is carrier's or shipper's weight, is it not allowable with respect to logs to state that the number of logs, which is the method of designating the quantity, is by the shipper's count? The other requirement with regard to stating the apparent order or condition is gratified by the statement "in apparent good order except as noted." There being no notation, the clause stands as a simple statement of apparent good order. I can find nothing in the bill of lading which as to the matters charged in the indictment and as to a shipment of 31 walnut logs violates the duty imposed on the carrier by section 4. Is there anything charged in the indictment which as to such a shipment as 31 walnut logs is violative of sections 1 or 2 of the Harter act? It is to be noticed preliminarily that the bill of lading itself expressly declares that the shipment is made subject to all the terms

and provisions of the Harter act, so that, if possible, it is proper to construe the bill of lading as conforming to that act. As was said in *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174-181, 23 L. Ed. 872:

"It is not to be presumed that the parties intended to make a contract which the law does not allow. Looked at from this standpoint, can it be said that any of the claims objected to can be construed as plainly attempting, contrary to the first section, to relieve the carrier from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise committed to its or their charge?"

Is there any clause which contrary to the second section in any wise, lessens, weakens, or avoids the obligation of the owner of the vessel to exercise due diligence to properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly handle the same? I can find nothing. Not liable for loss or damage occasioned by breakage means, and has been held to mean, breakage which occurs without the negligent fault or failure of the owners of the vessel or their agents or servants, and that exemption the carrier is entitled to contract for.

The meaning of the clause, "not liable for risk of craft, hulk, or transshipment," is not altogether clear, and in a criminal case it is not upon mere presumption to be held unlawful. *U. S. v. Brewer*, 139 U. S. 278-288, 11 Sup. Ct. 538, 35 L. Ed. 190. It probably means that in case of necessary transshipment, if the carrier has exercised due diligence to provide proper, fit, and seaworthy craft or appliances for the transshipment, it shall not be held liable for damage. *The Hadji* (D. C.) 16 Fed. 861; *Insurance Company v. N. G. Lloyd & Co.* (D. C.) 106 Fed. 973. Exemption to this extent is contemplated by the act.

Is there anything charged in the indictment and contained in the bill of lading which violates section 4? Does the bill of lading state the marks necessary for identification? It is a sufficient answer that it is not alleged that there were any marks on the logs which were not put in the bill of lading. Does the bill of lading give the number of packages? In this case one "car load consisting of 31 walnut logs P. R. R. 8722" was all that could be given. Was it a violation of the fourth section to state that the 31 walnut logs said to be on the car were the "shipper's load and count"? By the fourth section it is made the duty of the carrier to state whether the weight was ascertained by the carrier or the shipper, and, when the merchandise is computed by the number of the articles, I can see no violation of the fourth section in stating that the count has been made by the shipper. This is a bill of lading dated at Baltimore on April 17th for a shipment received on the car at Reading on April 15th, and the difficulty, inconvenience, and delay of a special count by the carrier at Baltimore is quite obvious.

Finally, is the clause, "that the carrier shall not be concluded as to the correctness of statements herein of quality, quantity and contents,"

prohibited by any section of the Harter act? Section 4 enacts that such a bill of lading as the act makes it the duty of the carrier to give shall be prima facie evidence of the receipt of the merchandise therein described. That means that the carrier may show that there was mistake in the statement of the quality, quantity, and contents, and that is all that is meant by saying that the statement is not conclusive.

For the reasons stated, the defendant's demurrer to the indictment is sustained, and judgment will be entered that the defendant be dismissed and discharged from the matters in the said indictment specified.

THE CHARLES G. ENDICOTT.

THE MONTSERRAT.

(District Court, S. D. New York. April 16, 1908.)

COLLISION—STEAM AND SAILING VESSELS—FAULTS OF STEAMER.

A collision occurred in the daytime in lower New York Bay between a steamship and a schooner, both proceeding to sea. The steamer was in the main ship channel, making a speed of about 13 miles an hour, without a lookout, while the schooner was crossing the channel on a course E. S. E. at a speed of about 3 knots. *Held*, that the steamer was solely in fault for not avoiding the schooner and proceeding full speed into collision; it appearing that the latter kept her course and speed until immediately before the collision, when she turned to starboard, thereby lessening the injury to some extent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, §§ 182-186.]

In Admiralty. Cross-suits for collision.

Hunt, Hill & Betts, for the Montserrat.
Alexander & Ash, for Bailey.

ADAMS, District Judge. These actions, the *Compania Trasatlantica* against the schooner *Charles G. Endicott* and *Marvin H. Bailey* against the steamship *Montserrat*, arose out of a collision which took place between those vessels in the lower bay of New York, about 3 p. m. on the 5th of January, 1906. Both vessels were bound to sea, the *Montserrat* from New York and the *Endicott* from an anchorage in the bay, where she had been lying awaiting a favorable wind, which came on in the afternoon. The steamer was proceeding down the main ship channel and the schooner was attempting to cross the channel when the vessels came together, the jib boom of the schooner catching in the steamer's starboard rigging. Both vessels were somewhat damaged.

The steamer's contention is that while she was proceeding down the channel at the rate of about 13 miles per hour, about 3:15 p. m., and was substantially half way down the West Bank, she observed the schooner some 3 miles ahead on the starboard side and to the westward of the channel, with only her fore staysail and jib set, headed about the same as the steamer. The schooner then appeared to be getting under way, or, in any event, was not making much headway, but was so far to the starboard of the steamer's course, that the lat-

ter saw no reason to change it and if both vessels had continued as they were headed they would have cleared by several ships' lengths, but the schooner suddenly fell off before the wind and ran into the steamer. This happened in the vicinity of buoy No. 7, about a mile and a half below the West Bank Light. The steamer was about 400 feet long.

The schooner's claim is that she was taken in tow at Perth Amboy, light, bound for Newport News, Virginia, and went through the dredged channel, leading into the bay, to a point near its mouth, where she made sail and proceeded toward Sandy Hook. The wind being light from the southwest, which would be a head wind down the New Jersey beach, the master determined to wait until it was more favorable and brought his vessel to anchor about a mile and a half southeast of Old Orchard Shoal Light. Some time between 2:30 and 3 o'clock p. m. after the wind had shifted to west northwest, the schooner was gotten under way again with the head sails stated on a course of east southeast to the bell buoy off Sandy Hook, on which she continued until just before the collision. The steamer's approach was seen and for that reason the schooner did not make any change in her sails, expecting the steamer to change and pass under the schooner's stern, but instead of doing so, the steamer, when the vessels were in close proximity, sheered to port. The schooner put her wheel hard astarboard, with the effect of swinging her about a point to the starboard, making her heading at time of collision about southeast by east. The schooner was 172 feet long, with three masts.

The steamer charged the schooner with fault in that (1) she was not under the command of a competent master and was not properly manned and equipped, (2) she did not keep a good lookout, (3) she did not keep her course, (4) she undertook to cross the bows of a steamer of great draught, proceeding in a narrow channel and where she could not manœuvre and (5) she did not manage her helm, so as to avoid the collision, and keep parallel with the steamer. The schooner charged the steamer with fault in that (1) she was not in command of a competent master, attentive to duty, (2) she did not maintain a proper lookout, (3) she sheered to port and attempted the dangerous manœuvre of running across the bows of the schooner, (4) she did not sheer to starboard and pass astern of the schooner, (5) she attempted to shave too close to the schooner, (6) she was on the port side of a narrow channel, (7) she did not keep clear of the schooner (8) she did not reduce her speed and stop and back and (9) she was running at too high a rate of speed.

The steamer had no lookout and her testimony that she saw the schooner sail from a point some distance out of the channel, but in the same general direction with the steamer; and then suddenly change across the channel and into the steamer is not very credible and the weight to be given to the account is greatly affected by the very unsatisfactory statements made by her witnesses with respect to the location of the schooner and what she did. The contention that she moved from a position several hundred feet to the westward of the channel to a point on the eastern side, a distance altogether of from 975 to 1,900 feet, as variously stated, is too extraordinary for belief.

No one contends that the schooner had more than her two head sails set and even with a fair wind it was practically impossible for her to sail much in excess of the estimate of the rate given by her, which was 3 knots. At this speed she could only have sailed across the channel, about 900 feet in 3 minutes, and the distance to the westward of the channel would have increased the time considerably, depending upon how far it was. Very little satisfaction is obtainable from the steamer's testimony and it is not seen how the collision could have occurred from her accounts.

The schooner's testimony sustains the account given above and it is stated that she sailed from her anchorage on a steady course until the vicinity of the steamer was reached and it was seen from the latter's movements that it would be necessary for the schooner to take some measures to avoid a dangerous collision, and she turned somewhat, about a point, to the starboard and thus reduced the damages. The master expected the steamer as the vessels approached to turn to the starboard and pass under the schooner's stern instead of which she turned to the port across her bow. In pursuing her course, the schooner was never up as far as buoy No. 7, but, following a straight course, she crossed the channel about a mile to the southward of that buoy. She was not struck by a flurry of wind which caused her to pay off toward the steamer, as stated by the latter's witnesses, and no change was made in her course until in the extremity of the collision, when she changed about a point as above stated.

It seems to be perfectly clear that the collision was due to the faults of the steamer in not seeing and avoiding the schooner and in proceeding at full speed into the collision.

The libel on the part of the steamer will be dismissed. The schooner's libel will be sustained, with an order of reference.

HAYWOOD CO. v. PITTSBURGH INDUSTRIAL IRON WORKS.

(District Court, W. D. Pennsylvania. January, 1908.)

BANKRUPTCY—FRAUDULENT SALES—REDELIVERY OF PROPERTY.

Claimant, in October, 1906, accepted an order from the bankrupt for certain timbers to be shipped from the Pacific Coast, which were not delivered until October, 1907. The bankrupt, in December, 1906, placed a mortgage on its real estate for an amount equal to its full value, and, in addition, on August 1, 1907, made an assignment of all bills receivable, contracts, and assets of every description, and about November 2, 1907, submitted a statement to its creditors disclosing its insolvency, all of which was without the seller's knowledge. *Held*, that the seller was not a mere general creditor of the bankrupt, but that the receipt of the timbers by the bankrupt when delivered amounted to a fraud, entitling the seller to rescind and recover the same from the trustee.

Ralph L. Smith, for petitioner.

R. T. McCready, for creditors.

EWING, District Judge. This is a rule on the receiver to show cause why certain lumber sold and delivered to the bankrupt by one J. W. Cottrell should not be delivered to said vendor.

It seems that in October, 1906, Cottrell took an order from the bankrupt for certain large timbers which had to be procured on and shipped from the Pacific Coast, and that it was about the 1st of October, 1907, when delivery was made to the bankrupt, while on or about December 1, 1906, defendant placed upon its real property a mortgage for an amount equal at least to the full value thereof, and, in addition thereto, on or about August 1, 1907, the bankrupt, without said Cottrell's knowledge, made an assignment of all its bills receivable, contracts, and assets of practically every description, and, furthermore, about November 2, 1907, submitted a statement to its creditors disclosing its insolvency.

It will thus be seen that the bankrupt voluntarily so pledged and incumbered its entire estate, and that at the time the lumber was delivered it had placed itself in a position where it was impossible for it to make payment therefor according to the contract. Unquestionably, had the vendor known these facts, he would not have made delivery, and the acts of the bankrupt in so incumbering and disposing of its property between the time of the contract for, and delivery of, the lumber, and its receipt of the lumber at the time it was advising its creditors of its insolvency, amount to a fraud on said Cottrell and entitles him to relief.

The receiver admits having the lumber in his possession and contests the right of Cottrell to have delivery thereof made to him simply on the ground that he contends said Cottrell is but an ordinary general creditor of the bankrupt. Upon the facts above stated, and without enlarging upon them, I think it is decidedly a case where the said Cottrell occupies a position far in advance of an ordinary general creditor. The conduct of the bankrupt was concealed from Cottrell until after he had made delivery of the lumber. The lumber was only received by the bankrupt immediately preceding its bankruptcy, and no creditors were misled or influenced thereby to their detriment, and the bankrupt itself has no right or equity under the circumstances to retain the material. The rapidity with which the disposition and incumbering of its property by the bankrupt followed the giving of this order for this lumber, and its persistency in continuing that conduct up until the lumber was actually received and it declared to its creditors its insolvent condition, tend to show a lack of bona fides in the whole transaction from its very inception to its close.

The rule is therefore made absolute, and the receiver directed to deliver to said Cottrell all of said material now in his hands.

UNITED STATES FIDELITY & GUARANTY CO. v. HAGGART.

(Circuit Court of Appeals, Eighth Circuit. August 5, 1908.)

No. 2,813.

1. JUDGMENT—PARTIES CONCLUDED—CONCLUSIVENESS AS BETWEEN CODEFENDANTS.

A judgment recovered by the United States against a marshal and the surety on his bond, conditioned for the faithful performance of the duties of his office by the marshal and his deputies, which was based on defalcations of two of his deputies, is conclusive of such defalcations and the amount thereof in a subsequent action between the marshal and his surety.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1229.]

2. PRINCIPAL AND SURETY—RECOVERY AGAINST SURETY—ACTION TO RECOVER OVER.

Plaintiff, a bonding company, became surety on the bond of defendants' intestate as United States marshal, and also surety on the bonds of his deputies, running to him and conditioned to save him harmless from liability on account of their acts. The United States recovered a judgment against the marshal and plaintiff as his surety on account of defalcations of two of his deputies which judgment plaintiff paid. *Held*, that its liability for such defalcations as between it and the marshal was primary, and it could not recover over against his estate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Surety, §§ 497, 499, 524.]

3. SAME—LIABILITY OF SURETY ON BOND—FAILURE OF PRINCIPAL TO SIGN.

In all cases where the principal in a bond would be liable without reference to the bond for acts which constitute a breach, and by the terms of the bond the parties bind themselves severally as well as jointly to perform its conditions, the failure of the principal to sign the bond does not render it void as to the surety, or release him from liability thereon.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Surety, § 39.]

In Error to the Circuit Court of the United States for the District of North Dakota.

W. S. Stambaugh and Engerud, Holt & Frame, for plaintiff in error.
S. G. Roberts, for defendant in error.

Before SANBORN and VAN DEVANTER, Circuit Judges, and
W. H. Munger, District Judge.

W. H. MUNGER, District Judge. The record in this case discloses the following facts: In January, 1898, one John E. Haggart was appointed United States marshal for the state of North Dakota, and on the 18th day of said month he executed to the United States of America a bond in the penal sum of \$20,000 for the faithful performance by said Haggart and his deputies of all the duties of said office, which said bond was executed by the United States Fidelity & Guaranty Company, as surety. Two of the deputies appointed by said Haggart were William J. Hurst and Fred W. Schindler. On January 29, 1898, said Hurst, as such deputy, executed to the said Haggart a bond in the penal sum of \$5,000, with said United States Fidelity & Guaranty Company as surety, by the terms of which bond said Hurst and said guaranty company jointly and severally bound themselves to save said Haggart harmless from every act done or neglected to be done by said

Hurst while acting as such deputy. On said 29th day of January, 1898, said Fred W. Schindler gave a like bond to said Haggart, with said United States Fidelity & Guaranty Company as surety, except that said bond was not signed by said Schindler. November 12, 1898, said Haggart wrote a letter to plaintiff, which was received by plaintiff, informing it that said Schindler had been indicted by the United States grand jury for rendering false accounts and creating false and fraudulent vouchers therefor, and calling the attention of the bond company to the fact that they were sureties upon said Schindler's bond. On February 10, 1903, said Haggart wrote a letter to said United States Fidelity & Guaranty Company to the effect that he had received formal notice from the Comptroller of the Treasury at Washington that the Attorney General had demanded a revision of the accounts of said marshal with respect to the accounts of said two deputies, with a view of charging back to said Haggart false items included in those accounts; that said Haggart was requested to submit under oath any reasons which he might have why the said accounts should not be recharged with the amounts disallowed on such revision, informing it that the amounts which the examiner had disallowed of the accounts against Hurst were \$843.18 and against Schindler \$2,973.95. To this letter the United States Fidelity & Guaranty Company wrote Haggart that his letter had been referred to their representative at Minneapolis. March 24, 1903, Haggart again wrote a letter to plaintiff, which was received, to the effect that the Comptroller of the Treasury had instructed him to make a revision of his accounts relative to the accounts of Deputy Marshals Schindler and Hurst, with a view to charging back to Mr. Haggart the false items included therein; that the revised account, together with the original accounts of the deputies, were in his office, subject to the inspection of its representative. To this letter the guaranty company answered under date of March 31st, stating that the matter had been referred to their Minneapolis office for attention. July 7, 1903, Haggart wrote said guaranty company that he had received the final revision from the comptroller, and that the shortage in Schindler's account after revision was \$1,982.30. July 14th the guaranty company answered this letter, advising him that his letter had been referred to their special representative and the matter was receiving his attention. November 14, 1902, Haggart wrote said guaranty company to the effect that on January 29, 1898, their company became surety to him upon the bond of said Deputy Hurst, and advising them that Hurst had been indicted by the United States grand jury for rendering false accounts and creating false and fraudulent vouchers in connection therewith. Under date of March 31, 1903, the said guaranty company acknowledged the receipt of the letter, and informed Mr. Haggart that it had been referred to their Minneapolis office for attention. On July 7, 1903, Haggart again wrote to said guaranty company, informing it that he had received the account of the revision by the comptroller of Deputy Hurst's account, and upon such revision it was shown that the shortage was \$261.12. January 24, 1904, Haggart wrote the guaranty company that he had furnished their representative, Mr. A. B. Walker, of Fargo, with a complete statement of the amount due under the

bonds of said deputies. Under date of January 23, 1904, Alfred B. Walker, representative at Fargo of said Guaranty Company, wrote the company, in substance, that he and one Mr. Shattuck, agent of the American Bonding Company, had spent the day looking into the matter of the respective deficits of said deputies; and found that the defalcation of Deputy Hurst, for which the guaranty company was liable, was \$500.76, and that the amount for which the company was liable on Schindler's bond was the sum of \$1,919.45. In said letter he further informed the company that said Haggart had been of great assistance to them in figuring out the various items and requested the company to promptly settle the same.

These matters not having been adjusted, the United States on March 24, 1904, commenced an action against said Haggart and said guaranty company, in the United States Circuit Court for the District of North Dakota, to recover upon said bond of Haggart to the United States the sum of \$2,697.45 and interest. The guaranty company defended said action, and applied to and obtained from the court an order that the United States, as plaintiff, furnish a bill of particulars by June 10, 1904. The bill of particulars was furnished, showing that the sum sued for was on account of alleged false accounts of said two deputies. The guaranty company filed an answer, admitting the giving of the bond, its corporate capacity, and denying all other allegations of the complaint. The action was tried and a judgment rendered in favor of the United States and against the defendants on the 21st day of June, 1905, for the amount and interest. In September, 1905, said Haggart died, and Betsey J. Haggart was duly appointed the administratrix of his estate. In December, 1905, the defendant guaranty company paid said judgment, and afterwards presented its claim for repayment to the administratrix. The same not being allowed, the guaranty company on June 5, 1906, commenced this action in the Circuit Court of the United States to recover the same. The defense interposed by defendant as administratrix in her answer was, in substance, that the judgment mentioned was based wholly on defalcations of said two deputies, for which plaintiff guaranty company was surety to defendant's intestate. During the trial the defendant introduced in evidence said bonds given by each of said deputies, the record and judgment in the former case, and evidence that the amount of the defalcations of the deputies, and no part thereof, had been paid. Upon the conclusion of all the evidence the court directed a verdict for defendant, and plaintiff brings the action to this court for review.

During the trial counsel for plaintiff made appropriate objections to the introduction of evidence, and excepted to the various rulings of the court with respect thereto, also to the direction by the court of a verdict for the defendant. While there are 30 assignments of error, counsel for plaintiff in their brief properly say:

"The case presents but two main questions:

"(1) Does the answer set forth a good plea of estoppel by judgment?

"(2) If the defense of res adjudicata is well pleaded, does the evidence sustain the plea?

"Plaintiff does not controvert any of the evidence introduced by defendant, so the questions presented are purely questions of law."

It is insisted upon the part of plaintiff that the record in the case of the United States v. Haggart and the guaranty company was improperly admitted in evidence, as that judgment was in no respect res adjudicata of any of the questions involved in this action. This contention is based chiefly upon the proposition that a judgment is not res adjudicata excepting as between adversary parties; that in that case Haggart and the guaranty company were not adversary parties, but merely codefendants. In support of this proposition numerous authorities have been cited, among them 1 Van Fleet on Former Adjudication, § 256, from which they quote the following:

"Unless the defendants contest an issue with each other either upon the pleadings between them and the plaintiffs, or upon cross-pleadings between themselves, it will not be res adjudicata in a litigation between them. Of course, a judgment determining the rights of the defendants between themselves, under proper pleadings, is conclusive upon them, but a judgment against them if there are no issues between them does not bind them as against each other."

While this is undoubtedly the general rule, it is not without its exceptions. True it is that judgment did not settle the question as to whether or not the guaranty company was liable to Haggart. However, that judgment, we think, did settle some of the questions as between Haggart and the guaranty company, among them that the basis and foundation of the judgment was the defalcation of said two deputies, and the amount thereof. Could it be successfully contended by Haggart's administratrix in the present case that, notwithstanding the judgment in the prior action, he was not marshal of the district of North Dakota, or that he did not execute the bond sued upon in that action, or that he did not make default in any of the conditions of that bond, or that he had fully accounted to the government before that action was brought for all money which had come into his hands, or that the matter actually litigated in that action was one for which he was not responsible to the government? Or, state the matter in another way, A. sues B. and C. upon a joint promissory note, alleged to have been executed by B. and C. Upon a trial judgment is given against both B. and C. B. is made to pay the judgment and sues C. for contribution. Can C. successfully defend upon the ground that he never signed the note, or that he had wholly paid it before A. sued upon it? It is obvious that these questions must be answered in the negative.

The case of Lloyd v. Barr, 11 Pa. 41, was an action brought by Barr, the last indorser of a promissory note, against Lloyd, a prior indorser. The declaration set forth the making of the note, its indorsement by Lloyd, its still later indorsement by Barr, its presentment and dishonor at maturity, due notice to each of its indorsers of its dishonor, a subsequent action thereon by the holder against the maker and the several indorsers, including Lloyd and Barr, the rendition of a judgment in that action in favor of the holder against the maker and the several indorsers, and the payment of that judgment by Barr to the last indorser. Barr's action was founded upon the right of a subsequent indorser, when compelled to pay a note, to enforce reimbursement from a prior indorser. Lloyd pleaded that he had not been notified

of the dishonor of the note, and therefore that his liability as an indorser had not been perfected or preserved. To this plea Barr replied, setting forth the record in the prior action, to which both Lloyd and Barr were parties defendant, wherein the declaration had alleged that the note was due, was presented for payment at its maturity, that it was then dishonored, and that notice thereof was duly given to each of the indorsers. Lloyd demurred to the replication, and the court gave judgment for the plaintiff Barr upon the demurrer. In the Supreme Court it was insisted by Lloyd that he and Barr were codefendants in the prior action, where they were repelling the act of a common foe, and were not litigating their relations as between themselves, and were not adversary parties; that the judgment, therefore, in that action was not conclusive upon the question as to whether or not Lloyd had been duly notified of the dishonor of the note. The Supreme Court held that the prior judgment conclusively established that due notice of the dishonor of the note had been given to Lloyd, and in the course of the opinion it was said:

"The now defendant had then a full opportunity to controvert his liability on the note in question, and to cross-examine the witnesses produced by the bank to prove it, a privilege which constitutes one of the principal tests of estoppel by judgment. The very point, too, to establish which that judgment is now pleaded, was then in issue. * * *

"It is further objected that the record pleaded lacks the essential quality of mutuality as between the now plaintiff and defendant. If so, it is clearly inconclusive, for none can take advantage of the record of a judgment who might not be prejudiced by it, and this includes only parties and privies. The question of mutuality almost always arises between those who have occupied an antagonist position in the litigation of which the judgment is the fruit. But the principle from which estoppel springs is also applicable between joint defendants, where, from the nature and course of the suit, everything necessary to give to one defendant a cause of action against his fellow must have been proved by the original plaintiff in support of his claim to recover. * * * A difference in the forms of the actions matters nothing. The inquiries are: What was decided, and was the party against whom it is proposed to use the first record, also a party to the proceeding? If so, it can make no difference whether he was plaintiff or one of several defendants. This truth may be illustrated by the statement of one or two simple instances. If a recovery be had against two or more partners in trade, and the judgment paid by one of them, it would certainly be conclusive evidence against the other partners, who ought to have paid it; not only of the fact of the judgment, but also of the liability of the defendants, of the amount recovered, and the grounds of it. So, too, a joint judgment recovered upon a bond against principal and surety could not be impeached or overhauled in a subsequent action, brought by the surety against his principal, to recover money paid in discharge of it, upon any ground that might have been made a defense in the first suit. * * *

"Between codefendants, as well as in the case of antagonist parties, the public tranquility requires that, having been once fairly tried, further agitation of the same subject be forbidden. And the law does forbid it."

The record shows that in the suit brought by the government against Haggart and the guaranty company a transcript of books and proceedings in the Treasury Department was given in evidence, and in the stipulation as to the summary of said transcript is the following:

"The greater portion of these disallowances on the revision were on account of the alleged defalcations of the Deputy Marshals Schindler and Hurst. The remainder were on account of alleged defalcations of other deputies. The disallowances on account of the acts of deputies other than Schindler and Hurst were repaid to the government, thus leaving the marshal's accounts showing

a balance in favor of the government and against the marshal aggregating the sum of \$2,097.45."

It is stipulated in this case that upon the trial of the former case an Assistant Auditor of the United States was called as a witness by the government, who testified relative to said transcript from the books and accounts of the Treasury Department, and the stipulation says:

"That the witness heretofore described as assistant auditor in the former stipulation on this trial was cross-examined by counsel for the United States Fidelity & Guaranty Company as to the character and extent of the items charged as false and fraudulent in the accounts of Fred W. Schindler and William J. Hurst, as deputy marshals."

Thus it is shown by the record, not only that the matter of inquiry in the former case was the defalcations of said deputies, but that the guaranty company, plaintiff in this action, not only was afforded an opportunity to cross-examine the witnesses relative thereto, but did actually make such cross-examination, and the case falls, we think, directly within the rule thus announced in the foregoing cited case. *Lawrence v. City of Milwaukee*, 45 Wis. 306, was a suit brought by a contractor against the city upon a contract between them. It was held that a judgment in a prior action brought by a taxpayer against the contractor and the city, wherein the contract was adjudged void, was conclusive of the invalidity of the contract, and that that matter was not open to relitigation between the defendants to the prior action. *Millikan v. Lafayette*, 118 Ind. 323, 20 N. E. 847, was an action by a purchaser at a tax sale to recover from the city the amount paid by him for the property sold. It was held that a judgment in a prior action brought by the former owner of the property against the city and the tax sale purchaser, wherein it was adjudged that the tax sale was ineffectual and gave no title to the purchaser, was conclusive of the invalidity of the sale, and that the matter was not open to relitigation between the defendants in the prior action. *Osage City Bank v. Jones*, 51 Kan. 379, 32 Pac. 1096, was an action by a guarantor against the maker of a certificate of deposit for reimbursement because of having paid a judgment rendered against them upon the certificate of deposit, in an action brought by a holder thereof. It was held that the judgment in the prior action to which the maker and the guarantor were parties defendant was conclusive of the validity of the certificate of deposit, and that it was not open to the maker, a bank, to defend against the guarantor's action upon the ground that the certificate had been unlawfully issued.

The former action brought by the government being based wholly upon the defalcations of said two deputies, and the bond of each of those deputies, with said guaranty company as surety thereon to said Haggart covering such defalcations as between Haggart and the guaranty company, the guaranty company was primarily liable therefor. As before shown, it clearly appears that Haggart, as soon as he first learned that said deputies had in their accounts made false and fictitious claims, and that the United States had signified its intention to revise said accounts, promptly notified the guaranty company thereof, calling its attention to the fact that it was surety for said deputies, and that he successively notified the guaranty company of each step

taken in the progress of revising said accounts. They were thus given an opportunity to defend. Under such state of facts, even though the guaranty company had not been a party in the government suit and defended therein, such judgment would have been evidence in the present action that the judgment was based upon the defalcations of the deputies and amount thereof, for which the guaranty company would be liable as shown by the following authorities:

In *Hand v. Taylor*, 4 Ind. 409, it was held in an action by the United States marshal against his deputy and sureties that a judgment obtained against the marshal for damages by reason of the deputy having taken insufficient bail on an execution, the deputy and his sureties having been notified of the action against the marshal, that such judgment against the marshal was conclusive against the deputy and his sureties as to the damages.

In *Fay v. Ames*, 44 Barb. (N. Y.) 327, it was held:

"In an action by a sheriff upon the bond given by a deputy sheriff on receiving his appointment to indemnify the sheriff against his acts or omissions as such deputy, the surety on such bond is concluded by a judgment recovered against the sheriff in an action brought against him for the neglect of the deputy to collect an execution, of which action the deputy had notice, and which he defended, although no notice of such suit was given to the surety.

"And the surety is not at liberty in such action upon the bond to litigate over again the liability of the sheriff in the former action, nor to prove facts in exoneration of its principal which the latter set up as a defense in the former suit.

"Where parties join in a bond of indemnity as principal and sureties, they are in privity of contract with each other, and are to be regarded and treated as the contract and the rights and liabilities connected with and growing out of it as one person. In such a case, notice to one is notice to all."

In *Crawford v. Turk*, 24 Grat. (Va.) 176, it was held that in an action by an execution creditor against a sheriff for the failure of his deputy to pay over money made on the execution, the deputy being present at the trial and examined as a witness, and judgment rendered against the sheriff in such action, that in a subsequent action by the sheriff against the deputy and his sureties on his bond, conditioned to indemnify the sheriff from all loss and damages from the conduct of the deputy in said office, the judgment against the sheriff, in the absence of fraud, was conclusive evidence of the fault of the deputy, against not only the deputy, but also his sureties. It was farther held that though the declaration in the action by the sheriff did not allege that the deputy was requested to defend the suit against the sheriff, or had an opportunity to do so, or had notice thereof, the deputy's presence at the trial, and being active in the defense, might be proved by oral testimony.

In *Chamberlin v. Godfrey*, 36 Vt. 380, 84 Am. Dec. 690, the first paragraph of the syllabus is as follows:

"The defendants were jointly and severally bound in a penal bond, conditioned to indemnify and save harmless the plaintiff as sheriff of the county of Orange from all actions, suits, troubles, costs, charges, damages, and expenses on account of any malfeasance, misfeasance, or nonfeasance of the defendant Godfrey as deputy sheriff. Judgment was recovered in a suit against the sheriff for the neglect of his duty in not paying over moneys collected on an execution. Held, that this judgment was conclusive as to the fact of the

deputy's neglect, not only against the deputy, who defended the suit, but also against the sureties, who had notice."

In *Beauchine v. McKinnon*, 55 Minn. 318, 56 N. W. 1065, 43 Am. St. Rep. 506, which was an action brought against the sureties upon a sheriff's bond, it was held that a judgment against the sheriff alone was prima facie evidence of the liability of the sureties. The court in its opinion cite numerous authorities upon the three propositions: (1) That such judgment is not evidence; (2) that it is prima facie evidence; (3) that it is conclusive evidence.

Washington Gas Co. v. District of Columbia, 161 U. S. 316, 16 Sup. Ct. 564, 40 L. Ed. 712, was a case in which one Marietta M. Parker recovered a judgment against the District of Columbia for a personal injury alleged to have been sustained by reason of a defect in the sidewalk in the city of Washington; the defect having been caused by the Washington Gas Company. The District of Columbia notified the gas company of the suit, and the gas company was afforded an opportunity to defend, which they did not do. Judgment was obtained against the District of Columbia, which was paid, and the District of Columbia brought suit against the Washington Gas Company.

The court say:

"As a deduction from the recognized right to recover over it is settled that where one having such right is sued, the judgment rendered against him is conclusive upon the person liable over, provided notice be given to the latter, and full opportunity be afforded him to defend the action."

It was held that the judgment was conclusive as to the liability of the company to the district. It was further held that in such action for the purpose of ascertaining the subject-matter of the controversy between the person who was injured and the district, and fixing the scope of the thing adjudged, the entire record, including the testimony offered, might be examined.

See, also, *Lake Drummond Canal & Water Co. v. West End Trust & Safe Deposit Co.*, 142 Fed. 41, 73 C. C. A. 227.

In *Moses v. United States*, 166 U. S. 571, 17 S. Ct. 682, 41 L. Ed. 1119, the United States obtained a judgment against one Howgate, to which action his sureties were not parties. The United States subsequently sued the sureties, and it was held that the judgment against Howgate, the principal, was at least prima facie evidence as to a breach of the bond by the principal, and the amount of damages, in the action against the sureties.

From the foregoing authorities we think it clear that the record of the judgment in the government suit against Haggart and the guaranty company was competent evidence to establish the fact that that judgment was based upon the default of the two deputies, and the amount thereof. It is true that action was upon the bond given by Haggart to the United States, upon which the guaranty company was surety. That bond, however, was conditioned, not only that Haggart would faithfully perform his duties as marshal, but was also conditioned for the faithful performance of the duties of his deputies. Though the petition filed in the government case did not specify whether the breach of the bond was because of a personal delinquency upon

the part of Haggart, or misconduct of his deputies, the fact in that respect was disclosed by the bill of particulars which was furnished at the request of the guaranty company. While a bill of particulars is not a pleading in the sense that a demurrer may be interposed thereto, and it cannot enlarge the claim of the plaintiff, yet a bill of particulars does limit the issues to the particular matters therein stated. In the case at bar the action is brought by the guaranty company to recover from Haggart's estate the amount of that judgment which it paid. The guaranty company being a party to that action, and knowing that it was based upon the defalcation of the deputies for each of whom it was surety, it stands in the same attitude at least as one who is liable over to another and has notice of the bringing of a suit against such other, and given an opportunity to defend. Supposing the case was reversed, that Haggart had paid the judgment and then brought suit against this guaranty company as surety upon the bond of his deputies? Under the facts stated and the foregoing authorities, the judgment against Haggart would be at least *prima facie* evidence of a breach of the condition of the bond and the amount of damages. How can it be different where the guaranty company has paid the judgment, which, as between it and Haggart, it was primarily liable for, and seeks to recover from his estate? Of course, the guaranty company was not precluded from making other defenses. It would have been open to the guaranty company to have shown that it was not surety upon the deputies' bonds, had such been the fact. It was open for them to show that the deputies had paid that judgment obtained by the government. These facts were not shown; indeed, the contrary was admitted. The guaranty company did deny liability upon the bond given by Schindler, for the reason that such bond was not signed by Schindler. Schindler's name, however, was written in the body of the bond, as principal, and it appears that the company received a premium for executing as surety the Schindler bond and for annually renewing it thereafter. We think the proper rule of law to be in all cases where the principal in a bond would be liable without reference to the bond for the acts constituting the breach, and by the terms of such bond the parties bind themselves severally as well as jointly to perform its conditions, the failure of the principal to sign the bond does not render the bond void as to the surety, and release the surety from liability thereon. *St. Louis Brewing Ass'n v. Hayes et al.*, 38 C. C. A. 449, 97 Fed. 859; *State v. Bowman*, 10 Ohio, 445; *City of Deering v. Moore*, 86 Me. 181, 29 Atl. 988, 41 Am. St. Rep. 534; *Lovejoy v. Isbell*, 70 Conn. 557, 40 Atl. 531; *Pina County v. Snyder et al.*, 5 Ariz. 45, 44 Pac. 297; *Douglas County v. Bardon et al.*, 79 Wis. 641, 48 N. W. 969.

It is urged with some persistence that in the trial of the government case incompetent evidence was admitted, and that the evidence was insufficient to support the judgment. That question is not open for consideration now. If error was committed during the progress of the trial of that case, or if the evidence was insufficient to support the judgment, the remedy of the parties was to have brought that case here for review. That was not done. The judgment was accepted as final and paid, and the parties are now concluded by it.

Again, it is insisted that the evidence in this case is insufficient to support the judgment. The evidence discloses that plaintiff in error, as surety for said deputies, engaged with Haggart that they would faithfully perform the duties of their office, and save Haggart harmless from a failure so to do. The issues tried and disposed of in the government case established the fact that said deputies did not faithfully perform those duties. The evidence shows that the deputies have not paid any portion of the amount of their defalcation as established in the government case. From the evidence and the law it clearly appears that, as between plaintiff in error and Haggart, plaintiff in error was primarily liable for the payment of the judgment obtained by the government. Not only has justice been done in this case, but trial had and judgment obtained in conformity with the technical rules of law.

For these reasons, the judgment is affirmed.

ALKON v. UNITED STATES.

(Circuit Court of Appeals, First Circuit. August 13, 1908.)

No. 766.

1. CONSPIRACY—INDICTMENT—CONCEALMENT OF PROPERTY BY BANKRUPT.

An indictment for conspiracy that one of the conspirators should purchase goods, and afterwards go into bankruptcy and that the goods should be concealed by the other, in violation of Bankr. Act July 1, 1898, c. 541, § 29b(1), 30 Stat. 554 (U. S. Comp. St. 1901, p. 3433), which punishes concealment of property "while a bankrupt," is not insufficient because it avers that the conspiracy was formed and the goods were to be concealed prior to the bankruptcy, where it also avers that it was the intention to continue the concealment thereafter.

2. SAME—TRIAL—SUFFICIENCY OF EVIDENCE.

Evidence held sufficient to sustain the action of the trial court, in a prosecution for conspiracy, in overruling a motion by defendants for direction of a verdict at the close of the prosecution's case, in view of the rule that conspiracy may be determined by inference from the facts proved.

3. CRIMINAL LAW—EVIDENCE—ADMISSIONS OF CONSPIRATOR.

In a prosecution for conspiracy, the alleged purpose of which was that one of the conspirators should purchase goods on credit, deliver them to his co-conspirator for concealment, and then become a bankrupt, evidence that, after the date of the conspiracy, such co-conspirator solicited a third person to enter into a similar scheme, and stated that "I have handled several of those cases," was admissible, as an admission to go to the jury.

4. SAME—APPEAL AND ERROR—REVIEW—ERROR IN ADMISSION OF EVIDENCE—PREJUDICE.

It is the rule in the federal courts that where a party persisted in putting in testimony which was objected to, and the admission of which was error, the error is fatal if the testimony was or might have been prejudicial.

5. WITNESSES—PRIVILEGE OF ACCUSED IN CRIMINAL PROSECUTION.

Under Rev. St. § 860 (U. S. Comp. St. 1901, p. 681), testimony given by a witness under subpoena in a bankruptcy proceeding cannot be given in evidence against him on a subsequent criminal prosecution, and it is prejudicial error to permit him to be asked on his cross-examination as a witness in such a prosecution, if he did not in his testimony in the bankruptcy pro-

ceeding make certain statements, and then to admit the notes of his examination therein for the purpose of contradicting and impeaching him.

In Error to the District Court of the United States for the District of Massachusetts.

Elisha Greenwood, for plaintiff in error.

Asa P. French, U. S. Atty., and William H. Garland, Asst. U. S. Atty.

Before COLT, PUTNAM, and LOWELL, Circuit Judges.

PUTNAM, Circuit Judge. Barish and Alkon were indicted for a conspiracy, the substance of which was that Barish should purchase goods, and Alkon should conceal them, and that afterwards Barish should go into bankruptcy, and the concealment should continue after the bankruptcy, with the intention that at some subsequent time the profit by the concealment should be divided between Barish and Alkon. Both were convicted, but the only writ of error before us is Alkon's.

We are informed by our own records, to which by the settled rules we are authorized to turn, that Barish sued out a writ of error, but that on his own motion the same has been dismissed; and it is now too late for him to sue out another. The only two persons charged as conspiring were Barish and Alkon, so that, except in extreme cases, such as the death of one of the alleged conspirators or his absence from the jurisdiction, unless both could be legally convicted, neither could be. Nearly all the exceptions brought to our attention were taken jointly by both Barish and Alkon. Not only for this latter reason, but also because of the fact of the necessity of a legal conviction of both alleged conspirators in order to accomplish the legal conviction of either, it would seem as though in a case of this character there should be but one writ of error, and that a joint one. Nevertheless the practice is the other way, which is also in accordance with the authorities. 1 Bishop's New Criminal Procedure, § 1039. We are compelled to deal with the position as we find it, remarking that it may be, following out the rules practiced in *High v. Coyne*, 178 U. S. 112, 20 Sup. Ct. 747, 44 L. Ed. 997, and in *Washington Company v. Lansden*, 172 U. S. 534, 556, 19 Sup. Ct. 296, 43 L. Ed. 543, that we might reverse the judgment in toto as against both Barish and Alkon, if a proposition to that effect had been submitted to us by the parties in such form that we could properly consider it.

The first proposition is that the indictment alleged no offense because there was no existing bankruptcy when the conspiracy originated, while the statute—section 29 of the bankruptcy act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 554 [U. S. Comp. St. 1901, p. 3433])—punishes only concealment of goods "while a bankrupt"; and it is said that, as the alleged conspiracy related only to the doing of something which was not illegal when the conspiracy originated, the statute under which the indictment was found did not apply. That result would follow if the proposition as to the extent of the conspiracy was true; but it included an intent to continue the concealment until after Barish became a bankrupt, and it was like all conspiracies in that it related to something in futuro. The plaintiff in error cites no case in support of his

position; and in common with the Circuit Court of Appeals for the Second Circuit, in *Cohen v. United States* (C. C. A.) 157 Fed. 651, 654, it does not occur to us that there is anything in principle or on authority which invalidates the indictment on this account.

At the close of the proofs for the United States, Alkon and Barish jointly moved that the court direct a verdict in their favor. The court refused this request. As we understand the record, the court expressly reserved an exception to this refusal notwithstanding Alkon and Barish afterwards offered proofs in their own behalf. Passing by any question whether this assurance on the part of the court should not be accepted as avoiding the common rule by virtue of which this subsequent going on with the defense waived the motion to direct a verdict, we cannot as a court of law hold that the District Court was in error in refusing the motion. There was evidence that goods purchased by Barish were stored in abnormal quantities on Alkon's premises, and that these goods were not disclosed to Barish's trustee in bankruptcy; and some of the circumstances with reference thereto were of a decidedly suspicious character. There was evidence that Alkon knew the facts in regard to the storage of goods, and of a conversation between Alkon and one Lambkin, sufficient to bring before the jury the question whether Alkon had not made a general confession which covered the fact that he contemplated Barish's bankruptcy and a fraudulent intent in reference thereto. The rule of law is well settled that in conspiracy cases it is often necessary to resort to inferences, and that it is proper so to do. It is also settled that it is not required to prove by direct evidence an agreement to act together, and that "ordinarily it is only necessary to prove the acts of particular defendants, leaving the question of conspiracy to be determined by inference." Wharton's Criminal Law (10th Ed., 1896), § 1401; 2 Bishop's New Criminal Law, § 227 (2); Russell on Crimes (International Ed., 1896) 533.

The record does not purport to give all the evidence, because the bill of exceptions concludes with a statement that what is recited in it was "substantially all." The case in the way shown to us is exceedingly thin, and, if we were judges of the fact as well as of the law, it may be that we should find against the United States in reference thereto. As, however, the proofs in cases of conspiracy are frequently purely inferential, we cannot say that there were not circumstances which appeared at the trial, but which are not shown, and which justified the District Court in sending the case to the jury. In the form in which the case comes to us, it is not so bare of possibilities that, sitting as a court of law, we can declare that there was error in overruling this motion.

There were put in evidence two conversations with Lambkin, the purpose of which was to show an intent on the part of Alkon to induce Lambkin to enter into a scheme like that charged in the indictment. These conversations were objected to as *res inter alios*; but the United States claim that they come within the rules by virtue of which various independent offenses akin to the one charged, and nearly contemporaneous with it, are sometimes allowed to be proved. So far as this proposition is concerned, it may be these conversations go beyond

what the law permits; but the last one, taken as a whole, was admissible. It was as follows:

"That later the witness accidentally met Alkon, and Alkon said: 'Did you decide about that scheme I was telling you about?' That the witness said, 'Which one?' and Alkon replied: 'You know I spoke to you about getting all the goods you possibly could and turn them over to me, and I would see your way through bankruptcy without any trouble.' That Alkon said further that, if any of the dealers wanted any reference regarding the witness's credit, he would give the witness all the reference they wanted. That witness told Alkon that he 'did not care to be mixed up in any such business.' That he met him a third time and Alkon asked him again if he had decided on the same subject, and, on witness saying that he 'did not care to be mixed up in any such business,' Alkon said: 'Why, it's a cinch. I have handled several of those cases.'"

This conversation was about two months after the date of the alleged conspiracy, and it was an open admission by Alkon that he had at least on one occasion not remote been guilty of all the elements entering into the offense charged by this indictment. We cannot hold that the court was not justified in letting this go to the jury for the purpose of a determination by it whether this admission covered the alleged conspiracy with Barish. At the trial plaintiff in error made a distinction between this conversation and the earlier conversation which did not contain such an admission as we have described. One objection was that, if any part of these conversations was admissible, it was only the latter part, meaning, of course, the statement of what Alkon had previously done which we hold to have been admissible. Even this was objected to generally. Yet this distinction was clearly made, and might be of effect as to the first conversation except for the fact that, as the record is made up, it was apparently necessary to introduce it in order to explain the second. The second commenced with the interrogation from Alkon to Lambkin, "Did you"—that is, Lambkin—"decide about that scheme I was telling you about?" This connects the two conversations in such way that the second was not comprehensible without the first. Consequently, as the record stands, both, or, at least, parts of both, were admissible, though it is possible that some parts of each should have been ruled out if specifically objected to. It is also possible that the court, if asked so to do, might have been required to point out to the jury the limitation to be put on the use of the first conversation, or parts of it. But such distinctions were not made at the trial by the plaintiff in error, and we are not called on to make them.

An examination of our opinion in *Jacobs v. United States* (C. C. A.) 161 Fed. 694, passed down on April 29, 1908, and the statements of facts and law therein contained, which we adopt as introductory here, will save much explanation with regard to the next proposition which we have to discuss. Alkon was examined before the referee in the bankruptcy of Barish. There is no suggestion that his appearance there was voluntary, and, indeed, the record says he was a subpoenaed witness. Alkon testified in his own behalf in the pending matter in the District Court. On his cross-examination the attorney for the United States, subject to objection and exception, was permitted to ask him particularly whether in testifying before the referee he had not made

a number of statements conflicting with his evidence on the trial now before us. The record details only one statement, which related to a question of a petty balance of accounts between Barish and Alkon, the importance of which is not made plain. The objection to this examination was based on section 860 of the Revised Statutes (U. S. Comp. St. 1901, p. 661). Subsequently the attorney for the United States called the stenographer who had made the notes of the examination of Alkon before the referee, who thereupon read portions thereof. The record states, not only that the portions of the testimony so read related to the matters about which Alkon had been cross-examined, but also that this portion of the cross-examination objected to was to test the credibility of the witness. In all particulars, unless as to the question whether or not the cross-examination was prejudicial to Alkon, the case before us is strictly analogous to *Jacobs v. United States*, with the exception that in *Jacobs v. United States* the plaintiff in error relied on the seventh section of the bankruptcy statute of July, 1898, while here the plaintiff in error relies on section 860 of the Revised Statutes. The former concerns testimony given by the bankrupt, while the latter relates to evidence in any judicial proceeding from any witness.

Following certain observations made by us in *Jacobs v. United States*, we are met at the threshold by the claim that there is nothing here to show that this cross-examination was prejudicial; and the United States make the proposition that as to this the burden rests on the plaintiff in error to show affirmatively that it was. This is not the rule in the federal courts. The rule there is that, where a party persists in putting in testimony which was objected to, and which was erroneous, the error is fatal if the testimony was or might have been prejudicial. *Columbia Railroad Company v. Hawthorne*, 144 U. S. 202, 207, 208, 12 Sup. Ct. 591, 36 L. Ed. 405; *National Biscuit Co. v. Nolan*, 138 Fed. 6, 9, 10, 70 C. C. A. 436; *Inman Bros. v. Lumber Co.*, 146 Fed. 449, 455, 76 C. C. A. 659. In the present case we must assume that it was prejudicial in view of the fact that the cross-examination was for the expressed purpose of testing Alkon's credibility, as to which there is a much larger margin for prejudice which the court cannot lay hold of than in the ordinary case of a mere attempt to contradict a witness on a specific point. This is fortified by the fact that, after this cross-examination, the United States in rebuttal put in the notes of the examination relating to the very matters about which the cross-examination occurred. As the United States had no purpose in using the notes except to contradict, and thus prejudice, the plaintiff in error, we are not called on to accept any theory that their attorney was not competent to determine that his conduct of the case in the particular referred to was beneficial to the United States, and therefore prejudicial to Alkon.

Section 860 of the Revised Statutes originated in the act of February 25, 1868, as follows:

"Chap. 13. An act for the protection in certain cases of persons making disclosures as parties, or testifying as witnesses.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no answer or other pleading of any party, and no discovery, or evidence obtained by means of any judicial proceeding from any party or witness in this or any foreign country, shall be

given in evidence, or in any manner used against such party or witness, or his property or estate, in any court of the United States, or in any proceeding by or before any officer of the United States, in respect to any crime, or for the enforcement of any penalty or forfeiture by reason of any act or omission of such party or witness: Provided, that nothing in this act shall be construed to exempt any party or witness from prosecution and punishment for perjury committed by him in discovering or testifying as aforesaid.

"Sec. 2. And be it further enacted, That this act shall take effect from its passage, and shall apply to all pending proceedings, as well as to those hereafter instituted." Act Feb. 25, 1868, c. 13, 15 Stat. 37 [U. S. Comp. St. 1901, p. 661].

This act has not been under consideration by the Supreme Court, or by any Court of Appeals, so far as we can ascertain, except in *Tucker v. United States*, 151 U. S. 164, 14 Sup. Ct. 299, 38 L. Ed. 112, which does not assist us here. *Wilson v. United States*, 162 U. S. 613, 16 Sup. Ct. 895, 40 L. Ed. 1090, did not even allude to this statute, and it had no occasion to, because what was proven there by the United States was not given under oath, but was a mere prior statement, made freely and voluntarily before a commissioner. Prior to this statute the authorities were in some confusion on the point whether what was testified to by a person summoned to give evidence without anything being said by the court or by the witness with reference to his constitutional protection against incrimination could be used against him on a subsequent criminal proceeding. *Greenleaf's Evidence*, §§ 224, 226, 227; *Roscoe's Criminal Evidence* (12th Eng. Ed.) 44, 45, and especially *Wilson v. United States*, 162 U. S. 623, 16 Sup. Ct. 895, 40 L. Ed. 1090. Consequently this statute was needed; and, as it is remedial in its character, it is entitled to all the effect which its letter fairly calls for. So far as we can perceive, this case is within its letter, and we are unable to find any justification to support any efforts to withdraw the plaintiff in error from its protection. For this reason there must be a new trial.

There are other propositions submitted to us by the plaintiff in error; but, as none of them may come up on a new trial in the same form in which they present themselves now, we will not undertake the labor of solving them.

The judgment and verdict are set aside, and the case is remanded to the District Court for further proceedings in accordance with law.

TOWLE v. FIRST NAT. BANK OF BOSTON, MASS.

(Circuit Court of Appeals, Eighth Circuit. August 5, 1908.)

No. 2,806.

GUARANTY—CONSTRUCTION OF CONTRACT—FINDING OF FACTS.

Evidence considered, and *held* to sustain a finding of fact by the trial court in an action at law that the written guaranty sued on, by which defendant agreed to be responsible for the payment of loans made by plaintiff bank to "H. G. & H. W. Stevens," was not intended by the parties to be limited to loans made to such individuals jointly or as copartners, but was intended and understood to cover loans to a concern then doing business under the name of "H. G. & H. W. Stevens," although owned solely by H. W. Stevens.

In Error to the Circuit Court of the United States for the District of Minnesota.

See 153 Fed. 566, 82 C. C. A. 520.

John F. Fitzpatrick, for plaintiff in error.

William H. Lightner (Henry B. Wenzell and Edward E. Blodgett, on the brief), for defendant in error.

Before SANBORN and VAN DEVANTER, Circuit Judges, and W. H. MUNGER, District Judge.

W. H. MUNGER, District Judge. This action was commenced by defendant in error against one Uri L. Lamprey to recover upon a contract of guaranty given by said Lamprey to the Massachusetts National Bank, of Boston, Mass., which guaranty was in words as follows:

"Whereas H. G. & H. W. Stevens desire to do their banking business with the Massachusetts National Bank of Boston, Mass., and they may need from time to time in their business, loans, accommodations, and discounts from said bank.

"Now, therefore, I, the undersigned, do hereby request the said bank to make to the said H. G. & H. W. Stevens such loans, accommodations, and discounts as they may from time to time need or ask for, not exceeding in all at any one time thirty thousand (\$30,000) dollars.

"And in the consideration of the premises and of one dollar and other valuable considerations, the receipt whereof is hereby acknowledged, I do hereby promise and agree to and with the said bank that whatever note, draft or other obligation, or indebtedness in any form, of the said H. G. & H. W. Stevens, which the said bank may now or hereafter hold, is not paid at maturity by the said H. G. & H. W. Stevens, I will pay within twenty (20) days after written notice that they have failed to pay the same. My entire liabilities hereunder, however, not to exceed in all the said sum of \$30,000.

"It being understood that said bank may from time to time make such loans, accommodations and discounts to said H. G. & H. W. Stevens, and such renewals thereof as they may see fit, without notice to me either of the amounts, or the time, or the maturity thereof; and that this guaranty or agreement shall not terminate by my death; but that the same may be terminated at any time by me or by my executors or administrators by notice in writing to said Bank to that effect, and that upon such notice of its termination being given this agreement shall terminate and end except as to the obligations and indebtedness of the said H. G. & H. W. Stevens to said bank then existing; and that said bank will at any time upon request from me or from my executors or administrators furnish a statement to me or to them of the obligations of the said H. G. & H. W. Stevens held by said bank."

Said bank advanced various sums of money to the business concern conducted under the name of H. G. & H. W. Stevens, receiving notes therefor. Subsequently the notes and contract of guaranty were transferred by said Massachusetts National Bank to the defendant in error. By the answer of the defendant it was alleged that the guaranty was of a partnership consisting of H. G. and H. W. Stevens, as copartners or jointly, and not to loans or advances it made to either H. G. Stevens or H. W. Stevens individually or separately.

Pending the proceedings, Uri L. Lamprey, the defendant, died, and plaintiff in error, Eugene A. Towle, as administrator of his estate was substituted as defendant. By stipulation of parties, a jury was waived and the cause tried to the court. Certain findings of fact were made by the court, and judgment rendered in favor of plaintiff and against

the defendant. The defendant brought the case to this court by writ of error.

By the decision of this court, reported in 153 Fed. 566, 82 C. C. A. 520, it was held that said contract of guaranty was upon its face ambiguous; that it was for the trial court to find from the evidence whether or not the instrument of guaranty was intended to guarantee only loans made to H. G. & H. W. Stevens, as copartners, or whether it was intended as a guaranty to the business concern conducted under the name of H. G. & H. W. Stevens, without reference to whether such business concern was a partnership. This court further held that, as the trial court made no finding upon this material issue, the cause should be reversed for a new trial. Thereafter, when the case came on for trial in the Circuit Court, it was stipulated by the parties that the cause should again be submitted to the court without a jury upon the same evidence upon which the case was first tried. At the conclusion of the presenting of the evidence to the court, plaintiff in error moved the court for judgment in his favor on the ground that there was no evidence upon which a judgment for the plaintiff could be supported; that the evidence conclusively showed that the contract of guaranty sued upon covered only advances to be made to a partnership composed of H. G. and H. W. Stevens, and that no advances were made to such copartnership. This motion was overruled by the court, to which plaintiff in error duly excepted. Plaintiff in error asked the court to make certain special findings of fact, all of which were found excepting the third, which was as follows:

"Third. It was the intention of both parties to said guaranty that the same should cover only advances to a partnership composed of Horace G. Stevens and Hobart W. Stevens, doing business under the name of H. G. & H. W. Stevens."

This finding of fact was refused by the court.

Plaintiff in error also requested the court to find as a conclusion of law, in substance, first, that said guaranty was for advances to be made to a copartnership under the firm name of H. G. & H. W. Stevens; second, that the defendant was entitled to judgment, and that the plaintiff take nothing by this action, and for his costs and disbursements, which was refused.

Among the findings of fact made by the court were the following:

"Second. That at the time of the execution and delivery of the guaranty set forth in the fourth paragraph of said amended complaint, and thereafter until January 9, 1900, when the concern failed, there was a concern doing business under the firm name of H. G. & H. W. Stevens, and engaged in the manufacture and sale of carriages, having an office in the city of Boston, Mass., in charge of H. W. Stevens, and a manufacturing plant in the city of Merrimac, Mass., in charge of H. G. Stevens as assistant manager, and there was at said time no other concern of the same or similar name.

"Third. That there was no partnership of H. G. & H. W. Stevens; that said concern was owned entirely by H. W. Stevens, and H. G. Stevens was only an employé (thereof) as assistant manager, and that said H. W. Stevens was doing business (as such concern) under the name of H. G. & H. W. Stevens.

"Fourth. That at the time of the execution and delivery of said instrument set forth in the fourth paragraph of said amended complaint, and thereafter until January 9, 1900, said Lamprey, the guarantor, and the said Massachusetts National Bank, guarantee, supposed and believed that said concern

was a partnership composed of two brothers, H. G. and H. W. Stevens, engaged in the business of manufacturing and selling carriages, but it was not expressly agreed by and between these parties that this guaranty should only cover loans and advances to H. G. & H. W. Stevens as a copartnership or jointly, but, on the contrary, it was (contemplated by the parties and was) understood and agreed in and by said guaranty that it should cover the loans made to the said concern whether it was composed of H. G. Stevens (or) H. W. Stevens or both, and whether or not they were copartners.

"Fifth. That the H. G. Stevens and H. W. Stevens mentioned in the guaranty set forth in the fourth paragraph of said amended complaint and the H. G. & H. W. Stevens mentioned in the fifth, sixth, seventh, eighth, ninth, tenth, and fourteenth paragraphs of said amended complaint are one and the same party, to-wit: [Said concern mentioned in paragraph 2 of these findings and which said concern was] H. W. Stevens doing business under the name of H. G. & H. W. Stevens; [and that said loans set forth in the paragraphs of the amended complaint referred to in paragraph one of these findings were made to said concern]."

The court thereupon rendered judgment in favor of defendant in error against plaintiff in error for the amount due and unpaid upon advances made upon said guaranty. Plaintiff in error has now for the second time brought the case to this court.

Plaintiff in error has assigned as error the refusal of the court to find the facts as requested in its third request, and that the court erred in finding that it was not expressly agreed by and between the parties that the guaranty should only cover loans and advances to H. G. and H. W. Stevens as a copartnership or jointly, but that it was contemplated by the parties, and was understood and agreed in and by said guaranty, that it should cover loans made to the concern, whether composed of H. G. Stevens or H. W. Stevens, or both, and whether or not they were copartners; that the court erred in its conclusions of law. As before stated, when this case was first before this court, it was held that the guaranty did not expressly refer to the Stevenses as copartners, yet that their joint names were referred to therein as together desiring to make loans of the bank, and that there was thus manifestly an ambiguity which admitted of the elucidation by proof. It will thus be seen that the vital issue in the case was whether the guarantor, by the guaranty in question, intended to secure advances to a business concern under the name of H. G. & H. W. Stevens, without reference to whether such business concern consisted of a copartnership of H. G. and H. W. Stevens, or consisted of only H. W. Stevens. The trial court has now found as a fact that, while the guarantor and guarantee at the time of the making of the guaranty supposed the two brothers were partners, yet that the guaranty was not intended to be limited to advancements made to them as partners, for which both would be personally liable, but was intended to be for advances made to the concern which was doing business under the name of H. G. & H. W. Stevens. This finding of the trial judge has the same force and effect as a special finding by a jury, and this court cannot now, in an action at law, retry the case for the purpose of determining the weight of the evidence, but is limited to the inquiry whether such finding by the trial court is supported by any substantial evidence.

No synopsis would disclose the fair inference to be drawn from the evidence, and to give it in its entirety would serve no useful purpose.

It is sufficient to say that from a consideration of all the evidence we are satisfied that there was substantial evidence to support the findings made by the trial court; and the judgment is therefore affirmed.

Judgment affirmed.

KUYKENDALL v. UNION PAC. R. CO.

(Circuit Court of Appeals, Eighth Circuit. August 10, 1908.)

No. 2,576.

EXECUTORS AND ADMINISTRATORS—SUIT TO REQUIRE ACCOUNTING—FAILURE OF PROOF.

A complainant in a suit in equity brought by him, as administrator, against a railroad company to obtain an accounting in respect to a large number of bonds alleged to have been the property of the decedent, held to have wholly failed to prove the alleged ownership of the bonds by the decedent at the time of his death, which fact was essential to entitle him to maintain the suit.

Appeal from the Circuit Court of the United States for the District of Utah.

D. W. Wood and David K. Watson, for appellant.

P. L. Williams (Maxwell Evarts, on the brief), for appellee.

Before VAN DEVANTER, Circuit Judge, and PHILIPS, District Judge.

PHILIPS, District Judge. This is an appeal from the decree of the Circuit Court dismissing the bill of complaint. The bill is a maze of verbiage. So confused and involved are the allegations and recitations, that it proved somewhat difficult to extract the actual substance. Briefly stated, the claim for relief is that of the original first mortgage bonds issued by the Union Pacific Railroad Company, under the organic act of Congress of July 2, 1864, there were \$27,229,000, which became the property of one Charles Durkee, and were owned by him at the time of his death; which occurred in the state of Wisconsin in 1870. The complainant, John A. Kuykendall, was appointed administrator of his estate May 9, 1896, by the probate court of Salt Lake county, state of Utah, who instituted this suit, February 7, 1903, in the United States Circuit Court for the District of Utah, to have said bonds declared a first lien, under said mortgage, on the properties of the defendant, Union Pacific Railroad Company, a corporation of the state of Utah, the alleged successor of the original mortgagor company and the consolidated company, of the same name, which, it is asserted, succeeded to the rights and obligations of the original company.

The bill charges that Edwin D. Morgan and Oakes Ames were the original trustees named in said first mortgage to secure the payment of said bonds; that, they having died, F. Gordon Dexter and Oliver Ames were appointed as their successor trustees. It is then charged that a large number of persons, and some corporations, named as parties defendant, entered into a conspiracy to wrong and injure the estate, represented by said Kuykendall as administrator, by falsely

pretending that they were the owners of a large portion of the first mortgage bonds so issued by said original Union Pacific Railroad Company. To effectuate the conspiracy, and to exclude the said estate from participation in the fruits of the proceeding, the conspirators caused the said trustees to institute in the United States Circuit Court of Nebraska a suit to foreclose said mortgage, which resulted in a decree of foreclosure, under which the property of said railroad companies was sold, and bought in by the said defendant Company, corporation of the state of Utah, which was organized for such purpose, and a deed, in due form, was made and delivered to it therefor by the special master in chancery. The proceeds of the sale, not sufficient to satisfy the debts, were distributed pro rata among such of the bondholders as presented their bonds for such purpose. Before decree the complainant dismissed the bill as to all the defendants except the said Union Pacific Railroad Company of Utah.

The prayer of the bill is for an accounting to the complainant on account of said \$27,229,000 bonds and interest, and for the enforcement of the mortgage lien for payment, etc.

As the ownership of the bonds in question by Durkee, at the time of his death, was put in issue by the answer, it was a primary issue of fact, lying at the threshold of the complainant's right to any relief. Unless he owned the bonds at the time of his death, and they passed by devolution of law to the complainant as administrator, the latter has no standing in court to assert any of the matters set forth in the bill. This was so self-asserting that at the opening of the argument by counsel for the complainant on this appeal we insisted that they point out to the court, in the record, the proof touching this foundational fact before they proceeded to the discussion of other matters in contestation. This was manifestly embarrassing to counsel. After some delay and search through the record, containing a mass of testimony on relevant and irrelevant matters, they referred the court for this essential proof to the deposition of one Leonard C. Blaisdell. He married a niece of said Charles Durkee. As there were left surviving no immediate heirs of Durkee, this niece, and, perhaps, others of like degree, would be the sole distributees of the large fortune in question.

The reading of this witness' testimony furnishes ample evidence that he is quite visionary and impractical, if not mentally unbalanced. His statements are incoherent, disjointed, and pointless. He refers to incidents occurring about 1882-83-84. It is, perhaps, inferable from his straggling statement that Durkee at some ungiven times was surety on the bond, or bonds, of some persons having contracts for the construction work on the Union Pacific Railroad. Inferentially, without direct assertion, the witness had a theory, but without proof to sustain the fact, that Durkee had put up with the Secretary of the Treasury of the United States some of said Union Pacific Railroad bonds as collateral security on said contracts. Being interested in the Durkee estate, the witness claimed to have had considerable correspondence with the Secretary of the Treasury, and perhaps the Comptroller of the Treasury, respecting this matter. But he neither made profert of any such letters, nor showed that they had been lost or destroyed, nor was any effort disclosed to ascertain by inquiry whether or not his

letter or letters were on file in the Treasury Department, where it is a well-known fact all such business correspondence is carefully preserved. He further testified that by special arrangement he visited Washington City, and in the office of the Comptroller of the Currency he met on this business Judge Folger, then Secretary of the Treasury, where were present every member of the President's Cabinet, save the Secretaries of the Army and the Navy. His version of what occurred, what was said, and what was the exact subject-matter of discussion is so vague and disjunct as to mystify rather than enlighten. But the crux of it all is that Judge Folger then and there spread out on tables something over \$64,000,000 of Union Pacific Railroad mortgage bonds, saying:

"I have here upon these tables the bonds of all these respective railroad companies duly executed as first mortgage bonds of a lien prior and paramount to that of the United States, and also a collection of bonds deposited by the companies with the Secretary of the Treasury of the United States, to secure interest upon the first mortgage bonds aforesaid."

After some colloquy with Attorney General Brewster, Judge Folger turned to the witness, and said:

"What do you want done with these bonds? And I answered: 'I want to have the protection of the bonds, interest bonds and principal, as provided by the acts of Congress.' He then proceeded to give me the instructions I asked for to proceed intelligently with himself in an adjustment of this particular obligation of said Pacific Railroad Companies."

The witness then digressed into something about Judge Folger asking his opinion about an act of Congress looking to refunding bonds, etc., quite as unintelligible and impertinent as most of his discursive statement. He did not read the bonds claimed to have been thus displayed over many tables, outside of the treasury vaults, in the office of the Comptroller; but stated that Judge Folger read them aloud, as payable on their face to Charles Durkee.

It must be conceded that this is mere hearsay testimony, no more competent in this action, to which Judge Folger is not a party, than would be a statement made by him in pais to some third party that he had seen in the vaults of the treasury Union Pacific bonds payable to Charles Durkee. The claim of this witness that Secretary Folger read the bonds, as made payable on their face to Charles Durkee, discredits his whole story. Such bonds were made payable to the holder or bearer so that they might perform the office of commercial negotiable paper passing by mere act of delivery. In addition, the exhibit filed with the bill of complaint, as expressing the recitation and form of the bonds claimed to have been owned by Durkee, shows that "the said company promises to pay unto the holder hereof at its office in the city of New York." Superadded to all this, the clerk of the United States Court for Nebraska, in obedience to the request of complainant's counsel, brought and presented, as a part of his deposition, specimens of the bonds left with him by the holders to receive their dividends under the foreclosure decree, which show that they were made payable "unto the holder hereof."

At the time of taking the depositions herein, and at the hearing of this suit, there was living and accessible a member of said cabinet who

Blaisdell testified was present at that remarkable meeting in the Comptroller's office when he claims the bonds were exhibited by Judge Folger, to wit, the Honorable Henry M. Teller, who was then Secretary of the Interior, and now United States Senator from the state of Colorado. While this appeal was on argument before us at the city of Denver, Colo., the sitting judges chanced to see Senator Teller on one of the streets of the city. We made inquiry from the bench of counsel for the complainant why no deposition of any one present at that alleged occurrence in the Comptroller's office was taken for a much needed confirmation. Receiving answer that it was understood that all of them were dead, we called attention to the fact that Senator Teller was then alive, present in the city, and suggested that, if counsel desired, the court, in the exercise of its equitable discretion in furtherance of justice, would indulge them to introduce Senator Teller and examine him, ore tenus, before us. This proffer was not accepted by counsel.

It is unbelievable, in view of the known exactness of the Treasury Department in bookkeeping, jacketing, and preserving every memorandum and paper appertaining to every transaction and matter connected with the department, that \$27,229,000 of such bonds belonging to a third party could have been as late as 1882-83-84 in the custody of the Treasury Department of the United States without some record entry or memorandum showing how and on what account they came, for what purpose held, and what disposition was made of them. Furthermore, it is positively incredible that Mr. Durkee, who died testate in 1870, would make no mention in his will of the ownership of such a fabulous fortune. It is not difficult to discern the underlying purpose of taking out letters of administration on Durkee's estate, if he had any, in Utah, when his domicile at the time of his death was in the state of Wisconsin. Blaisdell testified that it was understood that this administrator was to be used in other litigation, but he was to have nothing to do with suits to recover on these bonds. The further evidence, however, develops what was the underlying scheme of this movement. A syndicate of "promoters" was formed. They devised the scheme of selling shares of stock in the chances of success in this suit. They even had agents, to be paid out of the funds thus collected, to exploit this stock. It was represented that, if the suit were won, the result would be over \$200,000,000 in money for division among the shareholders. These agents accordingly disposed of some shares at the proportion of 50 for \$1 in money; and, when the bait staled, they offered the still more alluring temptation of 100 shares for \$1 in money; and the evidence shows that they succeeded in drawing from their dupes about \$50,000. The evidence also showed that the administrator was party to and participated in the selling of said shares. What has become of this money is not shown. One of the witnesses for the complainant spoke of this scheme as a "Col. Sellers figures." One of the promoters the witness said:

"Looked like a broken down actor—same type as Col. Sellers—he said he was Col. Durkee's private secretary—wore a long black coat—all it lacked were the hoops to be a typical Col. Sellers—had whiskers on his pants," etc.

Such a combination does not commend itself to the favorable consideration of a court of equity.

As the complainant, when he closed the taking of testimony on his behalf, had failed to produce sufficient evidence of the ownership of the bonds declared on, the defendant was justified in declining to take countervailing testimony.

The decree of the Circuit Court is affirmed.

VANDAGRIFT v. RICH HILL BANK et al.

(Circuit Court of Appeals, Eighth Circuit. August 5, 1906.)

No. 2,820.

1. CORPORATIONS—CONTRACTS ULTRA VIRES—PURCHASE OF STOCK OF ANOTHER CORPORATION—ESTOPPEL.

It is the settled rule of the federal courts that where one corporation acquires stock of another by subscription thereto or by original purchase as an investment, and not in payment of some antecedent debt, when the acquisition of such stock is foreign to the objects of the corporation and is not authorized by law, the contract by which the stock was acquired is ultra vires and void, and the receipt of dividends will not estop the corporation from availing itself of the defense that the contract was void.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 1531-1534.

Acquisition by corporation of stock of other corporation, see note to Anglo-American Land, Mortgage & Agency Co. v. Lombard, 68 C. C. A. 120.]

2. BANKS AND BANKING—NATIONAL BANKS—ASSESSMENT OF STOCKHOLDERS—TRANSFER OF STOCK.

An absolute sale and transfer of the stock of a national bank by a holder thereof cannot subsequently be avoided and the transferee made liable for an assessment upon the stock, unless it is shown, not only that at the time of the transfer the bank was actually insolvent, but that the transferee knew of such insolvency, or had reason to believe it, and that that transfer was intended to evade liability.

In Error to the Circuit Court of the United States for the Western District of Missouri.

John A. Eaton and E. H. McVey, for plaintiff in error.

T. B. Wallace (Thomas J. Smith, on the brief), for defendants in error.

Before VAN DEVANTER, Circuit Judge, and W. H. MUNGER, District Judge.

W. H. MUNGER, District Judge. This action was brought by William J. Butler, receiver of the Bates National Bank of Butler, Mo., against the Rich Hill Bank, Frank McVey, and W. F. Tygard, to recover a stockholder's assessment levied by the Comptroller of the Currency.

In the petition it is alleged, among other things, that the Rich Hill Bank is a banking corporation, organized under the laws of the state of Missouri, and that at the organization of the Bates National Bank said Rich Hill Bank became a shareholder in the same, and owned 40 shares of the par value of \$100 each, which stock was held in the name of W. F. Tygard, as trustee for said Rich Hill Bank; that on February

16, 1907, said Tygard, who was president of the Rich Hill Bank, had said stock transferred to Frank McVey, the old certificate being taken up and a new certificate issued in the name of said Frank McVey. It is alleged that Frank McVey was a farm hand in the employ of said Tygard, and was insolvent; that said transfer was made to him in contemplation of the liability on said stock of the Bates National Bank, and for the fraudulent purpose of avoiding the payment of additional liability on said stock; that said transfer was colorable merely, and not made in good faith. It is further alleged in the petition that the Rich Hill Bank received dividends paid upon said stock up to the time of the insolvency of the Bates National Bank, and charges that by reason of this fact said Rich Hill Bank is estopped from denying not only its ownership, but that the contract of ownership was ultra vires. It is further alleged in the petition that on the — day of September, 1906, the Bates National Bank went into liquidation, and complainant was appointed receiver by the Comptroller of the Currency of the United States. The answer of the defendant Rich Hill Bank admits its incorporation under the laws of the state of Missouri, and alleges that it had no authority to subscribe for or hold stock in said the Bates National Bank; admits that the officers of the Rich Hill Bank subscribed for said stock in the Bates National Bank for and on behalf of said Rich Hill Bank; but alleges that their acts in that respect were ultra vires. It pleads the following provisions of the statutes of Missouri:

Section 903, Rev. St. 1879:

"Every such corporation shall be authorized and empowered to conduct the business of receiving money on deposit, and allowing interest thereon, and of buying and selling exchange, gold, silver, coins of all kinds, uncurrent money, of loaning money upon real estate or personal property and upon collateral and personal security at a rate of interest not exceeding that allowed by law, and also of buying, selling and discounting negotiable and non-negotiable paper of all kinds as well as all kinds of commercial paper, and for all loans and discounts made such corporation may receive and retain in advance the interest thereon."

Section 915:

"No corporation now existing, nor any hereafter organized under any law of this state, whether general or special, as a bank, or to carry on banking business, shall employ its money directly or indirectly in trade or commerce, by buying and selling ordinary goods, chattels, wares and merchandise, provided that it may use all kinds of property which may come into its possession as collateral security for loans, or in the ordinary collection of debts."

It also pleads section 7 of article 12 of the Constitution of Missouri (Ann. St. 1906, p. 304), as follows:

"No corporation shall engage in business other than that expressly authorized in its charter or the law under which it may have been or may hereafter be organized, nor shall it hold any real estate for any period longer than six years, except such as may be necessary and proper for carrying on its legitimate business."

Other allegations of the petition were denied.

It appears from the evidence that the defendant bank was the owner by subscription of shares of stock in the Bates County Bank, a Missouri corporation; that September 4, 1902, the Bates County Bank was

reorganized as the Bates National Bank, under the laws of the United States. The stock in the Bates County Bank was held in the name of the defendant bank, but at the time of the reorganization of said bank as a national bank the stock in the National Bank was taken in the name of W. F. Tygard, as trustee for the defendant bank, and the books of the defendant bank showed said stock as an asset of such bank. On April 1, 1905, the Secretary of State wrote the defendant bank that it was not authorized under the laws of Missouri to hold stock in any other corporation, and directing it to dispose of such stock as soon as practicable. On the 7th of the same month the Secretary of State again wrote the bank, calling its attention, not only to the statutes of Missouri, but to the constitutional provision heretofore quoted. It is not alleged in the petition that the Bates National Bank was insolvent at the time of the transfer of the stock to McVey, nor does it appear anywhere in the evidence when said National Bank became insolvent. At the trial it was admitted by the parties that the National Bank was declared insolvent by the Comptroller on September 20, 1906. There is no evidence as to the bank being insolvent at the time of the transfer of the stock to McVey. The testimony of the officers of the bank is that the transfer to McVey was because of the said letters received from the Secretary of State and was not with any intent to escape liability, or having in view any future stockholder's liability. Their testimony is specific that at the time of the transfer they had no knowledge that the National Bank was insolvent, but supposed it to be in good financial condition. One semiannual dividend was paid by the National Bank to McVey after the stock was transferred to him. McVey was worth \$1,000 and gave his note for the par value of the stock, to wit, \$4,000, to the defendant Bank and secured it by the stock as collateral. The dividend which was paid to him, to wit, \$160, was credited by the defendant bank upon said \$4,000 note.

A demurrer was by the court sustained as to the defendant Tygard and the case by the court dismissed as against McVey. At the close of the testimony plaintiff and defendant each asked for a directed verdict in its favor. The court overruled plaintiff's application for a directed verdict in its behalf, and directed a verdict in behalf of the defendant. Plaintiff brings the case to this court on error.

The principal questions discussed by counsel are: (1) Was the subscription for the stock in the National Bank by the officers of the Rich Hill Bank an ultra vires act? (2) Did the regular receipt by the Rich Hill Bank of dividends paid by the National Bank during the time that the stock was held for the benefit of the Rich Hill Bank estop it from denying its liability as a stockholder?

While the decisions of the several state courts are not in harmony upon these questions, the established rule of the federal courts is that where one corporation acquires stock of another corporation by subscription thereto or by original purchase as an investment, and not in payment of some antecedent debt, when the acquisition of such stock is foreign to the objects of the corporation and is not authorized by law, the contract by which the stock was acquired was ultra vires and void, and the receipt of dividends would not estop the corporation availing itself of the defense that the contract was void. California Bank

v. Kennedy, 167 U. S. 362, 17 Sup. Ct. 831, 42 L. Ed. 198; Concord First Nat. Bank v. Hawkins, 174 U. S. 364, 19 Sup. Ct. 739, 43 L. Ed. 1007; Robinson v. Southern Nat. Bank, 180 U. S. 295, 21 Sup. Ct. 383, 45 L. Ed. 536; First Nat. Bank v. Converse, 200 U. S. 425, 26 Sup. Ct. 306, 50 L. Ed. 537.

The powers of a corporation in these respects being governed by the law of the state creating it and defendant's corporate authority being acquired under the laws of Missouri, if the Supreme Court of that state has construed the Constitution and statutes of the state in these respects, the decision of that court is binding upon this. Decisions of that court have been cited by each party which it is claimed are authority on that subject. The decisions, without proper analysis, would seem to be somewhat in conflict.

In *Anglo-American Land Mortgage & Agency Co. v. Lombard*, 132 Fed. 721, 68 C. C. A. 89, this court had occasion to review the decisions of the Supreme Court of Missouri upon that subject, and it was held that the seeming conflict did not exist; that the decisions of the Supreme Court, when properly understood, were in harmony and divided into two classes, viz.: Those holding that where a contract by a corporation was ultra vires because not within its corporate powers but had been fully executed by both parties, nothing of an executory nature remaining to be done, what was thus done under the contract would not be undone at the suit of either party on the ground that it was ultra vires; the other class holding that, where such contract remained in part unexecuted and the corporation was called upon to perform the executory part, it was not estopped to interpose the defense of ultra vires. It is, however, urged that in the more recent case of *Cass County v. Mercantile Town Mutual Ins. Co.*, 188 Mo. 1, 86 S. W. 237, the Supreme Court of Missouri has announced a different rule. While it is true that in that case the court discussed these questions in a manner which gives color to the present citation of the case, yet the decision seems to have turned upon the construction of a statute of Missouri, providing for the organization of town mutual insurance companies; the court holding that such a company was not limited to insuring the property of its members solely but might reinsure the property of a member of another such company which had been insured by the latter company, which was the character of contract there in question. While we are inclined to think that under the Constitution and laws of Missouri, as construed by the Supreme Court of that state, the officers of the defendant bank had no authority to bind the bank by a subscription to the stock of the Bates National Bank, and that the defendant bank is not estopped because of having received dividends from pleading the ultra vires character of the subscription contract, yet it is unnecessary to place the decision in this case upon that ground, as we think the judgment must be affirmed for another reason.

In the case of *McDonald v. Dewey*, 202 U. S. 510, 26 Sup. Ct. 731, 50 L. Ed. 1128, it was distinctly held that an absolute sale and transfer of stock of a national bank by a holder thereof could not subsequently be avoided and the transferee held liable for an assessment upon the stock, unless it was shown that at the time of the transfer

of the stock, not only that the bank was actually insolvent, but that the transferrer of the stock knew of such insolvency, or had reason to believe at the time of such transfer that the bank was insolvent, and that such transfer was intended to evade liability. The court in the opinion say:

"We think it a proper deduction from the prior cases, and such we hold to be the law, that the gist of the liability is the fraud implied in selling with notice of the insolvency of the bank and with intent to evade the double liability imposed upon the stockholder by the national banking act. * * * The stockholder is not deprived of his right to sell the stock by the fact that the sale is made to an insolvent person, unless it be made with knowledge of the insolvency of the bank."

In this case the transfer of the stock was made more than seven months before the bank was declared insolvent by the Comptroller. There is no evidence tending to show that the financial condition of the bank at the date of the transfer of stock on February 16th was the same as that of September 20th, when the Comptroller declared it insolvent, and when, as per stipulation of the parties, it is said the bank was insolvent, and we do not think the court would be justified in assuming that because the bank was insolvent on September 20th therefore it was insolvent on February 16th, in the absence of evidence of some facts which would indicate that there had been no changed condition of the assets and liabilities of the bank during that period. Whether the bank became insolvent in September, because of the loss of some securities which had been taken between the date of the transfer of the stock in question in February and September 20th, whether its assets were depleted by some improvident speculation or investment by its officers between those dates, we do not know. There is no evidence tending to show the condition of the national bank from the time of its organization in September, 1902, until it was declared insolvent September 20, 1906. The books of the bank were undoubtedly in the custody of the receiver, and it was within his power to have given evidence in this respect.

For the reason that the petition failed to allege the insolvency of the national bank at the time of the transfer of the stock, and because there is no evidence showing its insolvency at that time, and no evidence to show that the Rich Hill Bank, or any of its officers, had knowledge of the insolvency of the national bank at the time of the transfer of the stock, or knowledge of facts which would put an ordinarily prudent person upon inquiry, in that respect, we think the court properly directed a verdict for the defendant; and the judgment is therefore affirmed.

MAHONING ORE & STEEL CO. v. BLOMFELT.

(Circuit Court of Appeals, Eighth Circuit. August 5, 1908.)

No. 2,830.

1. MASTER AND SERVANT—INJURY TO SERVANT—ASSUMED RISK.

An employé of a mining company who had been working for several months as a brakeman engaged in the moving of dump cars by means of an engine, and who had knowledge of the means used for coupling to such cars, assumed the risk from such means, and there can be no re-

covery from the company for his death resulting therefrom, where the couplers were in good condition.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 574-600.]

2. NEGLIGENCE—ACTIONS—WHEN QUESTION FOR JURY.

Where there is uncertainty as to the existence of negligence or contributory negligence arising from conflicting testimony, the question is one of fact, to be determined by the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 277-353.]

3. MASTER AND SERVANT—DEATH OF SERVANT—ACTION—QUESTION FOR JURY.

An engineer operating an engine employed in moving dump cars at a mine backed his engine against a car to which it was to be coupled with such force that the sloping end of the tender was forced beneath the car, raising it from the track, and crushing and killing a brakeman who was standing on the running board at the rear of the tender to make the coupling. The engineer knew that there was no bumper on the car which would prevent such an occurrence, and also that it was necessary for the brakeman to be between the engine and car to make the coupling. *Held*, that evidence showing such facts was sufficient to require the submission of the question of the engineer's negligence to the jury in an action to recover for the death of the brakeman.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1051-1087.]

4. SAME—FELLOW-SERVANT LAW OF MINNESOTA.

The fellow-servant law of Minnesota (Gen. St. Minn. 1894, § 2701), as construed by the Supreme Court of the state, applies to a mining corporation which is not a railroad corporation, but which operates a short line of railroad in mining its ore, and under such statute a brakeman employed on such road does not assume the risk from negligence of an engineer also so employed.

5. WITNESSES—EXAMINATION—REDIRECT EXAMINATION.

Permitting a witness to be interrogated on redirect examination with respect to matters first brought out on cross-examination is not prejudicial error, even though the testimony may be irrelevant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 1004.]

6. EVIDENCE—OPINION OF EXPERT—COMPETENCY.

Upon an issue as to the negligence of a railroad engineer in running his engine against a car to which it was to be coupled with such force as to crush the brakeman who was between the two for the purpose of making the coupling, it was competent to show by an engineer of experience within what distance the engine could have been stopped.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2323.]

7. DEATH—ACTION FOR WRONGFUL DEATH—RIGHT OF NONRESIDENT ALIEN TO BENEFIT OF STATUTE.

The Minnesota statute giving a right of action for wrongful death for the benefit of the next of kin of the deceased, as construed by the Supreme Court of the state, includes among its beneficiaries a nonresident alien having the prescribed relationship.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, §§ 35-46.]

In Error to the Circuit Court of the United States for the District of Minnesota.

Thomas J. Davis (Theodore Hollister, on the brief), for plaintiff in error.

Clarence B. Miller (Harvey S. Clapp, on the brief), for defendant in error.

Before SANBORN and VAN DEVANTER, Circuit Judges, and W. H. MUNGER, District Judge.

W. H. MUNGER, District Judge. This action was brought by William Blomfelt, as administrator of the estate of Oscar Blomfelt, to recover damages for the wrongful death of said Oscar Blomfelt. The complaint alleges that deceased was about 24 years of age; that he left surviving him as only heir and next of kin his father, about 56 years of age; that the father was dependent upon deceased for maintenance and support; that the deceased was in the employ of the defendant, a mining corporation; that defendant in the operation of its mines operated a railroad, with various tracks, engines, and other appliances; that the deceased was in the employ of defendant as a brakeman, and that on the 12th day of August, 1905, while in the performance of his duties as a brakeman, he received the injury resulting in his death. It is alleged that said injury was caused, first, because of the negligence of the defendant in providing an improper coupling appliance which was worn out, dangerous, and defective; second, that the engineer operating the engine of the train upon which deceased was a brakeman operated the same in a careless and negligent manner by backing or running the engine with unnecessary, unusual, and violent force back against a car, between which and the engine deceased was required to be in the performance of his duty to couple the engine and car together, by reason of which deceased was crushed and mangled in a manner producing his death. Defendant in its answer denies the alleged acts of negligence, alleges that deceased was himself guilty of negligence, and that the risks and dangers connected with the work in which he was engaged were risks which he assumed; further denied that the father was his heir and next of kin.

It appears from the testimony: That the defendant was the owner of an iron mine. That it was engaged in stripping and removing the surface earth from the body of the iron ore. In doing this a steam shovel was employed, which removed the earth and loaded it upon dump cars standing upon the tracks for that purpose. That, when said dump cars were filled, they were removed by engines and unloaded at a place designated as the dump. In removing the earth there were eight or ten cars used in each train, and in going to the dump were pushed in front of the engine. Returning the cars were pulled by the engine backing. The front car was one which dumped at the end or forward. The others dumped at the side. On the day on which the injury happened there were some five or six of these dump cars standing on one of the tracks, loaded with coal used in the operation of the train and the steam shovel. It became necessary to move the cars containing coal from the place where they were standing, and this was sought to be done by the train upon which deceased was a brakeman. The train was returning from the dump with some eight or ten empty cars. In moving the coal cars from where they were standing, it was sought to push them some distance further up the track. To do this it was necessary to couple the engine on to the nearest one of the cars of coal, which was an end dump car; the dump end being next to the engine. The coupler of the end dump car was in under the end of the car some little distance, so that it required a link about three feet in length to couple on to the engine. This link was constructed of a flat bar of iron, with loops in each end, and strips or pieces of wood bolted

to the bar of iron, so that the bar of iron extended, at each end, some five or six inches beyond the strips of wood, forming at the ends a loop something in the shape of a clevis, and a pin was used in making the coupling. To make this coupling it was necessary for the deceased, as brakeman, to go in between the engine and the car. The tank or tender of the engine sloped down towards the end, the end of the slope was a few inches lower than the bed of the box of the dump car, and there was a running board at the end of the tender on which the deceased stood. In making the coupling on this occasion the engine and the dump car came together in such a manner that the end of the dump car was raised up on to the sloping end of the tender of the engine sufficient to raise the wheels of the car from the track, and deceased was crushed between the end of the tender and the dump car.

As to the allegation of negligence because of the use of this character of coupling link, plaintiff was not entitled to recover, for the reason that there was no evidence tending to show that it was not in perfect condition. That method of coupling was well known to deceased, who had been in the employ of the defendant as a brakeman for several months, and, if it was a negligent method, it was a risk which he assumed.

The grade of the track was some 5 or 6 per cent, and it appears from the testimony that the engineer backed his engine upwards toward the cars of coal for the purpose of coupling, but did not get near enough for that purpose. The engineer ran his engine forward some 20 or 30 feet, and then backed again; this time the engine and car coming together. Two theories are advanced. On the part of the plaintiff it is claimed that the engineer in his second effort went back with such unnecessary force and velocity that the rear end of the tender was propelled underneath the end of the dump car, crushing deceased, and raising the end of the dump car on to the tender of the engine, as before stated. On the part of the defendant the theory is advanced that just before the engine reached the cars of coal in the second effort it came to a stop, deceased went between the several cars of coal, unloosened the brakes, signaled the engineer to back, stepped on the running board between the engine and the dump car to make the coupling; that the engineer had propelled the cars back some 10 or 15 feet, when he discovered the end of the dump car upon the tender and immediately stopped, stopping, as he says, within 1 or 2 inches; that the brakeman either did not make a secure coupling, or else, after the engine started to push the cars, he withdrew the pin. There being somewhat of a curve in the track, if the pin was not inserted, or was withdrawn, it would naturally slip out of the coupling bar at the end of the tender. There was substantial evidence in the case which supported each theory. The trial court submitted the case to the jury and they returned a verdict for the plaintiff.

It is urged with much persistency that the evidence considered as a whole fails to show any negligence upon the part of the engineer. The evidence being conflicting, it was the province of the jury to determine the facts. As said by the Supreme Court, in *Richmond R. R. Co. v. Powers*, 149 U. S. 43-45, 13 Sup. Ct. 748, 37 L. Ed. 642:

"It is well settled that, where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury, and this whether the uncertainty arises from a conflict in the testimony or because, the facts being undisputed, fair-minded men will honestly draw different conclusions from them."

The jury having found the theory of plaintiff to be the true one, what then was the duty of the engineer? He was familiar with the coupling apparatus, he knew that there was no bumper on the dump car extending beyond the end, with which the bumper upon the engine would come in contact, so as to prevent, if the coupling was not made, the end of the car and the tender of the engine from coming in contact, and he must have known that the coupling could only be made by the brakeman when being between the engine and the end of the dump car. It was his duty, then, to have his engine under such control as not to permit it to come in contact with the end of the car with such speed and force as would prevent the brakeman from escaping. As stated, the evidence is conflicting, but we think there was evidence which warranted the jury in finding that the engineer did not exercise ordinary care under the circumstances in backing his engine. While it is true that the undisputed evidence shows that he made one effort and failed to get his engine back near enough to the dump car to make the coupling, and that he pulled forward a short distance and came back again, the fact, however, that he failed to get far enough back in his first effort, was no justification for his coming back the second time with force sufficient not only to crush deceased, but to raise the end of the dump car off the track and part way up on the sloping end of the tender. The court, therefore, did not err in submitting the question of the engineer's negligence to the jury.

Under the statutes of the state of Minnesota, as construed by the Supreme Court of the state in *Kline v. Minn. Iron Co.*, 93 Minn. 63, 100 N. W. 681, and by this court in *Kibbe v. Stevenson Iron Mining Co.*, 136 Fed. 147, 69 C. C. A. 145, deceased did not assume the risk of negligence of the engineer, a co-employé. Nor do we think it can be said that the deceased himself was guilty of contributory negligence. The coupling was not an automatic coupling, and it is clear from the evidence that it could only be made by inserting a pin through the coupler between the end of the tender and the end of the dump car; that, to perform this duty, it was necessary for deceased to be in between the car and engine.

At the trial William Blomfelt, brother of deceased, was called by the plaintiff as a witness, and testified, upon his direct examination, to the deceased sending money at various times to his father in the old country. On cross-examination by defendant he was interrogated, not only as to the deceased sending money to his father, and the manner in which the same was sent, but witness was asked with reference to whether he himself sent money to his father. On redirect examination he was asked if he sent his money in the same way his brother did, to which defendant objected, and excepted to the ruling of the court admitting the evidence. Objections and exceptions were also taken to the witness being asked to whom money orders were to be paid that he saw his brother send; the answer being to his father. The

witness upon his direct examination by plaintiff was not interrogated as to the sending by himself of money to his father. His direct examination was limited to the sending of money to his father by the deceased. The fact that the witness had sent money to his father, and the manner in which the deceased sent the money, was first called out upon cross-examination. For this reason we do not think the questions asked and objected to on redirect examination prejudicial error.

During the examination on the part of counsel for plaintiff of one Matthew J. McGovern, a witness who had been a locomotive engineer for some two years, he was asked the following question:

"Within how many inches could that engine be stopped, or should it be stopped, going up there in that way?"

To this question the following objection was interposed:

"There is nothing in the complaint here that makes anything of this kind relevant. Not suggested here that this engine was given a signal to stop that he didn't obey—anything of that sort. There is not anything here to predicate any negligence on the failure to stop the engine quicker than it was stopped."

We do not think this objection well taken. The distance within which the engine could have been stopped was competent and material. The distance within which it should be stopped was incompetent, as that was for the jury to determine. But the objection was not based upon that ground. The trial court's attention was not challenged to the objectionable portion of the question in that respect, and we do not think the objection available. But, considering the whole testimony of the witness in this respect, we think the jury must have understood that his evidence related to the distance within which the engine could have been stopped, and not to the distance in which it should have been stopped.

Defendant asked the court to instruct the jury as follows:

"It was the duty of the deceased in the performance of his work to use the appliances furnished him in a reasonably careful manner, and if the jury believe that the deceased received his injury while attempting to couple the coupling bar to the engine, while standing on the foot board, and further believe that to do so was obviously more hazardous than to make the last coupling at the end of the bar next to the car standing upon the ground, deceased would be held to have assumed the risk of adopting the more dangerous method."

This instruction was given by the court with the following addition:

"And if the jury believe from the evidence that his attempting to make the coupling in that way contributed to the happening of the accident, and the consequent injury—that is, that but for his attempting to make the coupling in that way the accident would not have happened—there can be no recovery."

It is insisted that the instruction as requested succinctly and properly stated the rule of law applicable to the case, and that its force was destroyed by the addition thereto by the court. We fail to perceive how the addition to this instruction in any way qualified the instruction as requested. It was proper for the court to instruct the jury in effect, not only that he assumed the risk of the more dangerous method stated, but also that it must appear that such more dangerous method contributed to the happening of the accident and the

consequent injury; and the court did not err in giving this additional instruction.

The court was requested to give the following instruction:

"In this action it appears that there is no beneficiary of the deceased except his father, a nonresident alien, and the jury are charged that no verdict can be allowed because of the death of the deceased for the benefit of a nonresident alien."

The refusal to give said instruction is assigned as error.

In *Renlund v. Commodore Mining Co.*, 89 Minn. 41, 93 N. W. 1057, 99 Am. St. Rep. 534, the Supreme Court of the state construed the statute, and held that nonresident aliens who are next of kin are entitled to its benefits. The construction of the statutes of a state by its highest court is binding upon this court. In *Patek v. American Smelting & Refining Co.*, 154 Fed. 190, 83 C. C. A. 284, this court gave to a similar statute of Colorado the same construction. The requested instruction was therefore rightfully refused.

The case was clearly and fairly submitted by the court to the jury and the judgment is affirmed.

MULROONEY V. ROYAL INS. CO. OF LIVERPOOL, ENGLAND.

(Circuit Court of Appeals, Eighth Circuit. August 21, 1908.)

No. 2,815.

1. INSURANCE—CONDITIONS IN POLICY—INCUMBRANCE OF PROPERTY.

A provision in an insurance policy that a mortgage placed upon the property insured shall render the policy void, unless consent of the company thereto shall be indorsed in writing on the policy, is valid and enforceable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 829.]

2. SAME—AUTHORITY OF AGENT TO WAIVE CONDITIONS—IOWA STATUTE.

A provision in a policy of insurance that none of its terms shall be modified or waived by an agent, except in writing indorsed upon the policy, is valid, both under the general law and under Code Iowa, § 1750, which provides that any agent who may solicit insurance, procure applications, issue policies, adjust losses, or transact business generally for an insurance company "shall be held to be the agent of such insurance company with authority to transact all business within the scope of his employment, anything in the application, policy, contract, by-laws, or articles of incorporation of such company to the contrary notwithstanding"; such provision of the policy being one merely regulating the manner in which the agent may exercise his authority.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1020.]

3. SAME—ADVERSE INTEREST OF AGENT.

An agent of an insurance company, who issued a policy on a stock of goods and afterward took a chattel mortgage on the stock in favor of a bank of which he was cashier and part owner, could not as such agent consent to such mortgage on behalf of the company.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 948.]

4. SAME—CONSENT TO INCUMBRANCE—CONSTRUCTION OF INDORSEMENT.

The written consent of an insurance company that the interest of an insured "as owner of the property" insured be assigned to another, indorsed on the policy by an agent, is not a consent to the incumbering of the property by a mortgage, although the agent knew that such was the nature of the transaction and verbally consented thereto.

In Error to the Circuit Court of the United States for the Northern District of Iowa.

Fred B. Dodge (Clarence A. Webber and P. F. Nugent, on the brief), for plaintiff in error.

Jerry B. Sullivan (John B. Sullivan, on the brief), for defendant in error.

Before SANBORN and VAN DEVANTER, Circuit Judges, and W. H. MUNGER, District Judge.

W. H. MUNGER, District Judge. This action was commenced to recover for a loss upon a policy of fire insurance. The cause was tried to the court. The trial judge made findings of fact and filed an opinion containing the conclusions of law which actuated him in rendering judgment for defendant. Such findings of fact and opinion are fully stated in 157 Fed. 598. It will, therefore, be unnecessary for us to more than briefly mention some of the facts. The policy of insurance was issued December 12, 1906, to one O. O. Kendall, who was then the owner of the stock of merchandise covered by the policy. The policy contains provisions to the effect that the entire policy, unless otherwise provided by agreement indorsed thereon or added thereto, shall be void, if the interest of the insured be other than unconditional or sole ownership, or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage, and also the following:

"This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto, and no officer, agent, or representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and additions no officer, agent, or representative shall have such power, or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto. Nor shall any privilege or permission affecting the insurance under this policy exist, or be claimed by the insured, unless so written or attached."

On February 12, 1907, insured made and delivered to one H. H. Buck a bill of sale of the property so insured; said bill of sale being in fact a chattel mortgage to secure the Harris Savings Bank and the Harris Mercantile Company, both of Harris, Iowa. Under the title "Assignment of Interest by Insured," O. O. Kendall indorsed upon the policy the following:

"The interest of O. O. Kendall, as owner of property covered by this policy, is hereby assigned to H. H. Buck, subject to the consent of the Royal Insurance Company.
O. O. Kendall.

"Dated 2-12-1907.

—and delivered the same to A. E. Buck, defendant's local agent, who issued the policy, with the request that said Buck get the company's consent to the making of said bill of sale, which said A. E. Buck verbally agreed to do; and on February 15th A. E. Buck sent the policy to Miller & Coleman, of George, Iowa, who were agents of defendant at that place, with the request that they attach to the policy a loss

clause payable to H. H. Buck, as holder of the bill of sale. February 18th A. E. Buck had a conversation with said Miller & Coleman, by telephone, and informed them that the said bill of sale from Kendall to H. H. Buck was intended as security only, and requested them to procure the company's assent thereto. Miller & Coleman, in such conversation over the telephone, verbally consented to the incumbrance; but thereafter, under the heading "Consent by Company to Assignment of Interest," they indorsed upon the policy the following:

"The Royal Insurance Company hereby consents that the interest of O. O. Kendall, as owner of the property covered by this policy, be assigned to H. H. Buck.

Miller & Coleman, Agent.

"Dated George, Ia., 2-21-07."

On February 27th the property was totally destroyed by fire, and proofs of loss were afterward properly made.

That a mortgage of personal property increases the insurance hazard is not disputed. Provisions in insurance policies that a mortgage placed upon the property insured shall render the policy void, unless consent of the company thereto shall be indorsed in writing upon the policy, are valid provisions. *Atlas Reduction Co. v. New Zealand Ins. Co.*, 138 Fed. 497, 71 C. C. A. 21, 9 L. R. A. (N. S.) 433; *Connecticut Fire Ins. Co. v. Buchanan*, 141 Fed. 877, 73 C. C. A. 111, 4 L. R. A. (N. S.) 758; *Assurance Co. v. Bldg. Association*, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213, and cases therein cited. Provisions in policies of insurance that none of its terms shall be modified or waived by an agent, except in writing indorsed upon the policy, are valid provisions. Cases cited, *supra*. The law as thus announced was so fully and accurately stated by the trial judge that we need not here do more than refer to his opinion.

It is, however, urged that the following provision of section 1750 of the Iowa Code, to wit:

"Any officer, agent or representative of an insurance company doing business in this state, who may solicit insurance, procure applications, issue policies, adjust losses, or transact the business generally of such companies, shall be held to be the agent of such insurance company, with authority to transact all business within the scope of his employment, anything in the application, policy, contract, by-laws, or articles of incorporation of such company to the contrary notwithstanding."

—modifies in these respects the general rules with reference to policies issued in that state, and that as A. E. Buck, the local agent of defendant, had knowledge that the bill of sale of the property was a mortgage only, and agreed to obtain the assent of the defendant thereto, the defendant is estopped by Buck's action. The findings of the trial judge show that the Harris Savings Bank was a beneficiary of said mortgage in the sum of \$2,500, and that said A. E. Buck was its cashier and owned one-fourth of its stock. A. E. Buck, then, was personally interested in the property insured, and could not, without the assent of defendant, act both for himself and as agent of defendant. He could not bind or estop defendant relative to a matter in which he was personally interested. *Arispe Mercantile Co. v. Capitol Ins. Co.*, 133 Iowa, 272, 110 N. W. 593, 9 L. R. A. (N. S.) 1084. See, also, *Pine Mountain Coal Co. v. Bailey*, 94 Fed. 258, 36 C. C. A. 229;

Bank of Overton v. Thompson, 118 Fed. 798, 56 C. C. A. 554; *American Surety Co. v. Pauly*, 170 U. S. 133, 18 Sup. Ct. 552, 42 L. Ed. 977.

It is also said that Miller & Coleman, agents of defendant, were informed that the transfer was a mortgage only and did verbally consent thereto, and thus that the case is within the statute. In support of this we are referred to the case of *Acid Mfg. Co. v. Insurance Co.*, 126 Iowa, 225, 101 N. W. 749. We do not think that case is controlling here. There it was sought by the terms of the policy to deprive the local agent of all authority to change or waive any provision therein. But it was held that such a provision was in contravention of the statute, and that the consent given, being otherwise within the apparent scope of the agent's authority, was valid. There was, however, no attempt in that policy to merely regulate the manner in which the agent's authority should be exercised. The policy before us does not deny to the local agents any authority contemplated by the statute, but merely prescribes that the exercise of their authority, to be effective, must be shown by a written indorsement upon the policy or by a writing attached to it, a provision which is manifestly to the advantage of both the insured and the insurer. *Assurance Co. v. Building Association*, 183 U. S. 308, 364, 22 Sup. Ct. 133, 46 L. Ed. 213. In other words, this policy recognizes that the local agents possess all the powers contemplated by the statute, and then, consistently with general rules of law and in the interest of both parties, prescribes that their powers can only be exercised in a manner which will place the evidence thereof on as high a plane as the policy itself. This the statute in no way prohibits. The parties, then, having agreed by their contract that no waiver of any provision or condition thereof by an agent shall be valid, unless the same shall be in writing indorsed upon or attached to the policy, and such a stipulation being a commendable one and in no wise violative of the statute, the oral consent must necessarily fail. Miller & Coleman, the agents, did in a writing indorsed upon the policy state the nature and extent of the consent intended to be given by them in the exercise of their undoubted authority. This indorsement is clear and unambiguous, and plainly has reference to a transfer of the entire ownership, and not to an incumbering of the property by a mortgage.

The judgment is affirmed.

**KAW VALLEY DRAINAGE DIST. OF WYANDOTTE COUNTY et al. v.
UNION PAC. R. CO. et al.**

(Circuit Court of Appeals, Eighth Circuit. May 30, 1908.)

No. 2,785.

1. EQUITY—CONSENT DECREE—PROCEEDING TO IMPEACH CONSENT.

A consent decree responsive to the bill stands so long as it remains in that form as an obstacle to a rehearing of the cause, to a bill of review, and to an appeal, but, where it recites that it was entered by consent of a party, and he denies seasonably that he consented, a bill of review is an appropriate remedy, and a decree thereon is appealable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 1075.]

2. SAME—BILL OF REVIEW.

A pleading filed may be taken as a bill of review and formal defects therein disregarded where its purpose is that of a bill of review, although it is denominated a petition.

3. APPEAL AND ERROR—RECORD—SUFFICIENCY OF TRANSCRIPT.

A transcript is sufficient if its contents show jurisdiction and so much of the record as is necessary for the consideration of the questions presented for determination; and the practice is for the appellate court to allow such defects to be cured and omissions to be supplied as are not fatal to its own jurisdiction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2673-2684.]

Appeal from the Circuit Court of the United States for the District of Kansas.

On Motion to Dismiss Appeal.

L. W. Keplinger (C. W. Trickett, on the brief), for appellants.

C. F. Hutchings (O. L. Miller, I. P. Dana, S. W. Moore, and Fred H. Wood, on the brief), for appellees.

Before HOOK and ADAMS, Circuit Judges, and AMIDON, District Judge.

PER CURIAM. A decree was entered by the trial court which materially affected substantial rights claimed by appellants. It contained recitals that the parties had consented thereto. The appellants, contending they gave no consent, petitioned the court to correct the decree in that particular. From an order denying the petition this appeal was taken. The appellees now move the court, to dismiss the appeal because (1) the order is not an appealable one; and (2) the transcript filed here is not sufficient and is not properly authenticated. In support of the motion, the appellees say the petition was one for rehearing, was therefore addressed to the discretion of the trial court, and consequently under a familiar rule the denial thereof is not the subject of review. A consent decree responsive to the bill stands, so long as it remains in that form, as an obstacle to a rehearing of the cause, to a bill of review (*Thompson v. Maxwell*, 95 U. S. 391, 24 L. Ed. 481), and to an appeal (*McCafferty v. Celluloid Co.*, 43 C. C. A. 540, 104 Fed. 305). Where a decree recites that it was entered by consent of a party, and he seasonably denies he consented, there must obviously be some method by which he may so challenge the action of the court in that particular and put upon the record the facts which induced it that they may be reviewed by an appellate court; otherwise a misconception of the legal significance of the conduct of a party litigant might prevent him from obtaining a judicial determination of his rights in any court, trial or appellate. A bill of review which proceeds to decree upon evidence and hearing is an appropriate remedy. In *Terry v. Commercial Bank*, 92 U. S. 454, 23 L. Ed. 620, it was held such a bill would lie where the solicitor of a party deserted his interests, failed to except to reports of a receiver and a master, and improperly consented to the decree; also where it was sought to set aside a decree for fraud. In *Ensminger v. Powers*, 108 U. S. 292, 2 Sup. Ct. 643, 27 L. Ed. 732, a decree recited that the cause was heard

on bill, answer, exhibits, agreement of counsel, and proof, and had been fully argued, and the court had duly deliberated thereon. Notwithstanding the cause was in equity, a bill of exceptions tendered by the defeated party was allowed and signed by the court, and filed as part of the record. It showed that the judge had abnegated his judicial functions, and had not considered and determined the issues in the case. It was held on bill of review that the decree was a nullity.

In the attack upon the decree in the case at bar not much attention was paid to the rules of pleading and practice in equity, but we think the petition presented to the trial court may be regarded as a bill of review. That it was called a petition does not determine its true character, and that it was informal in other respects may be disregarded in the interest of substantial justice. It was filed within the time allowed for a bill of review, was addressed to the judges of the Circuit Court, and contained a statement in ample detail of the parts of the decree objected to, with the grounds of objection, followed by a prayer for specific and general relief and a verification. The appellees, though not served with process, appeared to the petition by filing a full verified answer, in which they set forth facts upon which they claimed the consent rested, and prayed that the decree be confirmed without modification, but, if that were not done, then that the decree be wholly vacated, and the cause be left to stand upon the report of the master and the exceptions. The appellants prayed that the matters be inquired into and determined by affidavit or otherwise as to the court might seem proper; and the proof submitted by both parties was in the form of affidavits. The trial court found the facts to be as stated in appellees' answer and the supporting affidavits, independently of its personal knowledge, and denied the petition. No objection was made to the form of the pleadings or the character of the proof. In *Knox v. Iron Co.* (C. C.) 42 Fed. 378, a petition for rehearing was treated as a bill of review because the relief sought could only be granted upon a bill of that character. The decree which resulted was reversed on appeal (*Hoffman v. Knox*, 1 C. C. A. 535, 50 Fed. 484), but for other reasons.

We also think that the transcript is sufficient. The question involved is whether appellants consented to the decree, not whether it should prevail upon hearing on the merits. The transcript contains three of the original bills of complaint, the original decree reciting appellants' consent thereto, the petition attacking it, the answer to the petition, all of the proof upon the issue so made and the order of the court denying the petition, also all the papers and proceedings perfecting the appeal to this court. The provisions of the fourteenth rule of this court relating to transcripts on appeals and writs of error authorize the omission of those parts of the record not necessary to the hearing. A transcript is sufficient if its contents show jurisdiction and so much of the record as is necessary for the consideration of the questions presented for determination, and the practice is for the appellate court to allow such defects to be cured and omissions to be supplied as are not fatal to its own jurisdiction. *Teller v. United States*, 49 C. C. A. 263, 111 Fed. 119; *Larned v. Jenkins*, 48 C. C. A. 252, 109 Fed. 100; *Burnham v. Railway*, 30 C. C. A. 594, 87 Fed. 168;

Nashua & Lowell R. R. v. Boston & Lowell R. R., 9 C. C. A. 468, 61 Fed. 237. The authentication of the transcript is sufficient.

The motion to dismiss the appeal is denied.

GENERAL ELECTRIC CO. v. DUNCAN ELECTRIC MFG. CO. et al.

(Circuit Court of Appeals, Seventh Circuit. April 14, 1908.)

No. 1,397.

PATENTS—INFRINGEMENT—ELECTRIC METERS.

The Duncan patent, No. 604,465, for an electric meter, the invention relating to means for counterbalancing or compensating for the friction which opposes the rotation of the armature in an integrating watt-meter, which consists of one or more adjustable coils, is not infringed by the device of the Duncan patent, No. 752,048, in which electrical instead of mechanical means are used to accomplish the same purpose; the coils being stationary.

Appeal from the Circuit Court of the United States for the District of Indiana.

The decree from which this appeal is brought dismisses the bill filed by the complainant appellant, upon final hearing, for want of equity. Infringement of letters patent No. 604,465 is charged by the bill against the defendants appellees, and this patent is one of three several letters patent whereof infringement was adjudged against the same defendants in a prior suit, reported as Siemens-Halske Electric Co. v. Duncan Electric Mfg. Co., 142 Fed. 157, 73 C. C. A. 375; the present complainant having acquired title to such patent from Siemens-Halske Electric Company. In the case at bar the defendants are alike estopped from disputing the validity of the patent or scope of the claims within the fair import of their terms, as therein adjudicated, and the decree rests on the finding of noninfringement, with the issue thus narrowed. The present device of the defendants, however, alleged to be an infringement, was adopted and used after the commencement of the former litigation and not involved therein. It also appears that the defendant Duncan obtained a patent therefor, No. 752,048, issued February 16, 1904.

Patent No. 604,465, in suit, was issued to the defendant Duncan May 24, 1898. As stated in the specification, the "invention relates to improvements in electric meters, particularly that class known as 'integrating watt-meters' of the motor type." As described in the appellant's brief, the invention "relates to means for counterbalancing or compensating for the friction which opposes the rotation of the armature of an electric meter. This friction varies under different conditions, and the invention of the patent in suit consists in the employment of an adjustable compensating coil for counteracting or compensating for such friction, whereby the varying degrees of such friction at different times may be taken care of and the 'balance' of the meter maintained."

The introduction of "an adjustable compensating coil," namely, adjustable in relation to the armature, for the purpose referred to, instead of the pre-existing compensating coil which was in fixed position and "not variable in character," constitutes the single feature and means of novelty and invention in this class of so-called "integrating watt-meters."

Other specifications and facts involved in the inquiry are mentioned in the opinion, and the following are the claims in the patent whereof infringement is alleged:

"3. The hereinbefore-described method of securing a variable compensation for the increased friction incident to use in an electric meter, consisting in accelerating the rotation of the armature by the influence of one or more adjustable compensating coils arranged in co-operative relation therewith."

"6. In an electric meter adjustable compensating coils, 24, mounted as

shown in inductive relation to the rotary armature and adapted to compensate for the increased friction incident to use, substantially as described.

"7. In a motor-meter the combination of a series field carrying the main current, a revoluble armature in inductive relation to said field, and an adjustable compensating coil or coils in co-operative relation to said armature for the purpose specified."

The defendants' substitute device is a compensating (or shunt) coil, fixed in position and not adjustable to or from the armature, provided with means (described in Duncan's subsequent patent No. 752,048) for varying the effect by switching into circuit additional "turns" of the coil. This means consists of electrical connections terminating in contact points arranged in the form of an arc and stationary, and a switch arm so mounted in circuit that its tip engages the contact points in turn as required. Thus the number of coils energized by the current is increased or diminished by turning the switch arm.

Edward Rector and Drury W. Cooper, for appellants.

Robert H. Parkinson, for appellees.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

SEAMAN, Circuit Judge (after stating the facts as above). The question of infringement or noninfringement involved in this appeal is within narrow compass. Its solution hinges alone on the fair interpretation of the claims in suit, as allowed in patent No. 604,465, for the means there described, "for counterbalancing or compensating for the friction which opposes the rotation of the armature of an electric meter." This means is expressly defined, in specification and claims, as "an adjustable compensating coil or coils" in co-operative relation to the armature, with adjustability for such co-operation conceded to be the single feature of novelty; the compensating coil (or shunt coil) in fixed position in electric meters being well known and so recognized in the specification. As therein stated, this adjustability of the coil provided "a simple and efficient means for compensating for the increased friction caused by the wear and continued use of the working parts of the meter," and the sole means shown or claimed as invention was the provision for "bodily movement" of the coil towards and from the armature, to vary its influence and maintain the "balance" of the meter.

The defendants' meter employs means for like purpose, but retains the compensating or shunt coil of the prior art in fixed position, incapable of this mechanical or bodily movement of the patent device, and then provides electrical connections from sections of the coil to stationary central points, with an electrical switch to make the desired contact, "thus causing the current to flow through a greater or smaller number of turns of the wire constituting the coil," whereby its effect upon the armature is varied. Identity in the general purpose and result of compensating for friction is obvious in both devices, although various distinctions are claimed on behalf of the defendants, of advantage and disadvantage in such means respectively. The defendants' means, however, for such effect, is a departure, as we believe, from any idea of invention disclosed or taught by the patent—with the limited scope undeniably imposed by its recitals and terms. As stated by one of the experts:

"The patented method of adjustment is purely a mechanical movement of the coil, the means for effecting it being merely a mechanical agent for

changing the position of the coil, while no electrical change is made in the strength or path of the current through the coil. On the contrary, defendants' meter employs a principle, method, and means that are purely electrical, no movement of the coil being provided for or even possible."

In other words, the conception of the patentee for the improved means was to move and adjust the coil for the well-known effect of proximity upon the armature, with no change of current, while the other device adopts electrical connections to vary the length of path of that current through the coil—giving more or less "turns to the coil"—for like result.

The contention for infringement in this change of means and method is this: That the one is a well-known equivalent of the other, in the electrical art, for producing a variable effect; that the substitute means of the defendants to that end "is in fact and in substance an 'adjustable' coil," in the "nomenclature of the art" and within the meaning of the claims; that ordinary skill only was required to make the substitution; and that the general doctrine of equivalents is applicable to such substitute. We are of opinion, however, that neither of these propositions is tenable, under the plain disclaimers and limitations of invention for which monopoly was granted in this patent.

The specification describes the "improved means for compensating for the increased friction of the meter resulting from use" as consisting "of two compensating coils" located over the armature, and "firmly held in position out of contact with the armature by means of" clamps, with arms which "firmly embrace said coils"; also, provisions for adjustability. It then states:

"As these compensating coils may be variously adjusted toward or away from the armature and can be employed in meters having field-coils of different forms, I do not hereby limit myself to any of the specific forms or relative arrangements herein shown."

The following statements then appear:

"One of the principal features of my invention is the means I employ to make the meter reliably operative on small currents or small amounts of energy and to compensate for the increase of friction incident to continued service. For example, when a meter is first calibrated it possesses a certain amount of friction, which has in some meters been temporarily compensated for by supplementing the series field with a shunt-coil, thereby producing an auxiliary starting-field, which however, is not variable in character. The result is that after the meter has been in use for some months the friction of the moving parts in most cases will have so increased that from five to ten times as much energy is required to start it as when first calibrated.

"Another objection to the employment of a stationary shunt-coil in the present meters is the fact that any changes made in it, such as adding more turns to it, simply adds resistance into the armature-circuit, which results in possibly compensating for friction, but lowers the registry or characteristic on all the other loads. Placing the said supplement shunt-coil inside of the series coil is also objectionable, as it thus becomes a secondary to the series coil on alternating currents, thereby setting up a counter electromotive force in opposition to that of the mains. This counter effect increases as the current through the series coils increases, whereby its tendency to overcome friction decreases as the energy of the current through the meter increases instead of remaining constant.

"My improved means for overcoming the above objections is by employing one or more, preferably two, compensating coils, 24, located immediately above the armature. These compensating coils are connected in series

with the armature and a suitable resistance, 25. In calibrating the meter these compensating coils are simply moved laterally or vertically by means of the screw, 30, until the friction is overcome, whereupon a small amount of energy through the meter will operate it."

Thus it is conceded that shunt-coils have been used in meters to compensate for friction and made more or less variable in effect by other means, with express mention of "the stationary shunt-coil" as objectionable, because "changes made in it, such as adding more turns to it, simply adds resistance into the armature circuit, which results in possibly compensating for friction, but lowers the registry or characteristic on all the other loads." The only invention claimed or suggested was the introduction of means to make the coil adjustable instead of stationary, "for overcoming the above objections." Were it assumed therefore that the expedient adopted by the defendants, of "adding more turns" to the stationary coil, would otherwise appear, in any sense, within the contemplation of the invention and scope of the grant, it was not only disclaimed by this reference, but its exclusion, under the careful specifications of the improvement in means claimed and allowed is unmistakable, as we believe. That the effect obtained in improved compensation was not patentable is well settled, and the limitation to the means devised therefor is well recognized in these specifications, if not in the construction sought on this appeal. The disclaimer is binding, whatever the prior state of the art, either in fact or as viewed by the patentee, and no interpretation of the claims is authorized to charge the defendants with infringement for use of the stationary coil and electrical connections for equivalent function.

The alleged inconsistency between the present contentions of the appellant for construction of the patent and the construction urged and allowed in the prior litigation referred to do not require consideration, and the decree appealed from is affirmed.

B. F. AVERY & SON v. J. I. CASE PLOW WORKS.

(Circuit Court, E. D. Wisconsin. July 2, 1908.)

PATENTS—WRONGFUL INSTITUTION OF INTERFERENCE PROCEEDINGS—RIGHT OF ACTION FOR DAMAGES.

The action of a defendant in causing interference proceedings to be instituted and prosecuted in the patent office thereby delaying the issuance of a patent to complainant, although malicious and for the purpose of obtaining the benefit and use of the invention in the meantime, does not give a right of action at law for damages.

At Law. On general demurrer to complaint.

Edward T. Fenwick and L. L. Morrill, for plaintiff.

James H. Peirce, for defendant.

SEAMAN, Circuit Judge. The facts stated in the complaint are, in substance: Pendency in the Patent Office of rival applications for a patent on improvements in a seed planter—alleged to be the conception of plaintiffs' assignor, who filed the senior application—whereupon interference was declared. The junior applicant, representing

the defendant, was so persistent in his contentions and obstructive proceedings that no patent was issued to such senior applicant until long after the date he would otherwise have been entitled thereto, although all such contentions and proceedings on the part of the defendant were without merit and ultimately overruled, and the claims of the senior applicant were finally allowed, with grant of a patent accordingly. It is further averred, in effect, that these obstructive proceedings were intended to delay the issuance and thus obtain meantime benefit and use of the invention; that the defendant entered into the making of such improvements prior to such grant, and inflicted the injury complained of; and that such conduct was malicious.

Upon the facts so stated I am of opinion that no cause of action at law appears. That no case of malicious prosecution is set forth within the authorities cannot be doubted; nor do I understand that counsel for plaintiff so predicates any right of recovery. The proceedings referred to in the Patent Office and in the courts, however unmeritorious under the averments, were orderly civil proceedings, involving neither arrest of person, seizure of property, nor defamation of business credit or character. If the patent was unfairly delayed thereby, it nevertheless issued for the full term of monopoly authorized by law, and thus conferred exclusive use for such term, which is the only substantial property right obtainable (In re Dann [D. C.] 129 Fed. 495, 497); and no actionable injury arose out of the delay. The right of the inventor to a monopoly is purely a creature of the statute, not recognized at common law; and no cause of action arises, to say the least, at law, for infringement, before the grant of a patent, so no damages are recoverable for prior use, however obtained. *Rein v. Clayton* (C. C.) 37 Fed. 354, 356, 3 L. R. A. 78, and authorities cited. Whether equitable relief may be granted against use of a secret process (unpatented), whereof disclosure was obtained by the user through fraudulent representations and betrayal of confidence, followed by fraudulent application and issuance of a patent in favor of such user, as upheld in *Murjahn v. Hall* (C. C.) 119 Fed. 186, is an inquiry not involved in the present suit, nor within the facts complained of.

The authorities cited in support of this complaint do not meet the objection above stated, which I believe to be fatal, and the demurrer is sustained, with leave to amend the complaint within 20 days, unless the plaintiff elects to stand thereupon and submit to dismissal.

AMERICAN SULPHITE PULP CO. v. BAYLESS PULP & PAPER CO.

(Circuit Court, M. D. Pennsylvania. June 6, 1908.)

No. 36, December Term, 1907.

1. PATENTS—SUIT FOR INFRINGEMENT—EQUITY PRACTICE—PLEA.

It is the office of a plea in equity to present some one single and well-defined ground of defense, which, if sustained, will dispose of the case and avoid the expense and delay of a hearing; and in a suit for infringement of a patent the defense of noninfringement cannot properly be presented

by a plea, at least where it involves a consideration of evidence extrinsic to the patent itself.

2. SAME—MOTION TO STRIKE OFF.

That a plea is bad, as in effect setting up the noninfringement of the patent in suit, a defense which is to be made by answer and not by plea, is not a defect of form, to be taken advantage of by motion to strike off, but of substance, to be disposed of by setting the plea down for argument, which takes the place of a demurrer.

In Equity. On motion to strike off plea.

F. T. Benner, for the motion.

Henry Schreiter, opposed.

ARCHBALD, District Judge. "The cautious practitioner," says Mr. Foster (1 Foster's Fed. Pract. § 143), "will act wisely in eschewing the use of pleas, unless he desires to plead matter in abatement, or in extraordinary cases; for it is as true now as in the time of Beames [Beames on Pleas, 61] that the subject of pleas in equity is one 'concerning which so much remains to be elucidated, that it may be said of them, maxima pars eorum quae scimus est, minima eorum quae ignoramus.'" Something of the same kind no doubt was also in the mind of Vice Chancellor Kindersley when he declared in *Hanby v. Richardson*: "A plea is a very perilous experiment, and is generally unsuccessful." It is in effect a special answer, setting up some one thing why the suit should be dismissed or barred. Story's Equity Pleadings, § 649. 16 Encycl. Plead. & Pract. 588. And, as this, according to the present equity practice can as well be done by the ordinary general answer, the tendency of the profession is to avoid and of the courts to discourage the use of it. It must be recognized, however, that there are still some occasions when a plea is a convenient and appropriate means for disposing of a case on some one single and well-defined ground, doing away, if sustained, with the expense and delay of a hearing. It is resorted to in the present instance, because, as it is claimed, on the face of it the defendants' structure is not the structure of the patent, but the structure which is there disclaimed. This presents, as it is said, a single and narrow issue which, if made good, dispenses with the necessity for an extended inquiry into the validity of the patent and the defendants' alleged infringement of it which would otherwise follow. Whether, under any circumstances, a plea of this character would be justified, it is not necessary to decide. It would not ordinarily, almost every patent requiring the aid of extraneous evidence to construe it, and fix its place in the current art, as well as to determine whether or not the defendants' device infringes upon it. And it certainly would not be here, for proof of which we need go no further than the plea itself; for, not content with taking the patent as it stands, and resting on the terms of the disclaimer which there appears, in order to reinforce the contention as to the construction to be given to it, the defendants not only set up generally the existence prior to the patent of pulp digesters, continuously covered or lined with adhesive, cementitious, acid-resisting material, but particularly assert that this form of continuous lining is to be found in letters patent issued in 1883 by the Republic of France to one Maurice

Emile Pierredon, a reproduction of the drawings and an extract from the specifications of which, translated into English, is set out in the plea. Moreover, to further distinguish the defendants' digesters, and show that they do not come within the terms of the patent, it is also averred that in a suit brought in the Circuit Court of the United States for the Northern District of New York by one Romedius Panzl against the Battle Island Paper Co. (132 Fed. 607), it was adjudged on final hearing that the acid-proof composition which the defendants use to lay up the brick lining of their digesters, and which is covered by the patent granted to the said Romedius Panzl, was not known in the art at the time of or prior to the patent in suit, but was an independent and distinct invention of which he the said Romedius Panzl was the original and first inventor, which decision the Court of Appeals of that circuit afterwards affirmed. 138 Fed. 48, 70 C. C. A. 474.

It is suggested by counsel that this part of the plea may be stricken out, but there is no formal motion to do so, and I do not see my way, therefore, to altogether disregard it. But it matters little whether it is regarded or not, as it does not change the character of the plea, which is bad as this analysis shows, either with or without it. The defense which is set up in it, as is plain, is nothing more nor less than the usual one of noninfringement put perhaps in a somewhat novel and unusual form, but none the less such because of being so disguised; which by all the authorities must be set up by answer, and not by plea. *Sharp v. Reissner* (C. C.) 9 Fed. 445; *Hubbell v. De Land* (C. C.) 14 Fed. 471; *Jones v. Berger* (C. C.) 58 Fed. 1006; *Union Switch Co. v. Phila. & Reading R. R.* (C. C.) 69 Fed. 833; *Arrott v. Standard Co.* (C. C.) 113 Fed. 389; *Glucose Sugar Refining Co. v. Douglass* (C. C.) 145 Fed. 949. Otherwise, the same defense is open to be made twice, reappearing in the answer after having been overruled in the plea, the very thing which it is the office of a plea to avoid; and this is exemplified in the present instance, for, putting everything else aside, the plea is to be justified if at all on the asserted fact that the defendants' structure is the structure which the patent disclaims. But this, if considered and overruled at this time, will clearly be open to be urged again, and appropriately so, to help make out the claim that the defendants do not infringe—which they, of course, intend to maintain—the same thing being thus put forward, for the same purpose, a second time.

This is not a defect of form, however, to be taken advantage of by motion to strike off (*Computing Scale Co. v. Moore* [C. C.] 139 Fed. 197), but of substance, to be disposed of by setting the plea down for argument, which takes the place of a demurrer (*Burrell v. Hackley* [C. C.] 35 Fed. 833; *Travers v. Rose*, 14 N. J. Eq. 254). But this is not material, as it must in any event be overruled. *Union Switch Co. v. Philadelphia & Reading R. R.* [C. C.] 69 Fed. 833.

Plea overruled, and defendants required to answer within 30 days.

CLEVELAND PNEUMATIC TOOL CO. v. CHICAGO PNEUMATIC
TOOL CO.

(Circuit Court, E. D. Pennsylvania. July 11, 1908.)

No. 14, April Sessions 1904.

PATENTS—INVENTION—PNEUMATIC TOOL.

The Richards patent, No. 665,033, for a pneumatic tool, the only claimed novel feature of which is a permanently open live air port for admitting air to the rear of the piston to act as a cushion and reduce the jar, and to aid in starting the same, is void for lack of utility as well as invention, in view of the prior art; also *held* not infringed, if conceded validity, in view of its narrow scope.

In Equity. Suit for infringement of letters patent No. 665,033, for a pneumatic tool, issued January 1, 1901, to C. B. Richards. On final hearing.

E. Hayward Fairbanks, for complainants.

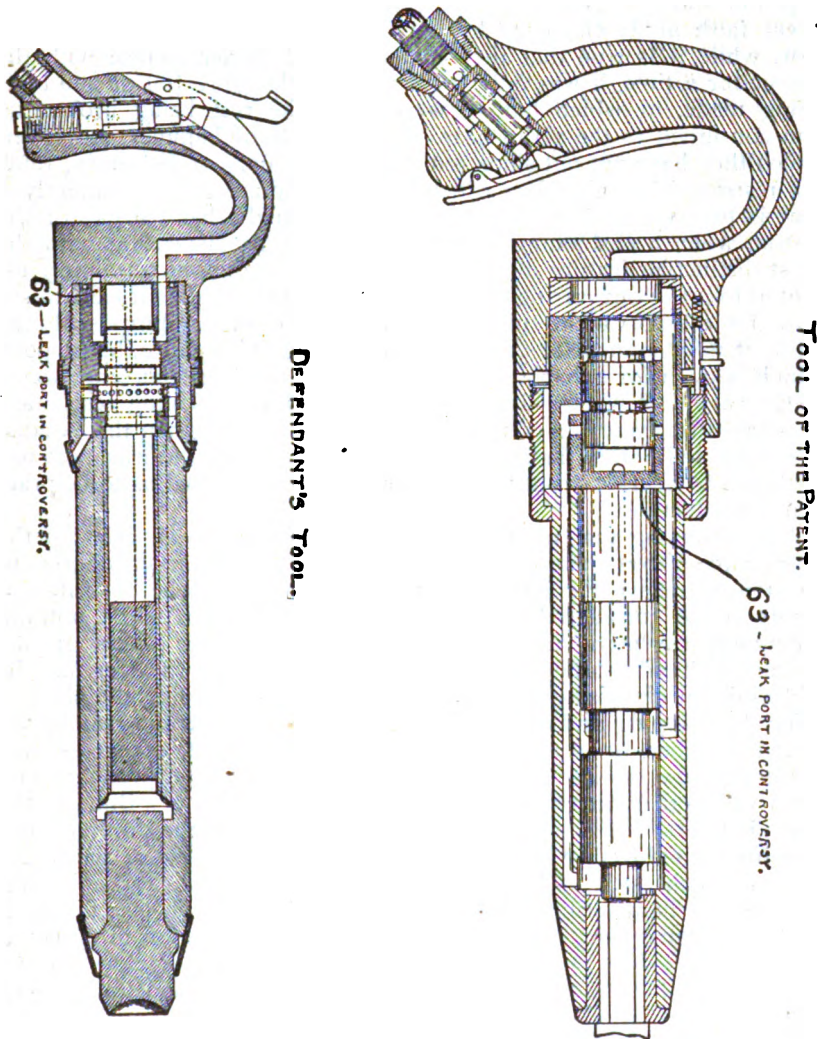
Samuel E. Hibben and Frank P. Prichard, for defendants.

ARCHBALD, District Judge. The patent in suit is for a pneumatic tool; the controversy being over that feature of it, by which, through a permanently open port or supply duct, live air is admitted to the rear of the piston or plunger cylinder, and the claims which cover it being given in the margin.¹ The advantage claimed for this, in the specifications, is that "at the end of the back stroke the plunger will be cushioned by the live air entering the rear end of the plunger cylinder through the permanently open shallow channel" thereby provided, thus reducing the jar experienced in the use of tools of this character, which at the best is racking, and also preventing the piston or plunger from striking against the end of the piston chamber or valve block. It is also now further claimed to furnish an initial impulse in starting the plunger forward, so that it shall respond on the instant to the action of the motive fluid, which is of especial importance when the tool is held vertically, as in overhead riveting. But nothing of that kind is suggested in the patent, and is conceded by the inventor to be an afterthought. The defendants, in the tool which they put out, make use of a permanent live air port, such as is so specified; but it is differently located, opening into the rear of the piston chamber back of the control valve, through which the plunger reciprocates, instead of immediately back of the plunger, and is not

¹ "20. In a pneumatic tool, the combination with a plunger-cylinder provided with air inlet and exhaust at its rear end and with a small duct at said end for permanent admission of live air, of a plunger reciprocating in said cylinder, and means for returning said plunger to and against the air-cushion provided through said permanent air-supply duct, substantially as set forth.

"22. In a pneumatic tool, the combination of a plunger-cylinder having an inlet and exhaust port at each end and means for distributing the air to and from said ends and formed with a permanently open live air inlet port of small area at the inner end of its bore, and a plunger reciprocating in said cylinder and cushioned at its back stroke by the air admitted through said last-mentioned port, substantially as set forth."

intended to cushion or relieve the back stroke, as it is said, but purely and solely to start the tool quickly, the cushioning of the plunger being otherwise provided for, by means of the live air trapped in the rear of it.



The utility of the complainants' device for the purpose designated is challenged, and is exceedingly doubtful under the showing made. The permanently open live air port, which is its feature, is declared by the inventor in a later patent to be unessential, although desirable to expedite the shifting of the valve, and is entirely omitted in a still later one, as it is in the one taken out by Secher & Greve in the complainants' interest. By the experiments, also, which were put in

evidence, it is established, as the complainants themselves in the end were compelled to admit, that, as a means to prevent the plunger from striking the end of the piston chamber or valve block the device is useless; the alternative advantage being thereupon claimed for it as a piston starter. Nor have the complainants themselves shown any great faith in its efficiency by the use which they have made of it. For, while it is true that they manufactured in accordance with the patent for a time, it was only for a few months, only 100 or 200 tools being made, of which but 50 were sold; the rest being broken up and consigned to the scrap heap. In the style of hammer, moreover, which they have put out since some time in January or February, 1900, the restricted live air inlets which they employ are not permanently—that is to say, at all times—open, but only on the back stroke of the piston, when a cushioning effect is desired, thus dispensing with the most distinctive feature of the device, as well as the one absolutely essential to make out infringement. Nor, upon principle, is it easy to see how the leak port of the patent can be effective for any purpose, located as it is in immediate proximity to the rear inlet and exhaust port, which is open for exhaust, and through which it must therefore waste at the very time when it is supposed to afford a cushioning resistance. It is said that there is a point during the back stroke, when the exhaust is cut off and before the live air is readmitted, when the leak port has a chance to operate. But this, if true, is so infinitesimal as to be practically ineffective.

But, assuming that a small, permanently open, live air inlet, at the rear of the piston chamber, may possibly serve, to a certain degree, to cushion or relieve the jarring of the plunger, and so be of sufficient utility to be considered, there would seem, even so, to be nothing patentably inventive, in a device of that kind, over others of like character already to be found in the prior art. Those devices may be laid aside, in discussing this, which provide for cushioning the plunger solely by trapping and compressing the motive fluid in the rear of the piston chamber, or in a recess or pocket back of that, except as they serve to show the use of such fluid for cushioning purposes, in one form or another, in reciprocating tools, to be common. But, on the other hand, no distinction is to be made by reason of the different motive force employed, whether steam or air; nor the size or particular use to which such tools are put, whether hand-held, for chipping, riveting, or hammering, or mounted on tripods or wheels, for rock drilling or quarrying, the structure and mode of operation in all being substantially alike. *American Pneumatic Tool Co. v. Bigelow Co.* (C. C.) 100 Fed. 467; *American Pneumatic Tool Co. v. Philadelphia Pneumatic Tool Co.* (C. C.) 123 Fed. 891.

Thus in the Sypher (1886) steam drill—in which, by the way, the use of compressed air is also recognized—at the rear of the piston chamber not only is there a pocket where the steam is confined, by which the piston is cushioned on its back stroke, but in addition there are restricted ports for admitting live steam into the same, for the same purpose, as well as to start the piston forward from its extreme rearward position. The distinction is made, as to these restricted ports, that they are intermittently and not permanently open, being

controlled by a spring check-valve, which closes when the density of the steam in the cushioning space exceeds that of the boiler pressure. But that does not do away with the effect of the use which is so disclosed of ports of this character to admit the motive fluid, both to form a cushion and to start forward the piston, the particular functions claimed for the device of the patent. These ports, moreover, are open so long as they are functionally useful, corresponding in this respect to the modified form to be found in the style of hammer at present put out by the complainants.

The same is to be said of the two subsequent Syphers, improvements on the first, in each of which, while the piston is principally cushioned on the steam trapped or locked in the rear of the piston chamber by the closing by the piston of the supply and exhaust inlets, a restricted amount of live motive fluid is admitted into such cushioning space, by small inlet or leak ports additionally provided for the purpose, as it is said, of starting or lifting the piston in overhead work, and also, as declared in the one, of assisting to cushion it; the cushioning effect, whether claimed or not, necessarily existing in both, if it does in the device in suit. Here, too, no doubt, the leak ports are not at all times open; but they are when they are of any efficiency, which would seem to be all that is required. It may be noted in passing, with regard to the last (1892) Sypher, that in the location and function of this port it is closer to the defendants' device than is that to the device of the patent.

In the Richmann (1880) rock drill, also, after the piston in its backward movement has closed the rear exhaust, the air back of it is trapped to form a cushion; a small live air port, leading into this part of the piston chamber, being closed by the outward pressure of the air against a plate valve, and, on the shifting of the control valve, admitting live air again to the rear of the piston, so as to start it forward, until taken up by the motive air supply coming in through the regular channels.

The Allen (1877) pneumatic hammer also provides for cushioning the piston by trapping the air at the rear of the piston chamber; a small live air port leading to it (which is closed for the time by a flap valve, so as not to waste the effect) admitting the motive fluid again to the rear of the piston, to start it forward.

In the Ross (British, 1898) hammer there is also the same double provision for reducing the shock of the back stroke: First, by the compression of the air back of the piston, after it has closed the rear exhaust port; and, second, by the direct introduction of the actuating fluid, through a permanently open live air port, to a cavity or recess, provided for the purpose, in the rear of the piston chamber, and separated from it by a movable end plate or diaphragm, this plate being kept in forward position by the pressure of the motive fluid admitted through the port, but yielding, as required, to the compression by the piston of the air in the piston chamber.

Except as to trapping the air, the construction of the Harrison (1882) coal mining machine is quite similar. Here, the same as in, the Ross, there is a disc or plate at the rear of the piston chamber, pressed normally into forward position by live air admitted back of

it through a small duct or port permanently open; this live air, in conjunction with the plate, forming a cushion to receive the impact of the piston.

So in the Wood (1873) rock drill, not only is the air trapped or compressed in the rear of the piston chamber, but, by means of a movable head closing it, a cavity is formed back of that, into which live air is admitted through a small port, for the purpose of still further cushioning the piston. This port is closed by a poppet valve against the escape of the motive fluid under the back pressure of the piston; but, the same as in the other cases mentioned above, it is opened whenever the admission of the fluid supply would be effective for cushioning purposes.

Again in the Boyer (1895-1897) chipping hammers the piston, after the shifting of the control valve, moves rearwardly against the resistance of an air cushion, formed by the live air admitted through small inlet ports thereby uncovered.

In the Boyer (1901) long stroke hammer, however, the cushioning is effected solely by trapping and compressing the air in the rear of the piston chamber. And so is it in the hammer manufactured under the Boyer application of September 26, 1899, which application, although filed over two months before that of the patent in suit, is still pending and undisposed of. In this latter style of hammer, however, not only does the piston trap and compress the air in the bushing which forms the rear of the piston chamber, both cushioning it and serving to start it forward, but a small leak port is also shown in the shell valve, through which the piston reciprocates, which admits live air about the piston in its rearward position, and thence, as it is claimed, by reason of its loose fit, to the rear of the piston chamber, both assisting to cushion the piston, as it is said, as well as to start it forward. But the purpose of this leak port is to admit live air to act upon and shift the valve, in advance and independently of that admitted through the rear main inlet, and the additional function which is claimed for it is, to say the least, doubtful. This style of hammer, moreover, was not devised until the summer of 1899, and while it is said to have been manufactured and put out the same year, which would make it a part of the prior art from that time on, regardless of the disposition of the pending application, the evidence leaves it uncertain from just when it is to be so taken, which does away with much of the effect of this. If considered, however, as established in the art, by such use, in the fall of 1899, prior to the application for the patent in suit, its significance, even so, consists solely in its showing a small leak port, of the same general character as that of the complainants' tool, for the purpose of admitting live air intermittently into the piston chamber, about the piston, but not directly, at least, in the rear of it; neither the cushioning nor the starting of the piston, by such means, being effectively disclosed.

Summing up the results of this review, it thus appears that in various reciprocating tools, operated by fluid motive force, long prior to the patent in suit, similar inlet or leak ports, in direct connection with the fluid supply, were extensively employed for the purpose of admitting such fluid to the rear of the piston or piston chamber, in

order to assist in cushioning the piston or lessening the shock or jar from it on its backward stroke, as well as to lift it or give it a quick forward start, either or both. It matters not, in view of this, whether the invention be confined to the cushioning function assigned to it in the patent (*Computing Scale Co. v. Keystone Co.* [C. C.] 88 Fed. 788, 101 Fed. 837, 42 C. C. A. 48; *Whitaker Co. v. Huntington Co.*, 95 Fed. 471, 37 C. C. A. 151; *Anthony Co. v. Gennert*, 108 Fed. 396, 47 C. C. A. 426), or is allowed the further effect now claimed for it of securing a quick start. In either case it is met by a similar device, employed for the same purpose, already in the art; the only difference being the particular location given to it and its relation to some of the adjacent parts. The distinction sought to be made for it, that in no other instance is the port permanently open, admitting the motive supply uncontrolledly to the rear of the piston, taken strictly, may be true, laying ground for the contention that no direct anticipation of the device is thus shown. But the question is not so much whether it has been anticipated as whether it shows any inventive advance over what was already known and used, as to which it is obvious that it does not. The whole invention, as it is to be noted, resides simply in the particular location given to the leak port, and in leaving it open at all times to the fluid supply. But the distinction between a port of this character left permanently open and one intermittently so, particularly where the latter is open whenever it is capable of any effective function, amounts to but little on the question of invention. And the same is true of the location of the port, whether opening back of a disc or plate at the rear of the piston chamber, or into such chamber direct at the rear of the piston. With parts so closely identical, both in form and function, it clearly involved no invention, as it served no useful purpose, in making use of a small live air inlet, old in the art, to lead it into the piston chamber at the rear of the piston, dispensing with a check valve, and leaving it open at all times to the motive supply. The change so effected from that which had gone before consisted in nothing more than a shifting of the position of the port, giving it uninterrupted contact with the air supply, and making it directly operative on the parts involved; altogether too insignificant and inconsiderable a matter to be made the basis of any claim.

But, even assuming that there was possibly some small margin of invention in this rearrangement and adjustment of old parts, and that possession was thereby legitimately taken of an unoccupied portion of the inventive field, still the invention is necessarily a narrow one, being confined by existing devices to the particular arrangement shown, which the defendants have not appropriated, and do not, therefore, infringe. It may be that, taking the patent literally, this cannot be said; the claims being in terms fulfilled by the defendants' device. But that does not altogether control. The fact is, as already pointed out, that, located as the defendants' live air port is at the extreme rear of the piston chamber, and opening there into a pocket or recess in which the air is trapped, the device approaches much nearer to others already in use than it does to the one in suit. Differing from that of the patent, the function claimed for it is the starting of

the piston; the cushioning being otherwise provided for. And while the complainants may be entitled to whatever utility resides in their invention, and the appropriation of it is not to be disguised by assigning a different use, there is no ground for any charge of that kind here. Both cushioning and starting, by means of restricted live air inlets, located exactly like these, and in immediate contact with the motive supply, being old, the defendants had a perfect right to adopt, as they have, that which they thus found already at hand in the prior art. The only point of similarity outside of this, and the only possible ground of complaint, is that it was left permanently open, instead of being checked or controlled. But this, as the basis of a claim either of infringement or invention, is of too little consequence to be sustained.

The bill will be dismissed, with costs.

SUDDARD v. AMERICAN MOTOR CO. et al.

(Circuit Court, D. Massachusetts. August 13, 1908.)

No. 295.

PATENTS—SUIT FOR INFRINGEMENT—COSTS.

Under Rev. St. § 4922 (U. S. Comp. St. 1901, p. 3396), where more than one claim of a patent is sued on in a bill in equity to restrain infringement, and one claim is held void, although others may be held valid and infringed, complainant is not entitled to recover costs; nor is he entitled to a decree, except on filing a disclaimer of the void claim, which otherwise invalidates the entire patent, and the better practice is to require such disclaimer to be filed before final decree.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 608.]

In Equity.

Horatio E. Bellows, for complainant.

Robert W. Frost, for defendants.

LOWELL, Circuit Judge. This was a bill in equity to restrain the infringement of a patent. Several claims were in suit, of which one was found to be valid and infringed. An injunction was issued restraining further infringement, and the question here presented concerns only the costs in the case. The defendant contends that the allowance of costs to the complainant is forbidden by Rev. St. § 4922 (U. S. Comp. St. 1901, p. 3396), which reads as follows:

"Whenever, through inadvertence, accident, or mistake, and without any willful default or intent to defraud or mislead the public, a patentee has, in his specification, claimed to be the original and first inventor or discoverer of any material or substantial part of the thing patented, of which he was not the original and first inventor or discoverer, every such patentee, his executors, administrators, and assigns, whether of the whole or any sectional interest in the patent, may maintain a suit at law or in equity, for the infringement of any part thereof, which was bona fide his own, if it is a material and substantial part of the thing patented, and definitely distinguishable from the parts claimed without right, notwithstanding the specifications may embrace more than that of which the patentee was the first inventor or discoverer. But in every such case in which a judgment or decree shall be rendered for the plaintiff no costs shall be recovered unless the proper

disclaimer has been entered at the Patent Office before the commencement of the suit. But no patentee shall be entitled to the benefits of this section if he has unreasonably neglected or delayed to enter a disclaimer."

To construe that section, its history must be examined carefully.

The original patent act (Act April 10, 1790, c. 7, § 2, 1 Stat. 109) provided that the application for a patent should contain a "specification in writing containing a description." As distinguished from the specification, neither the application nor the patent contained any "claim," and the scope of the patent was gathered from the specification. Anything corresponding to the modern multiplicity of claims was impossible. In *Lowell v. Lewis*, 1 Mason, 182, Fed. Cas. No. 8,568, Mr. Justice Story said:

"By the common law, if anything material to the construction of the thing invented be omitted or concealed in the specification, or more be inserted or added than is necessary to produce the required effect, the patent is void. This doctrine of the common law our patent act has (whether wisely admits of very serious doubts) materially altered; for it does not avoid the patent in such case, unless the concealment or addition shall fully appear to have been made for the purpose of deceiving the public.' Section 6. Yet certainly the public may be as seriously injured by a materially defective specification resulting from mere accident as if it resulted from a fraudulent design." *Barnes v. Ryder*, Fed. Cas. No. 1,020; *Barnes v. Steamship Co.*, Fed. Cas. No. 1,021.

Section 6 of the act of 1790 read as follows:

"And be it further enacted, that in all actions to be brought by such patentee or patentees, his, her, or their executors, administrators or assigns, for any penalty incurred by virtue of this act, the said patents or specifications shall be prima facie evidence, that the said patentee or patentees was or were the first and true inventor or inventors, discoverer or discoverers of the thing so specified, and that the same is truly specified; but that nevertheless the defendant or defendants may plead the general issue, and give this act, and any special matter whereof notice in writing shall have been given to the plaintiff, or his attorney, thirty days before the trial, in evidence, tending to prove that the specification filed by the plaintiff does not contain the whole of the truth concerning his invention or discovery, or that it contains more than is necessary to produce the effect described; and if the concealment of, part, or the addition of more than is necessary, shall appear to have been intended to mislead, or shall actually mislead the public, so as the effect described cannot be produced by the means specified, then, and in such cases, the verdict and judgment shall be for the defendant."

The provisions of section 6 were not intended to narrow the common-law rights of a patentee, but to enlarge them, and to limit the rights of an alleged infringer. In certain cases a patent which was too broad, and so was wholly invalid at common law, was yet validated as to that part of it which covered a patentable invention made by the patentee.

By Act Feb. 21, 1793, c. 11, 1 Stat. 318, it was provided that the application should contain "a written description." This is evidently the "specification" of the act of 1790, and the act of 1793 provided for no "claim," as distinguished therefrom. The patent could neither claim nor cover more than one invention. In section 6 the act provided that the defendant in an infringement suit should prevail if the "specification" does not contain the whole truth relating to his (the patentee's) discovery, or contains more than is necessary to pro-

duce the desired effect, which concealment or addition shall fully appear to be made for the purpose of deceiving the public. It will be noticed that this section somewhat further enlarged the common-law rights of an inventor whose specification had been made too broad. Deception of the public without intent to deceive no longer invalidated an overbroad patent.

Act July 4, 1836, c. 357, § 117, first differentiated in our patent law the claim and the specification, though not expressly. Section 6 provided that the application should contain a written description of the invention, "and shall particularly specify and point out the part, improvement or combination which he claims as his own invention or discovery." Thereafter a patent might contain more than one claim. *Railroad Co. v. Mellon*, 104 U. S. 112, 26 L. Ed. 639. There was thus established a system of patent law supposed to relate to the old form of patent with its single claim, but made in express terms to apply to the modern patent of many claims. The statutes were meant for the first condition, but they became applicable to the second.

Section 15 of the act of 1836 corresponded to section 6 of the act of 1793. It is passed over here, because it was replaced almost immediately by Act March 3, 1837, c. 45, § 193, 194. Sections 7 and 9 of that act read as follows:

"Sec. 7. And be it further enacted, that, whenever any patentee shall have, through inadvertence, accident, or mistake, made his specification of claim too broad, claiming more than that of which he was the original or first inventor, some material and substantial part of the thing patented being truly and justly his own, any such patentee, his administrators, executors, and assigns, whether of the whole or of a sectional interest therein, may make disclaimer of such parts of the thing patented as the disclaimant shall not claim to hold by virtue of the patent or assignment, stating therein the extent of his interest in such patent, which disclaimer shall be in writing, attested by one or more witnesses, and recorded in the Patent Office, on payment by the person disclaiming, in manner as other patent duties are required by law to be paid, of the sum of ten dollars. And such disclaimer shall thereafter be taken and considered as part of the original specification, to the extent of the interest which shall be possessed in the patent or right secured thereby, by the disclaimant, and by those claiming by or under him subsequent to the record thereof. But no such disclaimer shall affect any action pending at the time of its being filed, except so far as may relate to the question of unreasonable neglect or delay in filing the same."

"Sec. 9. And be it further enacted, anything in the fifteenth section of the act to which this is additional to the contrary notwithstanding, that, whenever, by mistake, accident, or inadvertence, and without any willful default or intent to defraud or mislead the public, any patentee shall have in his specification claimed to be the original and first inventor or discoverer of any material or substantial part of the thing patented, of which he was not the first and original inventor, and shall have no legal or just right to claim the same, in every such case the patent shall be deemed good and valid for so much of the invention or discovery as shall be truly and bona fide his own: Provided, it shall be a material and substantial part of the thing patented, and be definitely distinguishable from the other parts so claimed without right as aforesaid. And every such patentee, his executors, administrators, and assigns, whether of the whole or of a sectional interest therein, shall be entitled to maintain a suit at law or in equity on such patent for any infringement of such part of the invention or discovery as shall be bona fide his own as aforesaid, notwithstanding the specification may embrace more than he shall have any legal right to claim. But, in every such case in which

a judgment or verdict shall be rendered for the plaintiff, he shall not be entitled to recover costs against the defendant unless he shall have entered at the Patent Office, prior to the commencement of the suit, a disclaimer of all that part of the thing patented which he has so claimed without right: Provided, however, that no person bringing any such suit shall be entitled to the benefits of the provisions contained in this section, who shall have unreasonably neglected or delayed to enter at the Patent Office a disclaimer as aforesaid."

This law was intended to aid further the inventor whose patent was too broadly expressed. The newly authorized disclaimer enabled him to amend the patent by an easier and speedier process than that of surrender and reissue under section 13 of the act of 1836. If the disclaimer was filed before suit was brought, the defect was completely cured. If it was filed after suit was brought, but without unreasonable delay, the patentee might recover, but got no costs. Rev. St. §§ 4917, 4922 (U. S. Comp. St. 1901 pp. 3393, 3396, are descended from the act of 1837 through Act July 8, 1870, c. 230, §§ 53, 54, 16 Stat. 205, 206. Yet in modern patent practice the disclaimer first authorized by the act of 1837 has been to some extent superseded by the introduction of many claims, variously worded, but intended to describe the same invention, so that, if one claim shall fail by its excessive breadth or otherwise, other claims will be at hand to take its place. In the old practice the patentee brought suit on his patent. Now he brings suit on certain claims of his patent. With the rest of them he does not concern himself.

The Supreme Court first came to construe the acts of 1836 and 1837 before the patent of many claims was fully developed and recognized. In *O'Reilly v. Morse*, 15 How. 62, 120, 14 L. Ed. 601, the eighth claim of a patent was held invalid. The court went on to observe:

"The patent, then, being illegal and void, so far as respects the eighth claim, the question arises whether the whole patent is void, unless this portion of it is disclaimed in a reasonable time, after the patent issued.

"It has been urged, on the part of the complainants, that there is no necessity for a disclaimer in a case of this kind. That it is required in those cases only in which the party commits an error in fact, in claiming something which was known before, and of which he was not the first discoverer; that in this case he was the first to discover that the motive power of electro-magnetism might be used to write at a distance; and that his error, if any, was a mistake in law, in supposing his invention, as described in his specification, authorized this broad claim of exclusive privilege; and that the claim, therefore, may be regarded as a nullity, and allowed to stand in the patent without a disclaimer, and without affecting the validity of the patent.

"This distinction can hardly be maintained. The act of Congress above recited requires that the invention shall be so described that a person skilled in the science to which it appertains, or with which it is most nearly connected, shall be able to construct the improvement from the description given by the inventor.

"Now, in this case, there is no description but one of a process by which signs or letters may be printed at a distance. And yet he claims the exclusive right to any other mode and any other process, although not described by him, by which the end can be accomplished, if electro-magnetism is used as the motive power; that is to say, he claims a patent for an effect produced by the use of electro-magnetism distinct from the process or machinery necessary to produce it. The words of the acts of Congress above quoted show that no patent can lawfully issue upon such a claim; for he

claims what he has not described in the manner required by law, and a patent for such a claim is as strongly forbidden by the act of Congress as if some other person had invented it before him.

"Why, therefore, should he be required and permitted to disclaim in the one case and not in the other? The evil is the same if he claims more than he has invented, although no other person has invented it before him. He prevents others from attempting to improve upon the manner and process which he has described in his specification, and may deter the public from using it, even if discovered. He can lawfully claim only what he has invented and described, and if he claims more his patent is void. And the judgment in this case must be against the patentee, unless he is within the act of Congress which gives the right to disclaim.

"The law which requires and permits him to disclaim is not penal, but remedial. It is intended for the protection of the patentee, as well as the public, and ought not, therefore, to receive a construction that would restrict its operation within narrower limits than its words fairly import. It provides 'that when any patentee shall have in his specification claimed to be the first and original inventor and discoverer of any material, or substantial part of the thing patented of which he was not the first and original inventor, and shall have no legal or just claim to the same,' he must disclaim in order to protect so much of the claim as is legally patented.

"Whether, therefore, the patent is illegal in part because he claims more than he has sufficiently described, or more than he invented, he must in either case disclaim, in order to save the portion to which he is entitled; and he is allowed to do so when the error was committed by mistake.

"A different construction would be unjust to the public, as well as to the patentee, and defeat the manifest object of the law, and produce the very evil against which it intended to guard.

"It appears that no disclaimer has yet been entered at the Patent Office; but the delay in entering it is not unreasonable, for the objectionable claim was sanctioned by the head of the office, it has been held to be valid by a Circuit Court, and differences of opinion in relation to it are found to exist among the justices of this court. Under such circumstances the patentee had a right to insist upon it, and not disclaim it until the highest court to which it could be carried had pronounced its judgment. The omission to disclaim, therefore, does not render the patent altogether void; and he is entitled to proceed in this suit for an infringement of that part of his invention which is legally claimed and described. But, as no disclaimer was entered in the Patent Office before this suit was instituted, he cannot, under the act of Congress, be allowed costs against the wrongdoers, although the infringement should be proved."

The entire reasoning is here quoted in order that the position of the Supreme Court may be fully understood. That court held (1) that an invalid claim, unless seasonably disclaimed, invalidated the entire patent, and therefore, (2) even though duly disclaimed after suit brought, yet prevented the patentee from recovering costs. *Seymour v. McCormick*, 19 How. 96, 15 L. Ed. 557, in the language of its opinion, followed *O'Reilly v. Morse* in denying the plaintiff costs. The court there recognized that the disclaimer must often be postponed until after the final decision of the appellate court. Until that time the invalid claim may be in litigation.

Gage v. Herring, 107 U. S. 640, 2 Sup. Ct. 819, 27 L. Ed. 601, was decided in 1882, when letters patent did not essentially differ from their present form. In delivering the opinion of the court Mr. Justice Gray said:

"The invalidity of the new claim in the reissue does not, indeed, impair the validity of the original claim, which is repeated and separately stated in the reissued patent. Under the provisions of the patent act, whenever through inadvertence, accident, or mistake, and without any willful default or intent

to defraud or mislead the public, a patentee in his specification has claimed more than that of which he was the original and first inventor or discoverer, his patent is valid for all that part which is truly and justly his own, provided the same is a material and substantial part of the thing patented, and definitely distinguishable from the parts claimed without right; and the patentee, upon seasonably recording in the Patent Office a disclaimer in writing of the parts which he did not invent, or to which he has no valid claim, may maintain a suit upon that part which he is entitled to hold, although in a suit brought before the disclaimer he cannot recover costs. * * * The plaintiffs, upon filing a disclaimer of the new one, are entitled to a decree, without costs, for the infringement of the old and valid claim." 107 U. S. 646, 2 Sup. Ct. 824, 27 L. Ed. 601.

The court here recognized the need of a disclaimer to validate the patent, and denied the complainant costs where an invalid claim had been found in the patent. Other cases more or less authoritative are to the same effect. *Smith v. Nichols*, 21 Wall. 112, 117, 22 L. Ed. 566; *Sessions v. Romadka*, 145 U. S. 29, 41, 12 Sup. Ct. 799, 36 L. Ed. 609; *Burdett v. Estey* (C. C.) 19 Blatchf. 1, 7, 3 Fed. 566; *Coburn v. Schroeder* (C. C.) 19 Blatchf. 377, 8 Fed. 519; *Hake v. Brown* (C. C.) 37 Fed. 783, 785; *Draper v. Wattles* (C. C.) 81 Fed. 374; *Metallic Ext. Co. v. Brown*, 110 Fed. 665, 49 C. C. A. 147; *Fairbanks v. Stickney*, 123 Fed. 79, 59 C. C. A. 209. If there be anything to the contrary in *National Elec. Co. v. De Forest Tel. Co.* (C. C.) 140 Fed. 449, 455, it is opposed to the weight of authority.

For many purposes, however, courts have come to treat the several claims in one patent as if they were separate patents. Thus in *Game-well v. Municipal Signal Co.*, 77 Fed. 490, 23 C. C. A. 250, it was said:

"The bill of complaint charged generally infringement, but it in no particular indicated what special claims were infringed. The answer was equally general in its denials. It also, in general terms and without any specification, averred that a disclaimer was necessary. As the cause proceeded, the complainants limited their issues to claim 1 of the patent. No other claim was submitted to the judgment of the court, or passed on by it."

The defendant objected to the payment of costs, as no disclaimer had been entered. If any claim of the patent was invalid, according to the doctrine of *O'Reilly v. Morse*, the whole patent was invalid without a disclaimer, and if a disclaimer was filed the complainant lost his costs. The court said:

"There was nothing on record to show that any claims in the patent needed to be disclaimed within the purview of those provisions, and the court had not been asked to pass on any claims except the first one, even if it could have been required to do so merely for a matter of costs."

The final decree sometimes does not mention the needed disclaimer; but it is made necessary by the statute, and, unless it is seasonably entered, the complainant may lose the benefit of his otherwise successful litigation. It is proper to notice the disclaimer in the decree, and to require its filing before the final decree is entered.

The court has not here to decide if a defendant, answering to a bill of complaint which is specifically limited to certain claims of a patent, may set up the invalidity of other claims not "in suit," in order to escape the payment of costs. The statutes seem broad enough to admit this defense, but the question may be left for decision when it

arises. In the case at bar it is enough to hold that where a court finds that one claim sued upon is invalid and another claim is valid, so that the complainant obtains a decree, he is yet to be deprived of costs by force of the statute as interpreted by the courts.

CHAMBERLAYNE v. AMERICAN LAW BOOK CO.

(Circuit Court, E. D. New York. August 4, 1908.)

LITERARY PROPERTY—ACTION FOR INFRINGEMENT OF RIGHTS—PRELIMINARY INJUNCTION.

On motion for a preliminary injunction to restrain the further sale of volumes of a law cyclopedia containing an article written principally by complainant, in a form and with annotations which it was alleged would cause irreparable injury to complainant's reputation as a law writer, it appeared that such volumes had already been published, copyrighted, and extensively sold in connection with others of the series, and that complainant had recovered a judgment at law for damages covering, to some extent at least, the same matters, which was under review in an appellate court. *Held*, that the injunction should be denied.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Literary Property. § 8.]

In Equity. On motion for preliminary injunction.

Frank Harvey Field (Frank Harvey Field, Ernest H. Wells, and Howard P. Nash, of counsel), for complainant.

William B. Hale (Charles N. Judson, of counsel), for defendant.

CHATFIELD, District Judge. The complainant has filed a bill asking for an injunction with relation to an article published by the American Law Book Company in the Cyclopedia of Law & Procedure under the head of "Evidence." This article is contained in 17 chapters, of which 10 are contained in volume 16 of the Cyclopedia, and the remaining seven are contained in volume 17 of that publication. The entire article bears the title "Evidence," with a footnote as follows:

"The author and editor of particular sections are indicated in a footnote at the beginning of each section. The entire article was revised and edited by Charles C. Moore and Wm. Lawrence Clark."

At the head of chapters 1, 10, and 11 is the title of the chapter, with a star referring to a footnote:

"By Charles F. Chamberlayne. Revised and edited by Wm. Lawrence Clark."

The second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, twelfth, and thirteenth chapters have a star reference as a footnote:

"By Charles F. Chamberlayne. Revised and edited by Charles C. Moore and Wm. Lawrence Clark."

The fourteenth chapter has a star footnote:

"By A. S. H. Bristow. Revised and edited by Charles C. Moore and Wm. Lawrence Clark."

The fifteenth chapter has a footnote:

"By Hiram Thomas. Revised and edited by Charles C. Moore and Wm. Lawrence Clark."

The sixteenth chapter has a footnote:

"By Joseph Walker Magrath. Revised and edited by Charles C. Moore and Wm. Lawrence Clark."

The seventeenth chapter has a footnote:

"By Charles C. Moore."

The allegations of the bill are substantially with relation to the making of a contract under which the complainant performed work and wrote substantially the greater portion of the article "Evidence," and that the defendant, with intent to injure the complainant, and in alleged violation of its agreement, caused 4 of the 17 chapters to be written by persons other than the complainant, and then printed the entire article, consisting of the 17 chapters, in the manner above set forth. The complainant alleges that the four chapters written by other persons contained a different treatment and different propositions of law from the main portions written by the complainant, and that the publication of the four chapters in one general treatise damages the complainant as a writer and specialist on the law of evidence; that the joining of the names of the editors and the additional writers who are alleged to be not writers of standard reputation upon the law of evidence deprives the complainant of credit which he would otherwise obtain, and places him in the class of the other writers, to his injury. The complainant further alleges that the article written by him was not "revised and edited" any more than the other subjects throughout the entire cyclopedia to which no footnotes with relation to revising and editing were appended, and that the manner of printing, publishing, and circulating not only the large number of volumes already in print, but the continued issuance of the volumes in question, has caused and will cause great and irreparable damage to the reputation and fame of the complainant, who had been advertised as engaged in writing the article for the purpose of this book. The complainant further recites an action previously tried in this court for damages between these same parties, which was determined in favor of the complainant, and asks relief in the form of a permanent injunction as to the first thirteen chapters, and as to so much of the last four chapters as contain the complainant's name with others as joint authors, with omission of the statement of revising and editing; and also demands that the American Law Book Company be required to set forth the true rights and standing of the complainant as sole author of the treatise on evidence, with a separate statement as to the preparation and writing of the last four chapters, and the issuance of those four chapters under a separate title, together with the costs of the action, etc.

The complainant has moved for a temporary injunction pending the outcome of the suit, based upon the complaint and affidavits reciting the particulars of the above transactions, and the various details in which he alleges the four chapters written by other persons failed to carry out the scheme and theory of the entire article as planned by himself.

The contract on which the action at law previously tried was based is also set up, and certain affidavits of publishers, as to custom, are furnished, to the effect that no publisher or editor is justified in adding to or changing the essential features of a publication of this character. A further affidavit is presented by one George W. Kirchwey, Dean of Columbia University, to the effect that previous to the publication of the cyclopedia in question he had never heard of Charles C. Moore, William Lawrence Clark, A. S. H. Bristow, Hiram Thomas, or Joseph Walker Magrath as writers upon the subject of evidence, that these gentlemen have no reputation as authorities upon that subject, and that the manner of printing and compiling the article in question as published has caused said Kirchwey in his educational work to treat the entire article as a digest and not as a text-book or treatise. The defendant has answered these affidavits by affidavits of some of the same publishers, to the effect that they have no knowledge of the methods of writing law encyclopedias, and that custom does not control in the face of the existence of a definite contract, together with other affidavits, that in work upon encyclopedias of law the revising editors make changes, and exclude and include portions of articles in some cases without consultation with the authors. Another affidavit by R. W. Dumont recites a large portion of the contentions made by the defendant in the action at law recently tried in this court, sets up the pleadings in a third action previously brought in this court for an injunction prior to the institution or trial of the action at law, which has been above referred to. The former action for injunction was based upon the publication of the first 10 chapters of the article in volume 16 of the cyclopedia, and resulted in a denial of the application for a preliminary injunction in that suit. This affidavit also recites the correspondence between the parties, which comprised many of the exhibits in the trial of the action at law. The affidavit also includes a copy of the order ultimately dismissing the previous application for a permanent injunction for failure to prosecute the same, and the decision of the Appellate Division of the New York Supreme Court, in the First Department, in an action brought by one Jones, a law writer, against the American Law Book Company. Affidavits of Wm. Lawrence Clark, A. S. H. Bristow, Hiram Thomas, and Joseph Walker Magrath, and that of Adeline Sessions, stenographer, furnish much of the testimony and statements upon which the action at law in which damages were awarded to the complainant was determined. The affidavit of William B. Hale recites the various actions brought by the complainant against the defendant, and also sets forth from the record of the action at law, the charge of the court, the rendition of a verdict, and statements as to the taking of an appeal by writ of error, which is now pending in the Circuit Court of Appeals. Upon this record, the issues of the proceedings of the action at law, and the ideas of the court with reference thereto, are made a part of the present application for an injunction, and are, as well, urged in opposition to the issuance of such an injunction.

It is difficult to separate the ideas which the court had in determining the amount of the former verdict from the questions presented

upon this record. The granting of this preliminary injunction would, in effect, be a determination upon the merits of this action, inasmuch as the theory of the present bill in alleging irreparable damage must necessarily contemplate a continuing injury like trespass upon the literary property of the defendant in an unpublished manuscript. If the complainant is entitled to a preliminary injunction because such continuing trespass exists, if the publication be sold in its present form, the court would necessarily be compelled to hold that the same continuing trespass would be sufficient to entitle the complainant to a permanent injunction upon the issues, inasmuch as the affidavits substantially raise questions of law, and no issues of fact seem to be involved. The large previous issue of the cyclopedia, the fact that it has been copyrighted in its present form, and the difficulties connected with the use of the books by those already owning copies, the inconvenience to subsequent purchasers and users if the style of the book be changed, or the reference to certain parts or pages be made impossible—all these bear against the issuance of an injunction by which the publication of the cyclopedia in the same form, so far as the subject-matter is concerned, might be interrupted. It is true that a partial injunction, requiring the publishers of the cyclopedia to alter the form of the headnotes, classifications, and general index, might be possible and might afford Mr. Chamberlayne relief from the injuries which this court found upon the trial of the action at law, and because of which its verdict was rendered. But the effect of publication and copyrighting has intervened since the trespass considered in the previous action, and cannot be satisfactorily determined on this motion and at this time.

There is also a serious dispute of law as to whether the verdict rendered for the illegal appropriation of Mr. Chamberlayne's literary property, as stated by the court in its verdict to have been estimated upon an assumption that the publication was to continue in its present form, would prevent any further recovery of damages, if further use of the publication were made. That verdict was a determination of the damages suffered by Mr. Chamberlayne up to the time of the suit, and was in the nature of exemplary damages, inasmuch as no evidence of actual damage had been furnished in the case, and, as was said by the court, was estimated up to the time of the verdict, with the thought in mind that the company might or might not be held in another suit subject to further damage, if additional injury should be inflicted. It is apparent that it was not intended to determine that \$2,500 was all the damage which could be recovered at any time, if it should be subsequently held that the right to further damage continued after the rendition of such verdict, after publication, and after copyright. Nor was it determined whether or not Mr. Chamberlayne had the right to claim additional damage, provided the publication should be continued in the same form, and provided a court should hold that act actionable. If Mr. Chamberlayne can show that because of the former verdict, or for any other reason, the jurisdiction of a court of equity is needed in order to adjust the equities between the parties, and prevent a wrong that cannot be measured in pecuniary damages, that matter can be dis-

posed of on final argument of the case after the taking of testimony. But no such situation is shown at the present time, and pending the determination of the appeal from the former judgment, and as well pending a hearing upon the testimony which may be offered in this suit, it would seem that the sale of so many of the defendant's books as may be disposed of in that interval cannot so add to the injury which Mr. Chamberlayne claims to have suffered as to entitle him now to an injunction stopping the publication and sale of the cyclo-pedia as a whole, or compelling withdrawal from sale of the particular volumes or portions of volumes involved in this action.

The motion for a preliminary injunction must be denied.

THE HENDRICK HUDSON.

(District Court, S. D. New York. April 29, 1908.)

1. SHIPPING—LIABILITY OF VESSEL CAUSING DANGEROUS SWELLS—INJURY TO VESSELS AT PIER.

Vessels using a dock cannot be expected to so manage their work as to receive extraordinary swells without harm, and a vessel making such swells, although navigated in the usual manner, is responsible for their effects upon innocent vessels.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, § 345.

Liability of vessel for injuries caused by creation of swell, see note to The Asbury Park, 78 C. C. A. 3.]

2. SAME.

A steamship passing up the Hudson river at her usual speed of 16 miles an hour, and creating such swells on passing a pier that men unloading scows thereat were obliged to stop work for fear of being knocked overboard, held liable for injury caused thereby to one scow lying nearest to the shore, with little water under her and partly loaded with stone, by being pounded on the bottom with such force as to start her seams.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, § 345.]

In Admiralty.

Foley & Martin, for libellant.

Olcott, Gruber, Bonyng & McManus and Harrington Putnam, for claimant.

ADAMS, District Judge. Edward Reilly, the owner of the scow Prosperity, brought this action to recover the damages alleged to have been caused by the swells of the steamboat Hendrick Hudson, while passing the scow, then discharging a portion of her load of stone, at the foot of 158th street, North River, on the 12th day of August, 1907. It was alleged by the libellant that the scow was in all respects strong and seaworthy, was properly moored, and that the steamer when going up the river at an excessive and dangerous rate of speed, caused great suction and extraordinary swells which lifted the scow and caused her to strike violently against the bottom of the river and the dock where she lay, whereby the seams of the scow were opened and she was otherwise seriously damaged. Faults were alleged: (1) in proceeding at a high and dangerous rate of speed,

(2) in passing too close to the Prosperity, (3) in not stopping or slowing down when passing craft moored along the shore, (4) in failing to appreciate the reasonable effect of her speed and motion through the water at the place and (5) in failing to take reasonable precautions to avoid such an occurrence as described.

The answer of the steamer required proof as to the ownership of the scow, denied that she was staunch and seaworthy and alleged on the contrary that she was old, rotten, leaky and unseaworthy, required proof of her location, denied that she was properly moored, denied that the steamer passed the location described at an excessive and dangerous rate of speed, denied that she caused extraordinary swells or that any from the steamer caused the scow to strike violently against the bottom or the dock where she lay, whereby her seams were opened, or that she was thereby damaged; the answer alleged that the scow, in addition to being rotten and unseaworthy, was negligently and improperly fastened and that the place where she lay was not a proper or safe place for the scow to be moored or fastened; it was further alleged that the steamer passed the place at a reasonable speed and in a careful and proper manner and in such a way as to do no damage to boats which she passed, or which were properly moored or fastened at the docks, and that the scow was damaged through negligence on the libellant's part.

The testimony shows that the boat was about 10 years of age and in good condition. Her usual spring overhauling had been somewhat delayed and nothing had been done in the way of caulking and overhauling since November, 1906; but before she encountered the swells, which are the subject of this action, she leaked so little that it was unnecessary to pump her daily. By a survey, held on the 20th of August, following the accident, it was found that the oakum had worked out of the sides, ends and bottom and the scow was leaking badly.

The Prosperity was a rectangular wooden scow with a level deck and vertical sides with inclined overhanging ends, rising on a sloping angle from a flat bottom. She was about 100 feet long, 31 feet beam, with 10 feet depth of hold. Her whole load was carried on deck and kept in place by bulkheads at each end, forming a cargo box about 75 feet long and 29 feet inside width. Her ordinary load was from 470 to 500 yards, weighing about 500 gross tons. On this occasion she was loaded with a cargo of about 380 yards of broken stone of which 100 yards were to be delivered at 158th street. When she reached there, she was at first placed on the outside of a sand scow lying fastened to the south side of the wharf and remained there for several days, probably the 8th, 9th and 10th of August. On the 11th, she was moved around to the north side, where she lay through the night outside of another barge, and she obtained a discharging berth the next morning by lying in a diagonal position, her bow in toward the shore and the stern outside of another barge. The tidal current commenced to run flood about 5 o'clock. She was thus made fast and commenced discharging, and was only partially finished when the accident happened. There were 5 other vessels fastened to the pier at the time.

The wharf was a solid structure toward the shore but supported by piles on the outer end for about half its length. There was no bulkhead. The river bottom gradually shelved as it neared the shore and there was very little water over the bottom there at low tide. At the time of this accident it appears by the records of the city dock department, and this pier belonged to the city, that immediately next to the pier there were depths varying from 1 foot at the top of the mud, which covered the bottom, nearly inshore, to 31 feet at the end of the wharf. Such depth increased outward from the shore, slightly at the inner part, but quite noticeably, to 43 feet, at a point opposite the end of the wharf. The first berth, the outside one, covered a space of about 100 feet and at the inner end, there was a depth of 15 feet next to the wharf and 16 feet about 25 feet out therefrom. It was in this instance occupied by the barge Bourne No. 3. The next berth, partly occupied by the Prosperity, was largely over ground, which was intended to be dredged out for the purpose of making another berth but at the time was in the original condition. It commenced with the said respective depths of 15 and 16 feet and ran at the inner end, 100 feet nearer the shore line to 2 and 3 feet. The rise and fall of the tide was about $4\frac{1}{2}$ feet, so that at high tide, 11 o'clock, there would be over the respective points of the inner berth at the outer end $6\frac{1}{2}$ and $7\frac{1}{2}$ feet, according to the depths given. The master of the Prosperity said, however, that when he went to the berth, his boat was drawing 9 feet amidships. He could not give the depths elsewhere but said that probably she drew $7\frac{1}{2}$ feet at the bow, the inner end; that he went into the berth, about 7:15 o'clock and shortly afterward by sounding with a pole he found 8 or 9 feet under his bow, distant about 40 feet from a place farther in toward shore where he found 4 feet; that he had plenty of water when he went there. Under this very conflicting testimony, it is impossible to reach any definite conclusion as to the depth of water in which the boat was lying. That she was there in the position described, however, is shown by the statements of other witnesses, particularly from the Bourne No. 3, but it does not appear from any testimony except her own master's that she pounded on the bottom. There was apparently enough water to float her when she was pulled into the position in which she lay, and the depths given by the city engineer's diagram must be disregarded. The account of the depths of water where she lay given by the master of the vessel is not entirely consistent or satisfactory but when it is considered that she was seen by other witnesses to be seriously affected by the swells of the Hudson, I think that must be deemed conclusive. The Prosperity was the only one of the several boats lying at the pier which claimed to have received injury at the time but that is explained by her location at a place where she was subjected to being raised by the swells, and when the water, or some portion of it, being taken from under her by the suction. It was said by the libellant's witnesses that the swells were 6 to 8 feet high, but that cannot be credited as such waves would have gone over the wharf and there is no evidence to show that such a state of affairs existed. The height of the waves was doubtless considerably less than the estimate but the evidence is sufficient to establish that dangerous ones

were created and that the barge suffered from them by being pounded on the bottom, surged back and forth, with some slight damage from contact with the pier, and her lines stretched, notwithstanding any obstruction which might have been offered by the wharf or the outside boat.

The testimony of Mr. Kirby was particularly relied upon by the claimant, who said he observed that the swells of the Hudson scarcely moved boats lying at the pier. This witness was a very competent naval architect, who designed the Hudson for speed and with a view of creating the least swells possible and doubtless was successful in a degree in the latter respect. He certainly was as to speed, because it appeared that the Hudson ordinarily made at least 16 miles an hour, as she was doing in this instance, notwithstanding stoppages at various landings on the river. He was called as a witness after having made certain observations on the 17th of October, 1907, when he measured the height of the swells the steamer made at the pier and he said that they were "exactly eight inches." They were much higher than that in this case, sufficiently so to be dangerous to a vessel lying as the Prosperity was, with not very much water under her. Mr. Kirby also said that the people working on (at) the pier paid no attention to the waves made the day he took his observations. The testimony of the men working on the Bourne No. 3 was that when the swells from the Hudson came in on the 12th of August, they were obliged to stop working for fear they would be knocked overboard, a very different state of affairs from that which existed when Mr. Kirby ascertained his facts.

It is urged that the Hudson was operated in a reasonable everyday manner, the same as in the last two seasons of 1906 and 1907, upon the same time schedule as had been long used by the steamers of the line and no accident followed, and liability should not result from the accident in this case as the Prosperity was placed in a precarious position and she was the only vessel at the wharf claiming to have received any injury from the swells on this occasion. It does not appear, however, that such operation was not attended by the creation of dangerous swells but rather the contrary. It is true that the Prosperity's position was somewhat different from that of the other boats at the pier but it was necessarily so taking the facilities for discharging there into consideration. It can not be expected that vessels will so manage their work, as to receive extraordinary swells without harm. The vessel making such swells is responsible for their effects upon innocent vessels.

The case of *The Daniel Drew*, 13 Blatchf. 523, Fed. Cas. No. 3,565, cited by the claimant, can not now be regarded as an authority for a different rule. The more recent authorities (*The Drew* [D. C.] 22 Fed. 852; *The Majestic*, 48 Fed. 730, 1 C. C. A. 78; *The Asbury Park* [D. C.] 138 Fed. 617, affirmed 142 Fed. 1037, 71 C. C. A. 684; *Id.* [D. C.] 138 Fed. 925; *Id.* [D. C.] 144 Fed. 553; *The Hendrick Hudson* [decided February 28, 1908] 159 Fed. 581) impose a greater degree of care upon vessels which cause swells than was required in the *Drew Case*.

Decree for the libellant, with an order of reference.

HEFNER v. AMERICAN TUBE & STAMPING CO.

(District Court, S. D. New York. May 28, 1908.)

CORPORATIONS—SERVICE ON NONRESIDENT CORPORATION—RESIDENT SALES AGENT.

A sales agent, acting in New York for a foreign corporation, is not a person upon whom process can be served in a suit in which the corporation is sought to be held liable as consignee of a cargo to be delivered in another state, in a transaction with which such agent had no connection.

[Ed. Note.—Service on foreign corporations, see notes to *Eldred v. American Palace Car Co.*, 45 C. C. A. 3; *Cella Commission Co. v. Bohlinger*, 78 C. C. A. 473.]

In Admiralty. On motion to set aside service.

Peter S. Carter, for libellant.

Hastings & Gleason, for respondent.

ADAMS, District Judge. This action was brought by Henry Hefner, as master and owner of the barge *Elizabeth H. Gross*, to recover from The American Tube & Stamping Company the freight and demurrage alleged to be due by reason of the failure of the respondent to fulfil its contract made with the libellant to pay the amount, \$324.92, agreed upon as in compromise and in settlement of the claim arising from the said failure in the delivery of the cargo at Bridgeport, Connecticut, after transporting it from St. George, Staten Island.

Upon the libel being filed process was duly issued and delivered to the marshal, who on the 19th of May, 1908, filed his return alleging:

"I hereby certify, That on the 14th day of May, 1908, at the City of New York, in my district, I served the within citation upon the within-named respondent The American Tube and Stamping Company by exhibiting to George Damerel, as N. Y. Sales Agent of said Company at #100 Broadway, N. Y. the within original, and at the same time leaving with him a copy thereof."

The process was returnable on the said 19th of May, and when called, the respondent filed a special appearance objecting to the jurisdiction of the court and moved to set aside "the attempted service of the citation."

The question presented is whether the service described in the marshal's return is sufficient to authorize a retention of the action.

The respondent also filed an affidavit dated May 18, 1908, alleging as follows:

"George Damerel being duly sworn, deposes and says that he now is and was at all times hereinafter stated an employee of the American Tube and Stamping Company and that he is not now and never has been a director or officer of The American Tube and Stamping Company and that his sole connection therewith has been that of employee.

That on the 14th day of May, 1908, deponent was served with the citation or paper hereto annexed.

That on the 14th day of May when the said paper was attempted to be served upon deponent, deponent informed the person who attempted to make such service that he had no authority to accept any papers on behalf of The American Tube and Stamping Company and that he refused to accept the said paper and the paper was allowed to fall on the floor and

the person who attempted to make such service left the office, the said paper still remaining on the floor."

The libellant filed an opposing affidavit, dated May 21, 1908, alleging as follows:

"Peter S. Carter, being duly sworn, deposes and says: That he is the proctor of record for the above libellant; that he has read the affidavit of George Damerel herein, asserting that he is neither a director or officer, but an employee of the respondent company, but does not state what his duties are as such employee, and that being the case it is presumed in law that as he is known as 'N. Y. Manager' (as set forth below) he performs the duties as such; and that the above assertion of the said Damerel has no bearing upon this service, as it is not necessary even under the Code of Civil Procedure for a person to be either a director or officer, but that an employee, to wit: the managing agent, can be served, and that the decisions show that employees, not known as managing agents, but performing duties coming under the designation of managing agent, from the nature of their duties can be served; and the decisions of the United States Courts show that any person performing any responsible duties is a proper person to be served.

Deponent further says: That the respondent company's name is inserted in 'The Trow (formerly Wilson's) Co-partnership and Corporation Directory of the Boroughs of Manhattan and The Bronx, City of New York,' published, March, 1904, under the following title: 'Am. Tube & Stamping Co. (Bridgeport, Ct.) (George Damerel, N. Y. Manager), 258 B'way;' and in the same Directory for 1907 and 1908 the respondent company's name appears the same way, excepting the address which is '100 B'way' (the Directories for 1905 and 1906 not being seen by deponent). And in the Telephone Directory, issued February 1st, 1908, the respondent's name appears as follows: 'Amer. Tube & Stamping Co. 100 Bway. 1370 Rector.'

Deponent further says: That before the filing of the libel or the service of the citation by the Marshal, he wrote to the Secretary of the State of New York to ascertain if any person had been designated, in accordance with Section 432 of the Code of Civil Procedure of the State of New York, to accept service of papers on behalf of the respondent, and in reply deponent received from John S. Whalen, Esq., Secretary of State, of the State of New York, a letter stating: 'I find no such designation by said corporation on file in this office,' which letter deponent annexes to this affidavit and makes the same a part hereof.

Deponent further says: That the citation served on said George Damerel was properly served for the reason herein above stated, and that his duties in said respondent corporation are such as are performed by persons classed under the designation of 'managing agent'; and that under the United States decisions the service was proper, regardless of the designation 'managing agent,' or those coming under that designation. That accompanying this affidavit is deponent's 'Memorandum on Behalf of the Libellant,' giving the United States decisions and the State of New York decisions, bearing out deponent's contention.

Deponent, therefore, prays that the application to dismiss the citation on the grounds that the said George Damerel is not the proper person on whom the citation should be served, as he does not represent the respondent, be denied, and the respondent directed to appear and answer the libel."

It appears from the libel that the cargo of the boat was shipped at St. George under a contract made with the Robinson, Baxter, Dissosway Towing and Transportation Company of the Borough of Manhattan, for transportation and delivery to the respondent at Bridgeport, and the cause of action arises out of a breach of the contract of delivery, the respondent being the consignee.

I fail to see how the court obtained jurisdiction of the matter. The return shows that the person upon whom the citation was served was

the "sales agent" of the respondent, without apparent authority to otherwise represent it and without connection of any kind with this transaction. To bring a foreign corporation here to defend an action of this character seems to me to be without warrant. It is urged that the respondent has not complied with certain New York Statutes relating to the proof to be filed before a certificate of incorporation is granted, the payment of a license tax, and the ability to sue (Laws N. Y. 1895, p. 450, c. 672, § 16; Laws 1901, p. 1365, c. 558, § 181; Code Civ. Proc. N. Y. § 1779), but it does not appear how such fact aids the libellant.

The respondent's motion is granted.

ELDER DEMPSTER S. S. CO., Limited, v. EARN LINE S. S. CO.

(District Court, S. D. New York. May 16, 1908.)

SHIPPING—LAY DAYS—DISPATCH MONEY.

Where by the terms of a charter party the lay days for discharging were to commence 24 hours after the vessel's entry at the custom house, but both parties were ready and the discharge commenced immediately after her entry, for the purpose of computing dispatch money earned under the charter the lay days commenced at the time the discharge actually begun.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, §§ 590-592.]

In Admiralty.

Ralph J. M. Bullowa, for libellant.

Horace L. Cheney, for respondent.

ADAMS, District Judge. This action was brought by the Elder Dempster Steamship Company, Ltd., against the Earn Line Steamship Company to recover the sum of \$101.70, alleged to be due by reason of an excess deduction of that sum by the respondent as despatch money. The respondent excepted to the libel on the ground that it did not state a cause of action.

The libel alleged:

"Third: On or about the 26th day of November, 1907, in the City of New York, a charter party in writing was concluded between Daniel Bacon, agent for the libellant and the Earn Line Steamship Company. Said charter party provided for the freighting and chartering of the Steamship Memnon or substitute for the carriage of a cargo of coal from the port of Philadelphia, or Baltimore, or Newport News to Havana, Cuba.

Said charter party contained among other clauses the following:

'5. It is agreed that the lay days for loading and discharging shall be as follows, steamer to take her turn in loading, as customary, and cargo to be loaded with customary despatch.

Consignees to receive cargo at port of discharge at the rate of not less than 400 tons of coal per running day, Sundays and Legal Holidays excepted. Lay days at port of discharge to commence twenty four hours after Steamer's entry at Custom House, and steamer to work at night, if required.

6. Steamer to pay charterers or their agents despatch money at the rate of five cents United States gold per net register ton per day for each lay day not used at discharging port.

7. Also, that for each and every day's detention by default of said party of the second part, or Agent, ten cents U. S. gold per net register ton per day, day by day, shall be paid by said party of the second part, or Agent, to the said party of the first part, or Agent.'

A copy of said charter party is hereby referred to, marked 'Exhibit A' and is made part hereof.

Fourth: Thereafter the Steamship Adoni was substituted in place of the Memnon and loaded 4633 tons of coal in accordance with the provisions of the aforesaid charter party and proceeded to the port of Havana and arrived at said port on the 27th day of December at 8:30 A. M. and was entered at the Custom House and commenced to discharge her cargo on December 27th, 1907 at 10 A. M. and completed the discharge of the cargo on the 31st day of December at 3 P. M.

Fifth: The discharge of the Adoni occupied in all 3 working days and 5 hours.

Sixth: The respondent, under the provisions of the Charter party aforesaid was entitled to 11 working days and 14 hours for the discharge of the cargo of coal and was entitled to \$101.70 despatch money for each day not occupied in the discharge of cargo.

Seventh: The respondent, in making payment of freight deducted \$953.44 for 9 days and 9 hours despatch money instead of \$851.74 for 8 days and 9 hours despatch money which respondent was entitled to deduct, making an over deduction of \$101.70 which has been demanded of the respondent and payment of the same has been refused."

It appears that 3 days and 5 hours were occupied in discharging. The charterer was entitled to 11 days and 14 hours for that purpose and the respondent in paying freight deducted 9 days and 9 hours. The libellant claims that it was entitled to deduct for 8 days and 5 hours only.

The contract provided that lay days should commence 24 hours after the steamer's entry at the Custom House, if required. The respondent contends that the lay days commenced, therefore, on December 28th at 10 a. m. The libellant contends that while the charterer was not obliged to commence unloading on December 27, yet as it actually did commence on that day, it must be considered as a lay day.

The libellant's view seems to be correct and sustained by the authorities—The Cyprus (C. C.) 20 Fed. 144; The Katy, L. R. Prob. Div. 1895, 56; Leary v. Talbot (C. C. Appeals, 2d Circuit, April 14, 1908) 160 Fed. 914. In the latter case, it was said:

"The vessel reported on October 17 at 11 A. M. and under the rule, the charterers were entitled to one full calendar day in which to furnish a berth, which would have given them until the morning of October 19, a calendar day extending from midnight to midnight. Laws N. Y. 1892, p. 1491, c. 677, § 27. In point of fact the discharge began on the morning of October 18, so that lay days should be calculated from that time. * * *

A contrary view seems to have been taken in Earn Line Steamship Co. v. Ennis (D. C.) 157 Fed. 941, but no authorities are cited there, and it seems to me that those cited above should be followed. One lay day was, therefore, not used and it results that the despatch money sought to be recovered belongs properly to the libellant and should be allowed.

The exception is overruled.

MILLER v. AHRENS et al.

(Circuit Court, N. D. West Virginia. September 3, 1908.)

No. 583.

1. PARTNERSHIP—FIRM REAL ESTATE—QUIETING TITLE—SUIT TO SET ASIDE DEEDS—PARTIES.

A tract of land conveyed to two or more persons as individuals is not held by them as a partnership, but as tenants in common; and the fact of an agreement between them to hold and use the land as a partnership does not render it necessary that a suit to set aside the conveyance to them should be brought against them as partners.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, §§ 104, 105.]

2. WILLS—DEVISE TO CHURCH CORPORATION—VALIDITY—STATUTORY RESTRICTION—PUBLIC POLICY—RATIFICATION—ESTOPPEL.

A devise to a church corporation of real estate which it was prohibited from taking or holding by the laws of the state was invalid and void as against public policy, and no act of ratification by a person adversely interested could estop him from contesting its validity, or render it enforceable in the courts.

3. SAME—NATURE AND ELEMENTS—PREJUDICE TO PERSON SETTING UP ESTOPPEL.

A testator devised lands in another state to a trustee for a church corporation, which devise was void under the laws of the state where the land was situated. An heir at law commenced a suit to set aside the will, and pending such suit the trustee who had sold certain of the lands to defendants deposited the proceeds in court. Complainant's mother, who was residuary legatee and devisee under the will, was not a party to such suit, but, a settlement having been agreed upon between the trustee and the contestant, she and complainant, who had at the time no knowledge of the invalidity of the devise, were induced to join in a petition asking that the will and the devise be sustained, and the proceeds of the lands distributed, in the belief that they had no interest in such proceeds. Held, that the joining in such petition did not estop them from maintaining a suit to recover the lands under the residuary devise as against defendants, who were in no manner influenced or prejudiced thereby.

4. RELIGIOUS SOCIETIES—CAPACITY TO ACQUIRE AND HOLD PROPERTY—WEST VIRGINIA STATUTE.

The statute of West Virginia (Code 1906, §§ 2606, 2613) which prohibits any church organization from taking or holding real estate, except to an amount, and for the specific purposes enumerated, cannot be evaded by devising real estate to a trustee for a church to be by him sold for its benefit, and the fact that the trustee has by a sale converted the realty into personalty will not validate the trust, or render it enforceable in equity.

5. TAXATION—FORFEITURE OF LAND—FAILURE TO LIST LAND.

Lessees of land in West Virginia, who, while in possession under such lease, obtained a conveyance of the land to themselves from a trustee to whom a void devise of the same was made by the lessor, and caused the title to be transferred to their names on the record, and who did not after the death of the lessor attorn to the true owners for the rent, cannot invoke the state statute forfeiting the land to the state because not entered on the land books and assessed in the name of the true owner during a period of five years, in a suit for the cancellation of their deed to defeat the title of such owner, to whose benefit the payment of taxes by them inured.

[Ed. Note.—Forfeiture for nonpayment, see note to Read v. Dingess, 8 C. C. A. 401.]

6. ESTOPPEL—"EQUITABLE ESTOPPEL."

Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded from asserting rights, either of property, contract, or remedy, as against another person who has in good faith relied upon such conduct, and has been led thereby to change his condition for the worse [citing Words & Phrases, vol. 3, p. 2498].

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Estoppel, §§ 121-124.]

7. WORDS AND PHRASES—"ESTOPPEL."

To constitute an estoppel the following elements are essential: (1) There must be conduct, acts, language, or silence amounting to a representation or a concealment of material facts. (2) These facts must be known to the party estopped at the time of his said conduct, or, at least, the circumstances must be such that knowledge of them is necessarily imputed to him. (3) The truth concerning these facts must be unknown to the other party claiming the benefit of the estoppel at the time such conduct was done, and at the time when it was acted upon by him. (4) The conduct must be done with the intention, or, at least, with the expectation, that it would be acted upon by the other party, or under such circumstances that is both natural and probable that it will be so acted upon. (5) The conduct must be relied upon by the other party, and, thus relying, he must be led to act upon it. (6) He must, in fact, act upon it in such a manner as to change his position for the worse [quoting Words & Phrases, vol. 3, p. 2498].

8. SAME—"ESTOPPEL IN PARS."

The doctrine of estoppel in pars has no application where everything is equally known to both parties or the party sought to be estopped was ignorant of the facts out of which his rights sprung, or where the other party was influenced by the acts pleaded as an estoppel [quoting Words & Phrases, vol. 3, p. 2500].

9. SAME—"RATIFICATION."

Ratification presumes the existence of knowledge of all the facts, and one not informed of the whole transaction is not in a position to ratify the same [quoting Words & Phrases, vol. 7, p. 5930].

In Equity. On demurrer to amended bill.

On January 9, 1907, a written opinion was filed in this cause overruling defendants' demurrers to the original bill and bill of revivor, and requiring defendants to answer. This opinion will be found in 150 Fed. 644, and fully sets forth the facts as presented by the original bill. On April 4, 1907, the defendants filed their joint and separate answer to the original bill and bill of revivor, in which they admit that Frederick Fickey, Jr., was the owner in his lifetime of the 350 acres of land in Ritchie county; that he made the oil and gas lease thereof to defendant Ahrens as charged. They allege that said lease was taken by Ahrens on behalf of a mining partnership composed of himself, James B. Ross, Henry W. Odell, George W. Sill, now deceased, and Curtis S. Barrett, operating a large number of similar leases under the name of the Cairo Oil Company; that such partners as such company drilled sundry wells which produced and some still produce oil in paying quantities, and it is insisted that defendants are not sued as a partnership under the firm name of the Cairo Oil Company. The death of Fickey testate, as charged, is admitted; also that his will was probated in Baltimore city, Md., and in Randolph county, W. Va., and that thereby he devised and bequeathed to his sister Ann R. Miller the residuum of his estate, and that such clause would ordinarily entitle her to all his property not disposed of, but it is insisted that such cannot be so in this case for reasons stated. They admit that this will of Fickey's devised this tract of land to Woods, trustee, in trust to sell and pay the proceeds thereof to the First Spiritualist Church of Baltimore; that Woods, as trustee, did sell and by deed conveyed said land to Ahrens and such deed was duly recorded in Ritchie county; that afterwards Ahrens sold an undivided three-fourths interest therein to Ross, Odell, Sill, and Barrett, and conveyed the same to them by deeds duly recorded. It is charged that

the purchase from Woods was made by Ahrens, and his conveyances to Ross, Odell, Sill, and Barrett were executed for the purpose of carrying out the projects of said mining partnership to which the same now belongs. It is charged that the First Spiritualist Church of Baltimore is a Maryland corporation, and, on information and belief, it is denied that it is a religious denomination, or seeks to teach or spread the gospel of religion, and that the devise in its favor to Woods, trustee, was contrary to the laws of this state, or that Ann R. Miller under the residuary clause was entitled to this land. They admit they are claiming title in fee to this land, and are appropriating all the oil produced therefrom and in excess of what they would be entitled to under the oil lease from Fickey. They deny plaintiff's right to any part of the oil and gas produced, and refuse to discover how much of such oil and gas has been produced until right in plaintiff is legally established. They admit Ann R. Miller to be dead, but deny that she made a will, and deny plaintiff's right to institute suit as devisee. They admit death of Sill and that by his will he gave control of all gas and oil properties in which he was interested to his executors named as defendants. They admit that they are refusing to pay any royalties under the lease or in any way recognizing plaintiff's right to any part of the oil and gas, and charge that she is estopped, despite the illegality of said devise to Woods and of his deed to Ahrens, under the Constitution and laws of this state, to set up any such claim for that, they charge, Fickey was survived by two sisters, Sarah Elizabeth Hopkins and said Ann R. Miller, mother of the plaintiff; that the former, after Fickey's death, filed her petition and caveat in the Maryland probate court contesting said will and seeking to revoke Woods' letters testamentary; that Woods filed his answer to this petition, denying its allegations, to which answer the petitioner, Sarah Elizabeth Hopkins, filed a replication, and such proceedings were had that the issue joined was sent to the superior court of Baltimore to be tried by jury; that prior to this time Woods had filed his petition in the circuit court of Baltimore city alleging Fickey's death, his will, and the probate and recordation thereof, his appointment thereunder as sole trustee to sell lands in West Virginia, including the 350-acre tract in controversy, make conveyances thereof, collect the proceeds and pay over the same to said Spiritualist Church; that he had sold the 350 acres to Ahrens for \$7,000, subject to the oil lease, and asking such court to advise and direct him in the administration of said trust; that said court by order of May 26, 1899, assumed jurisdiction and confirmed said sale to Ahrens; that Woods filed in said court his report of sale of said lands, alleging himself to be ready to distribute the proceeds, but, inasmuch as said First Spiritualist Church was a religious sect which had not received the sanction of the Legislature to accept said gift, asking to be allowed to pay into court the fund until such legislative sanction could be obtained. It is then charged that this court referred Woods' account to an auditor, who ascertained a balance from sale of lands of \$40,592.62, which included the \$7,000 arising from the sale of the 350 acres in controversy to Ahrens, and the amount to be distributed to the church was permitted to be paid into the registry of the court to await the Legislature's sanction and until the court's further order. Defendants then charge that on May 23, 1901, while the petition and caveat of Sarah Elizabeth Hopkins was pending in the superior court of Baltimore awaiting a trial of the issue by jury, and while the proceeds of the sale of lands, including the \$7,000 arising from the sale of the 350-acre tract, were in the registry of the said circuit court, the said two sisters, Sarah Elizabeth Hopkins and Ann R. Miller, and the First Spiritualist Church of Baltimore, filed their petition in said circuit court of Baltimore, by which they showed to the court that the church was devisee under the will of Fickey and as such was entitled to the money arising from these sales of lands exceeding \$40,000, the pendency of such caveat, the issues to be tried by jury arising thereout; that these two sisters were sole heirs at law of Fickey; that they were desirous that the will and the devise to the church be sustained inasmuch as the church was willing to pay \$17,500 to Sarah Elizabeth Hopkins, who received little by the will, and asked that \$17,500 be paid to the said church or to Charles R. Schirm, its attorney, to the end that the will might be established and the devise to the church be confirmed; that, in accord

with the prayer of this petition, it was ordered by this circuit court of Baltimore city that said sum of \$17,500 be paid to Schirm, the church's attorney, out of the moneys held in the cause, and this sum was immediately paid to Sarah Elizabeth Hopkins by said Schirm in accordance with the prayer of said petition, and that by the payment thereof under the circumstances aforesaid the said Ann R. Miller ratified, approved, and confirmed the devise to Woods, trustee, for the purposes of the trust set forth in Fickey's will. It is then charged that on May 25, 1901, a final order was entered upon the petition and caveat of Sarah Elizabeth Hopkins, by which the probate of the will was confirmed by consent of the church and the two sisters, by reason of all which it is alleged that plaintiff is estopped from assailing or questioning the validity of the devise and conveyance of, or distribution of, the proceeds of sales of said lands.

It is then alleged that plaintiff has no right to maintain this suit, for the said 350 acres of land has not been upon the land books of Ritchie county in either the names of Ann R. Miller or Mary Virginia Miller for five successive years since 1898 and assessed with taxes, and that, therefore, plaintiff's title is forfeited and vested in the state. Records of the proceedings referred to from the orphans' and circuit courts of Baltimore city are filed as exhibits with this answer. On May 6, 1907, the plaintiff filed exceptions to this answer relating to all allegations therein touching the mining partnership alleged to exist or to have existed between the defendants; to the allegations that Ahrens purchased the 350 acres of land for and on behalf of this partnership; to all allegations charging ratification of the devise to Woods, trustee, for the benefit of the church, and claiming estoppel to deny its validity and to all allegations charging forfeiture of the land. In August following she, by leave, filed an amended bill in the nature of a special replication to the answer of the defendants, in which she charges: That the mining lease of Fickey was made to Ahrens personally, and not to any copartnership. That none of the defendants are designated or described as copartners in any of the deeds assailed, nor is the Cairo Oil Company mentioned or referred to therein. That long after the defendants had acquired claim of title and long after Ahrens had paid the purchase price to Woods, trustee, Sarah Elizabeth Hopkins did file caveat and petition in the orphans' court of Baltimore to annul the order probating Fickey's will on the grounds of mental incapacity of, and undue influence over, testator and defective execution of the will itself. That Woods, trustee, answered this petition, and issues were framed and sent to the superior court of Baltimore for trial by jury. That these issues were (1) whether Fickey was of sound mind and capable of executing the will; (2) whether the paper writing probated was executed by him as, and for, his last will and testament; (3) whether it was procured to be executed by him through fraud; and (4) whether its execution was procured by undue influence over him. That in the trial of these issues the court directed Sarah E. Hopkins to be plaintiff and Woods, executor, to be defendant. That neither the plaintiff nor her mother, Ann R. Miller, were party to, or represented by counsel in, the controversy at any time. That during trial Sarah E. Hopkins and her counsel and the counsel for Woods and the church agreed to compromise the contest, and she, Mrs. Hopkins, agreed thereby to dismiss her petition and consented to accept \$17,500 as payment therefor. That thereupon Charles R. Schirm, president of the church and one of counsel for Woods, trustee and executor, with other counsel for Woods and the church, prepared a petition in the names of Sarah Elizabeth Hopkins, Ann R. Miller, the First Spiritualist Church of Baltimore, addressed to the circuit court of Baltimore, praying said court to order \$17,500 out of the \$40,000 standing to the credit of said church in said court to be paid to Schirm, alleging the petitioners, including Ann R. Miller, to be desirous that the will and devise to the church be sustained, which petition they procured plaintiff and her mother to sign and file in said circuit court. That plaintiff and her mother did not desire said devise to be sustained. No order sustaining it was entered by said court. It had no jurisdiction to sustain it. There was no issue in said court requiring or authorizing construction of said will as to the validity of said devise, and the statement of desire in the petition was immaterial and irrelevant.

It is then charged that neither plaintiff nor her mother was in any way consulted, aided, or participated in the compromise. That the payment of the \$17,500 to Mrs. Hopkins was not made by any agreement on their part, nor did they receive any part thereof or any other thing. That they did not know from what source the \$17,500 was derived, did not know the 350 acres of land had been sold by Woods to Ahrens, did not know the nature of the petition signed by them, except that they were informed by an executor of the will of Fickey, acting as counsel for the trustee or church in the contest, that it was a paper to stop the attempt to break said will which they must sign, and that the money was not to come off Ann R. Miller. That her mother was an aged woman, and neither she nor plaintiff were experienced in business, had never lived in West Virginia, nor prior to Fickey's death owned any property there; knew nothing of the laws of that state touching the right of churches or their trustees to hold property; were wholly unadvised at the time of the invalidity of said devise, and, if they had been so advised, would never have signed said petition. It is then charged that, while they had no knowledge, counsel for the church and trustee did know of the invalidity of said devise under the laws of West Virginia, that plaintiff and her mother had made no claim to dictate the disposition of the funds in court, had never appeared in said cause, and that there was no proper cause for them signing the petition, and that the procuring them to do so was to embarrass them, if possible, in the assertion of title to said land when, if ever, they should learn the truth and their right thereto. That none of the defendants herein were parties to said proceeding in the superior or circuit courts of Baltimore. That defendants never notified plaintiff or her mother of the purchase by them of the land from Woods, trustee. That neither she nor her mother had ever known or heard of defendants at the time they signed the petition or for many months thereafter. That at the time Ahrens purchased from Woods he was operating the land for oil and gas, and knew the value thereof. That he and his codefendants were paying in royalties alone for oil taken therefrom upwards of \$285 per month. That the \$7,000 paid was grossly disproportionate to its value, and it is charged that Ahrens was informed that the devise to Woods was invalid, and his purchase was made upon hazard and speculation, and not in good faith. That after the recording of the deed from Woods, trustee, to Ahrens, the land was transferred and has been assessed in the name of Ahrens and co-claimants for each and every year since, and no taxes are due thereon to the state. That such taxes have been so assessed and paid to, and by, defendants, who claim title under the same grant and the same title as plaintiff, and who were and are tenants or lessees of hers, in debt to her for rents and royalties to an amount of upwards of \$25,000, which makes forfeiture under the circumstances impossible. Plaintiff then tenders to allow for these taxes paid by defendants upon an accounting had.

To this amended bill the defendants have filed a demurrer, assigning as grounds therefor that the matters set forth in said amended bill do not in law constitute defense to either the estoppel or forfeiture relied on by them in their answer, and the cause has been submitted upon this demurrer.

Maynard F. Stiles, for plaintiff.

Harry P. Camden, for defendants.

DAYTON, District Judge (after stating the facts as above). In my opinion heretofore filed in this case passing upon the demurrer to the original bill (150 Fed. 644) I held that the devise to Woods, trustee, for the benefit of the First Spiritualist Church of Baltimore, a Maryland corporation, assuming it to be a religious organization, was absolutely void as being contrary to the public policy and to express constitutional and statutory provisions of this state; that under express statutory provision, the devise having failed, the legal title to the 350 acres in controversy passed, under the residuary clause of the will,

to plaintiff's mother, Ann R. Miller; that by reason of the relation of landlord and tenant existing between plaintiff and defendants under, and by virtue of, the lease for oil and gas executed by Fickey in his lifetime to Ahrens, plaintiff had right to maintain this suit for the purpose of quieting her title thereto and removing clouds placed thereon by her said tenants, the defendants. By the answer of defendants three defenses are sought to be made: First. That defendants constitute a mining partnership, and are not sued as such. Second. That Ann R. Miller, the mother under whom plaintiff claims as sole devisee and heir at law, ratified the devise to Woods, trustee, for the benefit of the First Spiritualist Church of Baltimore, thereby validating it. Third. That plaintiff's title has become forfeited and vested in the state by reason of the land being omitted from the land books and not assessed with taxes for five consecutive years since 1898.

The first of these grounds of defense can be quickly disposed of. It is not alleged in the answers that the deed of Woods to Ahrens or those of Ahrens to his codefendants, sought to be set aside, anywhere disclose a partnership relation. It is not alleged that the oil and gas lease of Fickey to Ahrens disclosed such relation. "A joint purchase of the land by two does not constitute a copartnership in respect thereto, nor does an agreement to share the profits and losses on the sale of land create a partnership. The parties are only tenants in common." *Clark v. Sidway*, 142 U. S. 682, 12 Sup. Ct. 327, 35 L. Ed. 1157.

In considering the second defense, we must constantly bear in mind the distinction between contracts void for reasons of state, declared so by its laws or by its policy, as defined by its courts as being against the public interests, and contracts not inherently vicious, but void or voidable by reason of the infirmity of the parties, their fraudulent acts, misrepresentations, or misconduct, or by reason of defects in the execution thereof. When the disability to contract is removed, the party who has acted under disability may ratify and confirm the void act not in itself *malum prohibitum*. The fraudulent act, misrepresentation, or misconduct of one party to a contract can be waived or condoned by the other, and by such waiver or condonation the latter may completely estop himself to defend against the contract on the ground of such fraud, misrepresentation, or misconduct. If the execution of the instrument be defective, such defects may be waived or subsequent ratification in legal form may be made. There never can be by the parties either ratification or confirmation of a contract that is expressly prohibited by law to be made, or which contravenes public policy. The interests of the state and society intervene and are paramount. If the state forbids the doing of an act because to do it is against public good, one cannot accomplish the act by having another confirm it. Both the act and the confirmation are unlawful, and the one can in no way legalize the other. One cannot be estopped from disclaiming a contract prohibited by law or public policy from being made, no matter how hard he may theretofore have tried to ratify and enforce it. In this case I have in my former opinion reached the conclusion that the Constitution and laws of West Virginia expressly prohibit the incorporation of religious organizations; that they prohibit them as voluntary associations from acquiring more than 4 acres of

land in an incorporated city, town, or village, and not exceeding 60 acres outside of such city, town, or village; that such limited areas, too, can only be held for use as a place of public worship, a minister's residence, and a burial place; that all gifts, conveyances, and devises of real estate in larger area and for other uses are absolutely void as against a public policy established and enforced, without break, for more than 100 years in the states of Virginia and West Virginia; that no foreign church corporation can, by reason of its being a foreign one, acquire any superior right to exist or take land in this state under our laws than could a domestic one. I can see no reason to change these conclusions. If they be sound, then it must be admitted that Fickey could not by this devise invest this church corporation with title to this land. Neither could his sister, Ann R. Miller, after his death and when she held as residuary devisee, have conveyed it to this organization and given it power to take and hold it. It follows inevitably that no act of hers, therefore, either by deed or by renunciation in any court, could confer the right, expressly prohibited by law, upon this church to take and hold this land. These principles are settled by a long line of decisions, among which may be cited *Hall v. Coppell*, 7 Wall. 542, 19 L. Ed. 244; *Oscanyan v. W. R. Arms Co.*, 103 U. S. 261, 26 L. Ed. 539; *Spare v. Home Mut. Ins. Co. (C. C.)* 15 Fed. 707; *Armstrong v. Toler*, 11 Wheat. 258, 6 L. Ed. 468; *In re Comstock*, Fed. Cas. No. 3,078; *Mayhood*, Public Policy, pp. 2, 155. Possibly the law is as forcibly stated as it can be in *Hall v. Coppell*, supra, where it is said:

"The instruction given to the jury, that, if the contract was illegal, the illegality had been waived by the reconventional demand of the defendants, was founded upon a misconception of the law. In such cases there can be no waiver. The defense is allowed, not for the sake of the defendant, but of the law itself. The principle is indispensable to the purity of its administration. It will not enforce what it has forbidden and denounced. The maxim, '*Ex dolo malo non oritur actio*,' is limited by no such qualification. The proposition to the contrary strikes us as hardly worthy of serious refutation. Wherever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the vice of the original contract, and void for the same reasons. Whatever the contamination reaches it destroys. The principle to be extracted from all the cases is that the law will not lend its support to a claim founded upon its violation."

But, in addition to this, I have no trouble in concluding that the facts set up in the answer and explained and traversed by the allegations of this supplemental bill would be wholly insufficient to create an estoppel against plaintiff or her mother, if the case were one of an ordinary contract. "Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might have perhaps otherwise existed, either of property, of contract, or of remedy, as against another person who has in good faith relied upon such conduct, and has been led thereby to change his condition for the worse, and who, on his part, acquires some corresponding right, either of property, of contract, or of remedy"—citing *Louisville Banking Co. v. Asher (Ky.)* 65 S. W. 831 (quoting 2 Pom. Eq. Jur. § 804); *The Alberto (C. C.)*

24 Fed. 379, 382; *Richardson v. Olivier*, 105 Fed. 277, 282, 41 C. A. 468, 53 L. R. A. 113; *The Ottumwa Belle* (D. C.) 78 Fed. 643, 647; *First Nat. Bank v. Dean* (Super. N. Y.) 17 N. Y. Supp. 375, 377; *Nell v. Dayton*, 43 Minn. 242, 45 N. W. 229, 230; *Griffith v. Rife*, 72 Tex. 185, 12 S. W. 168, 172; *Whiteselle v. Texas Loan Agency* (Tex. Civ. App.) 27 S. W. 309, 315; *Miller-Jones Furniture Co. v. Ft. Smith Ice & Cold Storage Co.*, 66 Ark. 287, 50 S. W. 508, 509; *Nash v. Baker*, 40 Neb. 294, 58 N. W. 706, 707; *Ricketts v. Scothorn*, 57 Neb. 51, 77 N. W. 365, 369, 42 L. R. A. 794, 73 Am. St. Rep. 491; 3 Words & Phrases, p. 2498.

According to the allegations of the supplemental bill, Ahrens had purchased from Woods, trustee, paid the purchase money, and taken conveyance for this land long before he knew plaintiff or her mother, and long before she and her mother signed the petition expressing a desire that the devise be upheld, and agreeing to the payment of \$17,500 to Schirm for the benefit of Mrs. Hopkins out of the funds in court. How can he or his codefendants come and say that in making this purchase, paying over the purchase price and taking deed for this land, Ahrens "relied in good faith" upon an act which had not at the time been done, and how could he have been led thereby "to change his condition for the worse"? But again:

"To constitute an estoppel, the following elements are essential: (1) There must be conduct, acts, language, or silence amounting to a representation or a concealment of material facts. (2) These facts must be known to the party estopped at the time of his said conduct, or, at least, the circumstances must be such that knowledge of them is necessarily imputed to him. (3) The truth concerning these facts must be unknown to the other party claiming the benefit of the estoppel at the time such conduct was done, and at the time when it was acted upon by him. (4) The conduct must be done with the intention, or, at least, with the expectation, that it would be acted upon by the other party, or under such circumstances that it is both natural and probable that it will be so acted upon. (5) The conduct must be relied upon by the other party, and, thus relying, he must be led to act upon it. (6) He must in fact act upon it in such a manner as to change his position for the worse" (citing many cases). 3 Words & Phrases, p. 2498.

Finally:

"The doctrine of estoppel in pais has no application where everything is equally known to both parties, or the party sought to be estopped was ignorant of the facts out of which his rights sprung, or where the other party was influenced by the acts pleaded as an estoppel" (citing authorities). 3 Words & Phrases, p. 2500.

"Acquiescence imports and is founded on knowledge. Acquiescence cannot arise unless the party against whom it is set up is aware of his rights. A party cannot acquiesce unless fully apprised of all his rights and all the material facts and circumstances of the case." *Hermann, Estop.* 1191.

"Ratification presumes the existence of knowledge of all the facts, and one not informed of the whole transaction is not in a position to ratify the same" (citing *Hommel v. Meserole*, 18 App. Div. 106, 45 N. Y. Supp. 407, 409; *King v. Mackellar*, 109 N. Y. 215, 16 N. E. 201, 203; *Beck v. Donohue*, 27 Misc. Rep. 230, 57 N. Y. Supp. 741, 742). Words & Phrases, p. 5930.

See, also, *Mullins v. Shrewsbury*, 60 W. Va. 694, 55 S. E. 736, a case very much in point.

If the allegations of this supplemental bill be true, and I must assume them to be so on demurrer, neither Ann R. Miller nor her daugh-

ter, the plaintiff, had any knowledge whatever of the illegal character of the devise to the church or of the mother's rights under the residuary clause of the will to this land; while defendants, if they did not know these facts at the time they purchased, had certainly much superior opportunities to know them, operating as they were in West Virginia under her laws and in contact with her lawyers. When Ahrens purchased from Woods, trustee, he must have known that Woods was selling only such title as was vested in him, and his business sense would have dictated to him the necessity of having an examination made to ascertain what the character of such title was.

But it is insisted that this devise of real estate was to Woods, trustee; that the will directed it to be sold by him and the proceeds paid to the church, whereby an equitable conversion was made of it as realty into personalty, which, in turn, was taken out of the state and placed in the custody of a Maryland court which then had exclusive jurisdiction over its disposition. This is arguing simply in a circle, and reduces itself to these conclusions: Fickey, it is true, could not devise the land direct to the church, for, if he did, he would be placed in the attitude of doing something against the policy of the law and expressly forbidden by it. He, however, for the purpose of accomplishing this result can simply intervene a trustee, and direct him to sell and give the proceeds to the unlawful purpose. It is not necessary to consider long a proposition having as its basic idea that a court of equity will lend its administration to the accomplishment by indirection of an unlawful act. While it is true that it will enforce its doctrine of equitable conversion, and "consider that as done which is directed to be done" in legitimate cases, it is also true that it will never enforce this doctrine or any other one when its enforcement aids or accomplishes an act against the law or its public policy, an act prohibited. On the contrary, it sweeps away all technicalities, cuts across all cross lots, and opposes with its full power any and all efforts to evade the law and its just and equitable purposes. The weakness of this proposition lies in ignoring the fact that these church organizations are prohibited by law from taking directly or through trustees real estate by gift, conveyance, or devise, except in the amounts and for the purposes set forth by statute. While Woods as an individual could take under devise, Woods, as trustee, as the mere representative of the church, for its sole use and benefit, could no more take than could the church itself. Had the devise been to the church as trustee with direction to sell the land and devote the proceeds to its own use, the condition would not have been one whit changed. Equity never established the doctrine of trusts, never created, suffered, or upheld one, for the purpose of securing the commission of a wrong against society or the violation of an inhibition expressly made by Constitution and statute. It is only necessary to refer to the case of *Carskadon v. Torreyson*, 17 W. Va. 43, where the real estate by solemn deed was sought to be conveyed to trustees for the purpose, among others, even allowed and defined by the statute, to wit, that of a residence for the church's minister, but, because its trust conditions did not as a whole conform to the purposes and requirements of the statute, the conveyance to these trustees was held void.

Touching the third ground of defense—the alleged forfeiture of the land to the state for nonassessment of taxes—little need be said. Plaintiff's counsel in his brief has raised the very interesting question whether, under the Legislative act of 1882, there can be forfeiture for nonassessment of taxes in this state of tracts of less than 1,000 acres since that date; but it is not necessary for me to decide this question, and it is much better that such questions should be determined by the courts of the state. It is enough to say here that it is admitted that Ahrens took possession of this land under the oil and gas lease from Fickey which by its terms has not expired. As such tenant payment of taxes could properly be enforced out of property of his and his co-defendants upon said land. If he and his codefendants have title or attempted to take title from Woods, trustee, it was Fickey's title, the same title and source of title, as claimed by plaintiff. If Ahrens has by a void conveyance caused this title to be transferred on the land book from the name of the true owner to himself and associates, and has paid the taxes on the land, such payment by him inures to the benefit of the true owner under the well settled law on the subject enunciated in *Waldron v. Harvey*, 54 W. Va. 608, 46 S. E. 603, 102 Am. St. Rep. 959; *Sturm v. Fleming*, 26 W. Va. 54; *Lynch v. Andrews*, 25 W. Va. 751; *Hall v. Hall*, 27 W. Va. 468. If, on the other hand, they have not had this land transferred to them and paid the taxes, and if it has been forfeited to the state in the name of Fickey or his devisees or heirs, the right of redemption remains in the plaintiff, and the defendants would not be heard in equity to make defense of this forfeiture in their effort to take title before attorning to their landlord. It follows that the demurrer to this supplemental bill must be overruled, and that I must hold that the defendants' answer, so far as it seeks to set up as defense partnership by defendants in the land, ratification of this devise to the First Spiritualist Church by plaintiff, and her mother and forfeiture of the land, under the facts stated in the supplemental bill and the answer, must be held unavailing.

It is to be noted, however, that respondents in this answer say:

"They do not know for what purpose said church was incorporated, or whether the creed it sought to inculcate or the rites and practices which it sought to introduce and propagate were religious in their character or not, and on information and belief these respondents deny that the denomination so incorporated under the name of the First Spiritualist Church of Baltimore is a religious denomination, and deny that said church seeks to teach and spread the gospel of religion."

I think this allegation fully sufficient to put in issue the character of the First Spiritualist Church of Baltimore as a corporation and organization, and this is a question of fact to be determined by evidence. Of course, if it be not an organization based upon and for the purpose of teaching and inculcating religion, but, on the contrary, a corporation organized for legitimate worldly pursuits and ends, then all that I have said in this and my former opinion, assuming the allegations of the bills to the effect that it was such religious organization to be true, as I had to do on demurrer, can have no application to it.

IRISH v. CITIZENS' TRUST CO. OF UTICA, N. Y.

(District Court, N. D. New York. August 13, 1908.)

1. BANKRUPTCY — VOIDABLE PREFERENCE — KNOWLEDGE OF DEBTOR'S INSOLVENCY.

A bank, which received payment of notes from an insolvent corporation within four months prior to its bankruptcy, *held* not to have known at the time, or had reasonable cause to believe, that the debtor was insolvent or intended a preference which would render the payment recoverable as a preference by the trustee in bankruptcy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, §§ 255, 256.]

2. CORPORATIONS—VOIDABLE TRANSFER OF PROPERTY UNDER NEW YORK STATUTE—INTENT TO PREFER CREDITOR WHEN INSOLVENT.

Under section 48 of the New York stock corporation law (Laws 1892, p. 1838, c. 688), which provides that a transfer of property by a corporation which is insolvent, or when its insolvency is imminent, with intent to prefer a creditor, shall be void, an intent to prefer cannot be inferred alone from the fact that the corporation was insolvent and known to be so by its officers; but where a corporation so situated made payments only to its officers and to a single creditor to which it paid notes not yet due, using practically all of its cash for such purposes, and leaving other creditors unpaid, the facts, unexplained, are sufficient to establish such intent.

3. BANKS AND BANKING—"LIEN" OF BANK ON DEPOSITS—NOTES OF DEPOSITOR.

A bank holding notes of a depositor which are due has the right to charge the same to the depositor's account. Such right is not strictly a lien, within the meaning of the bankruptcy law, but a right of set-off; but it can be exercised only as to notes which are due.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Banks and Banking, §§ 353, 354.

For other definitions, see Words and Phrases, vol. 5, pp. 4144-4152; vol. 8, p. 7707.]

4. BANKRUPTCY — SUIT BY TRUSTEE — RECOVERY OF PROPERTY TRANSFERRED BY BANKRUPT.

An insolvent commercial corporation, which had lost its stock in trade by fire, collected the insurance thereon and deposited the same in the bank where it kept its account, which held a number of its notes, some of them payable on demand, and another not due. From such deposit it paid the bank all of such notes, giving checks therefor, including the note not due, and which did not mature until after the bankruptcy of the corporation, which occurred within four months after the deposit and payments, which were both made by the officers of the corporation with knowledge of its insolvency and an intent to prefer the bank, in violation of section 48 of the stock corporation law of New York (Laws 1892, p. 1838, c. 688). The bank, however, did not have such knowledge nor reasonable cause to believe that the corporation was insolvent such as to render the payments voidable as a preference. *Held*, that while the payments were voidable under section 48 of the state stock corporation law and Bankr. Act July 1, 1898, c. 541, § 67e, 30 Stat. 564 (U. S. Comp. St. 1901, p. 3449), the trustee in bankruptcy could recover the same only to the extent of the note which was not due, since as to the demand notes the bank had a lien or right of set-off which it could exercise as against the bankrupt or its trustee.

This action is to recover \$11,102.33 and interest from February 10, 1905, under section 60b and section 67e of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 562, 564 [U. S. Comp. St. 1901, pp. 3445, 3449]), and section 48 of the stock corporation law of the state of New York (Laws 1892, p. 1838, c. 688).

Grant & Wager and Jones, Townsend & Rudd, for plaintiff.
Dunmore & Ferris and F. G. Fincke, for defendant.

RAY, District Judge. The Coventry-Evans Company, a corporation existing under the laws of the state of New York, was engaged in mercantile pursuits, and on the 27th day of January, 1905, an involuntary petition in bankruptcy was filed against it by three of its creditors, Charles W. Darling, Foster Bros. Manufacturing Company, and the Utica Sunday Tribune Company, and on the 10th day of February, 1905, the said company was duly adjudicated a bankrupt.

The bankrupt company, a stock corporation, was organized about April 1, 1902, and of its authorized capital stock, \$20,000, \$12,000 was issued at about that date. Among the members of the board of directors and stockholders of the company were John A. Breen, Charles J. Breen, Jeremiah C. Breen, Thomas Breen, Charles W. Darling, and Hammond P. Evans. Darling had little interest in the concern except as a creditor to the extent of some \$7,000 or \$8,000 and which indebtedness to him in the fall of 1904 was put in the form of a note due three months from date for \$7,151.13. This note came due prior to December 10, 1904, and as early as January 14, 1905, Darling was insisting upon its payment. This company was also owing the defendant, Citizens' Trust Company of Utica, N. Y., something more than \$11,000 in the form of notes discounted at the bank and which will be referred to hereafter. The company was owing large sums outside of the indebtedness referred to to various persons and firms of whom it purchased merchandise, etc., and much of this indebtedness was past due prior to the filing of the petition in bankruptcy, and payment had been urged. The company had not been able to pay, and had not paid, all of its accounts owing when due or when demand was made; but it had obtained extensions in many, and perhaps most, instances by paying something on account. The evidence shows and is quite conclusive that this company lost money largely from the time it commenced doing business. The books and inventory of the company, January 1, 1903, showed a net loss of a little over \$3,000, and January 1, 1904, they showed an additional loss of something over \$9,000 in running the business which, of course, wiped out the capital stock paid in of \$12,000.

November 30, 1904, there was a fire in the store of the company which caused, substantially, a total loss. The company had an insurance upon its stock of \$15,000. That the company met with a total loss, substantially, by this fire, must have been known to the defendant, the Citizens' Trust Company of Utica. The trust company also knew that the furniture company owed other debts, but did not know the amount or extent of its indebtedness; that is, there is no evidence showing that the trust company knew this. By some jugglery with figures and facts, the *modus operandi* not appearing, the adjusters made some sort of a statement in adjusting the fire loss that the company had made a gross profit in 1904, up to the time of the fire, of about \$13,000 for that year alone, and the board of directors, on this statement and on one from John A. Breen, passed a resolution, December 10, 1904, that the company continue business, and it thereupon directed a man to go out and

purchase more goods. That the furniture company was then hopelessly insolvent is abundantly shown by the evidence. That this fact was known to the company and to the directors is conclusively proved. Its insurance money was but little more than sufficient to pay the indebtedness to the trust company, and its property and assets of all kinds, exclusive of this, would have paid but a small fraction of its other indebtedness. The officers and directors of the furniture company must have known, and I find that they did know, that they had been doing business at a large and increasing loss, and that the furniture company was insolvent. One of the Breens on the stand testified that in estimating the value of their stock of goods they took the cost price of them, and then added to that 50 or 60 per cent. There was no pretense that the goods had increased in value. This appears to me to be counting chickens before they are hatched. Quite likely, the most of these goods might have been disposed of at a profit of 50 or 60 per cent., but experience had shown that it cost much more than the profit to get it. Crediting these men with common sense and ordinary understanding, I am compelled to find, and do find, as above stated, that, at the time they made the payments to the defendant, the Citizens' Trust Company, they knew the company was insolvent. It does not follow, however, that the furniture company intended a preference, for hope burns brightly in the human heart, and I am convinced that the company intended to continue business and hoped to make money and pay off its indebtedness. In the beginning of December, 1903, the furniture company did not anticipate that Darling would demand payment of his note of over \$7,000, and it may be, and probably is, true that prior to the 15th of December, or about that time, the furniture company expected it would carry the loans with the trust company as it formerly had done and without other security or indorser.

The Citizens' Trust Company was not secured, and it is evident from the evidence in the case that, on or prior to December 15, 1904, the Citizens' Trust Company had demanded payment of a part at least of the indebtedness owing to it from the furniture company, for on that day the trust company, having on deposit with it more than that sum to the credit of the furniture company derived from its insurance, charged up to the account of the furniture company \$6,070 of the notes of the furniture company, and the one who did this in the trust company testified that he had been promised a check. The check not being forthcoming prior to the close of the bank on that day, notes to this amount were charged to the account. The evidence is that, after this was done, and that evening, or the next day, the check promised came in. Under the bankruptcy law, this would not constitute a preference which can be recovered by the trustee in bankruptcy, unless I also find that the Citizens' Trust Company at the time had reasonable cause to believe that in making such payment it was intended by the furniture company to give a preference. It does not expressly appear that the trust company refused to loan money to the furniture company for the further carrying on of its business. I think the evidence fails to show that the trust company had reasonable cause to believe that the furniture company was insolvent, or that the payment to it of these notes

referred to would enable it to obtain a greater percentage of its debt than any other of the creditors of the furniture company of the same class.

It is contended, however, that under section 48 of the stock corporation law of the state of New York (Laws 1892, p. 1838, c. 688), in connection with section 67e of the bankrupt act (July 1, 1898, c. 541, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449]), the plaintiff may recover this payment of December 15th.

Section 48 of the New York stock corporation law provides, in substance, that no transfer of any property of a corporation, which shall have refused to pay any of its notes or other obligations when due, by it or any officer, director, or stockholder thereof, nor any payment made when the corporation is insolvent, or its insolvency is imminent, with the intent of giving a preference to any particular creditor over other creditors of the corporation, shall be valid, and that every transfer or assignment or other act done in violation of such provisions shall be void. It follows that, irrespective of any intent or knowledge of the insolvency on the part of the trust company, if the payment of December 15, 1904, was made by the furniture company "with the intent of giving a preference" to the Citizens' Trust Company over the other creditors of the furniture company, such payment was invalid and void, and under the provisions of section 67e of the bankruptcy act the trustee may recover such payment. When that payment was made, assuming it to have been a voluntary payment of the notes, was it made with intent to prefer the Citizens' Trust Company? If at that time the furniture company intended and expected to continue its business, to pay all its creditors, and expected that when needed it could have the same line of credit with the trust company it had had before, and only paid up these notes to save interest, an intent to prefer, in the sense of the law, cannot justly be imputed.

During the month of December, 1904, the furniture company received about \$14,850 insurance money on its fire loss, which it deposited with the trust company. There is no special significance in this, as the furniture company did its banking business with the trust company, and had since its organization, and the Breens had done their business with its predecessor. Was this money deposited there as a step in giving a preference, or to enable the trust company to obtain a banker's lien, or in the ordinary course of its business? The note to Darling was drawing interest, but, so far as appears, as stated, the other indebtedness (outside of that of the trust company), was not. It may fairly be inferred that the furniture company anticipated that from its sales it would derive profits and, by borrowing money from time to time, as absolutely needed, be able to make payments on its debts to various firms and individuals and postpone final and full payment, and so eventually get out of debt. I find no substantial evidence of collusion with the trust company or with the petitioners in bankruptcy or either of them. There is no evidence that the Darling note was being pressed at all at this time. There is no substantial evidence that Darling had indicated a purpose to withdraw his support or credit. If so, it is not shown that the furniture company knew it, or changed its action be-

cause of that fact. The notes charged up to the account on the 15th day of December, 1904, were as follows: Note of \$2,000, dated February 29, 1904; note of \$1,000, dated March 16, 1904; note of \$1,000, dated April 1, 1904; note of \$2,000, dated October 15, 1904. The note of October 15, 1904, was due in four months, or about February 15, 1905. The others were demand notes or past due. At that time, December 15, 1904, the trust company held other notes, payable on demand, made by the furniture company, viz., note of February 2, 1904, for \$1,000; note of February 9, 1904, for \$1,000; note of February 26, 1904, for \$1,500; and note of March 9, 1904, for \$1,000. It is quite suspicious that the note of October 15, 1904, for \$2,000, not due until February, 1905, was charged to the account with the other notes mentioned, December 15, 1904, and included in the payment of such notes by check made that or the next day. Was it hoped or anticipated that actual bankruptcy would be deferred until four months had elapsed? Why were not the notes due on demand to the amount stated charged up or paid by check?

I think it clear that the trust company knew of the fire, knew that the insurance money was coming in, knew there might be some question of the ability of the furniture company to continue business or meet its obligations, and desired to secure its pay from the money in bank before further complications arose. Careful banks and trust companies always should have these matters in mind. But, as before stated, prudence in financial affairs and an adherence to strict business principles on the part of such institutions is required and expected, and we do not justly infer from their exercise an intent to receive a preference or a knowledge or a suspicion even that a preference is intended. But under the stock corporation law the intent of the trust company is immaterial, provided the payment was made with intent on the part of the furniture company or its officers to give a preference to the trust company. To find an intent on the part of the furniture company or its officers to give a preference, I must find more than insolvency and a knowledge of that fact by it. It or its officers having to do with the payment must have known or expected it would have that effect. An intent to prefer, when a payment is made, in the sense of this law, cannot be attributed to every insolvent person doing business, but who expects and intends in good faith to continue business, make money, and pay all his debts and obligations, and who pays a debt that is due. However, when a debtor comes to paying to one particular creditor debts not due, in preference to paying those creditors whose demands are due, we have a different situation, and must have a satisfactory explanation of the transaction, or the intent to prefer will be necessarily inferred. Have this trust company, the defendant here, and the furniture company and its officers given such explanation? If it be true that, being hard pressed, it was desired to save paying interest, cut down expenses or outgoes, and that this was the sole object of paying this note before due, and that is the only explanation given, then an intent to prefer the trust company should not be inferred. The furniture company was owing for merchandise about \$4,000, Breen and Shaver notes, aside from Darling note of \$7,000 or over, \$1,600, other

accounts about \$13,000, in addition to its indebtedness to the trust company. The evidence is scant and unsatisfactory as to what passed between the furniture company and the trust company just before and which brought about this payment. December 10, 1904, there was a meeting of the directors of the furniture company, and within a week thereafter its officers had checked out of the insurance to themselves some \$1,800, or more. If they were intent on saving interest charges and maintaining the credit of the company, why was it that they paid themselves and the trust company alone?

During the summer and fall of 1904 the bank account of the furniture company was frequently overdrawn. After December 10th, the furniture company purchased some \$8,000 worth of new goods on credit. While between December 6, 1904, and January 27, 1905, the company received and deposited some \$20,050, it paid to Citizens' Trust Company, defendant, \$12,321.35, paying it in full, to J. E. Davis, an agent of the company, some \$685, and to the Breens, or concerns with which they were connected, some \$3,000, or thereabouts, and to Talbot, the newly elected vice president, about \$75. I think some \$66 was on deposit when the end came. I do not find any evidence that when paying up the trust company any arrangement was made or attempted to be made for further credit or a renewal of credit when necessary. To my mind this is very suspicious. It is evident that the officers of the furniture company, in paying themselves and the trust company as they did, knew that the effect was to prefer themselves and the Citizens' Trust Company and precipitate failure. I am forced to the conclusion on all the evidence that the furniture company and its officers, knowing itself to be insolvent and on the eve of probable failure, and which it had in mind, made all the payments to the trust company, including that of December 15, 1904, with the intent of giving a preference to its creditor the Citizens' Trust Company of Utica, N. Y., over the other creditors of the corporation, and that such acts were in violation of section 48 of the corporation law of the state of New York and void.

But the trust company says that it had a banker's lien on the funds on deposit, and had the right to apply this money as it came in in payment of these demand notes. Express demand is not shown, but a check was promised, and in fact given, and as entered the furniture company was credited with payment of the notes made by checks on its account. These checks were honored, and the trust company took out the money (in effect) and transferred it to itself in payment of the notes. The transaction as a whole was a payment pure and simple made by the furniture company to the trust company. By the giving and acceptance of the checks, the one paid, and the other received, payment. It was not an adjustment of accounts or the making of a set-off. It was a transfer of property.

Again, all the deposits were made in due course of business in the usual manner and within four months of the filing of the petition in bankruptcy. Hence the lien, if any existed, was created within the four months preceding the filing of the petition in bankruptcy and at a time when the furniture company knew it was insolvent, and the deposits were accompanied with an intent on the part of the furniture

company and its officers to use them in making preferential payments, paying the trust company to the exclusion of other creditors. Subdivision "e" of section 67 of the bankruptcy act provides as follows:

"(e) That all conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this act subsequent to the passage of this act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned, or incumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors. And all conveyances, transfers, or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the state, territory, or district in which such property is situate, shall be deemed null and void under this act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt. For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

If the furniture company in due course of business had deposited this money with the trust company, and it or any part of it had remained there, the simple relation of debtor and creditor would have arisen, and, in the absence of fraud or collusion or intent to give and receive a preference, there would have been mutual demands which could have been set off, the one against the other, even though the deposits were made within the four months preceding the filing of the petition. *New York County National Bank v. Massey*, 192 U. S. 138, 24 Sup. Ct. 199, 48 L. Ed. 380, 11 Am. Bankr. Rep. 42. But such is not this case. The furniture company checked out the money, all of it so far as involved here, and by checks on the account transferred it to the trust company as a payment of notes with intent to prefer and it was accepted as payment of such notes.

I cannot assent to the proposition that the trust company had a strict lien on the deposit, or any part of it, for the payment of the notes or any of them when the transaction of December 15, 1904, took place, except, possibly, so far as demand of payment on demand notes had been made. There was no lien on the deposit so far as the note of \$2,000, not due until February, 1905, was concerned. *Jordan v. National Shoe & Leather Bank*, 74 N. Y. 467, 473, 30 Am. Rep. 319; *Pearsall, as Trustee, v. Nassau Nat. Bank*, 74 App. Div. 89, 77 N. Y. Supp. 11.

In *Jordan v. National Shoe & Leather Bank*, 74 N. Y., at pages 472, 473 (30 Am. Rep. 319) the court says:

"The defendant further contends that it had, and continues to have, a banker's lien on the balance of deposit sued for. There is spoken of in the books what is termed a banker's lien, but it is not a right to retain the balance of a customer's deposit, to pay or apply upon an indebtedness of his to the bank, not yet matured. The passage quoted by the defendant from *Morse*

on Banks: "The rule may be, broadly stated, that the bank has a general lien on all moneys and funds of a depositor in its possession, for the balance of the general account"—is too broadly stated, and needs the limitation that the balance of that account must be then due and payable. A lien is a right of one to retain property in his possession belonging to another, until certain demands of him in possession are satisfied. *Hammonds v. Barclay*, 2 East, 227-235. But mere possession does not give the right. It must arise from contract or operation of law. There was no contract for a lien, in this case. Nor did the law operate to give one. It would be in complete hostility to the whole purport and contemplation of the contract of discount. The purpose, existing and understood by the parties in that act, is that the customer of the bank may draw out at his pleasure the avails of the discount. After the paper discounted falls due and payable and remains unpaid, unless other rights have intervened, the bank may hold a balance of deposits and apply it towards the payment of the paper; but these deposits in a bank create between it and the depositor the relation of debtor and creditor. *Commercial Bk. of Albany v. Hughes*, 17 Wend. (N. Y.) 100; *Ætna National Bk. v. Fourth National Bk.*, 46 N. Y. 82, 7 Am. Rep. 314. Now a debtor in one sum has no lien upon it in his hands for the payment of a debt owned by him, which has not yet matured; nor has a bank, more than any other debtor. Both hold, as debtors, the moneys of their creditors, and may set up no claim to them not given by the law of set-off, counterclaim, recoupment, or kindred rules. *Beckwith v. Union Bank*, 3 Sandf. (N. Y.) 604, affirmed 9 N. Y. 211; *Giles v. Perkins*, 9 East, 37."

What were and what are the rights of the parties under the facts of this case as to the demand notes? They were due on demand, and I find that prior to December 15th demand had been made for payment of the demand notes included in the payment of that date. The trust company had been promised a check, presumably in payment of same, and this imports a demand that such notes be paid. Assuming this, if not paid, the bank had the right, acting in good faith, and not seeking or intending a preference to charge them to the account, which it did, but the promised check coming in that evening or the next day, it treated the transaction as a payment, and so accepted the check of the furniture company. In giving the check, in making this payment the furniture company intended to prefer the trust company in violation of the stock corporation law of the state of New York and violated such law. The trust company had no intent to accept a preference and no reason to believe a preference, in the sense of the statutes, was intended. Should I find, or can I find, that the payment of the demand notes made December 15th was in satisfaction of the lien, if any? By receiving the check, did the trust company waive its lien, if any, and accept payment in due course? I cannot doubt that the trust company, after demand of payment of the demand notes, so far as demand was made, had the right to retain the deposit so far as sufficient to extinguish them. But did it do this? It accepted the check and charged that to the account. The drawing and delivery of the check was with intent on the part of the furniture company to prefer the trust company over its other creditors, and that act is declared void by the stock corporation law; but the trust company then had and still has the money and, in fact, has never parted with it. It had the right to retain it notwithstanding the unlawful intent of the furniture company or its officers. Having demanded payment of those demand notes, paid December 15, 1904, it had the right to charge them to the account, and to that extent appropriate so much of the deposit as was necessary

to their payment. This it did in fact. When the check came in, it treated that as payment, and so applied it. Has the trust company by that act lost its right to retain that money so far as the demand notes paid December 15, 1904, are concerned? Assuming that the payment, as such, by the check, was void under the stock corporation law, where are the parties left December 16, 1904? The trust company, having demanded payment, has taken the money, applied it to the payment of certain demand notes, as it had the right to do, including a note of \$2,000 not due and to the payment of which it had no right to apply any part of the deposit at that time. As to the other demand notes, paid thereafter, what was the condition and rights of the parties when the petition was filed and up to the time the adjudication was made? If no checks had been given, if no demand of payment had been made, and all the money had remained with the trust company to the credit of the furniture company, the trust company could have retained of the deposit a sufficient sum to pay all the notes due or not due as against the trustee in bankruptcy. *Matter of Phillip Semmer Glass Co., Lim.*, 11 Am. Bankr. Rep. 665; *N. Y. Co. Nat. Bank v. Massey*, 192 U. S. 138, 24 Sup. Ct. 199, 48 L. Ed. 380.

The relation of the parties would have been this: The trust company was owing to the furniture company over \$12,000, balance of deposits to its credit, and the furniture company was owing the trust company on notes, some due and some not due, a somewhat smaller sum in the aggregate. The right of set-off existed, and the trust company could have successfully resisted any proceeding to compel it to pay to the trustee any sum except the excess over the amount of such notes. Did it lose that right by in good faith accepting payment from the furniture company prior to the filing of the petition in bankruptcy; the payment of such notes having been made by the furniture company with intent to prefer? Assume that the payments, and all of them, were void, as made in violation of the stock corporation law, does it follow that this trustee in bankruptcy can recover the amounts so paid when the further fact appears, if it be a fact, that, had the payments not been made, the trust company could not hold all the money paid to it by check and sought to be recovered? Can we impose that penalty in the trust company on the ground the furniture company and its officers violated the stock corporation law in making the payments? In short, declaring the payments made by the furniture company to the trust company, from and including December 15, 1904, up to the date of the filing of the petition in bankruptcy, void, can we deprive the trust company of the right of offset it had when the checks were drawn as to the demand notes payment of which had been demanded, and would have had when the petition was filed as to the others if the payments had not been made?

I do not think the trust company had, strictly speaking, a lien on the deposits. It did have the right to retain so much of the deposits as was necessary to pay any note or notes made by the furniture company and discounted by it with the trust company and which had come due. The trust company had the right, in the absence of agreement to the contrary, to charge such notes to the account, and I do not think this

right was in any way destroyed by the giving of the check. Subsequently to the giving of the check, December 15th or 16th, for the \$6,-070, deposits made with intent on the part of the depositor, furniture company, to apply them in making preferential payments, stand on a different footing. While deposited in the regular course of business with its banker by the furniture company, they were affected by the unlawful intent, and, had they not been applied in execution of that intent to the payment of the \$2,000 note not due and the other demand notes, can we say the deposits would have remained with the trust company so as to have been subject to the right of offset at the time the petition was filed and the adjudication made? Would they not have been applied to the payment of other debts owing to other creditors? Can we construct a right of set-off or lien so called in favor of the trust company that never came into existence? This money did not remain on deposit with the trust company subject to the check of the furniture company until bankruptcy proceedings were instituted. It was not paid over from time to time after December 15, 1904, on the demand notes as demand of payment was made, but voluntarily and pursuant to an intent to make preferential payments, and such payments were void. What the situation would have been January 27, 1905, or February 10, 1905, had not these payments been made is conjectural, and it seems to me that, unless the law says a banker may charge the note of a customer due on demand to his account without any demand other than so charging it—that is, without making demand of payment of the maker—no right of set-off as to the \$2,000 note or the other demand notes, those paid subsequently to December 15, 1904, ever arose. The money was paid over to the trust company from time to time in pursuance of an illegal intent as a preference and on demand notes payment of which had not been demanded and in violation of the stock corporation law. The money paid on the \$2,000 note coming due in February, 1905, never became subject to set-off or any banker's lien. I can find no evidence of a demand as to the demand notes paid after December 16, 1904, and I find no authority, and am pointed to none, holding that a bank may charge a demand note to the account of the maker prior to his failure or the filing of a petition in bankruptcy against him, without first making a demand. The note is payable on demand made by the bank. Has the maker a right to a demand before it is charged to his account? His deposit account is subject to his check and he may have given checks for the whole amount of it to other parties relying on that fact. If the bank or trust company may charge up the demand note or notes without demand or notice, the checks would be dishonored, and the depositor's credit shaken, and perhaps destroyed. If demand is made, the maker of the note may care for it in other ways, and it seems to me that he ought to have the opportunity so to do. Demand, in such cases, is not a useless formality. It is settled that demand of payment of a note payable on demand is not necessary before suit brought, as suit brought is a sufficient demand. *Haxtum v. Bishop*, 3 Wend. (N. Y.) 13. But a deposit in a bank is not due and cannot be made the subject of set-off against a note held by the bank until demand is made, although it is presently

payable on demand. *Munger v. Albany City National Bank et al.*, 85 N. Y. 580, 587; *Howell v. Adams*, 68 N. Y. 314. So of a deposit with a private individual. *Boughton v. Flint*, 74 N. Y. 476. On the other hand, the statute of limitations begins to run as against a note payable on demand from its date, whether demand is made or not, even if it is drawn with interest. *Wenman v. Mohawk Ins. Co.*, 13 Wend. (N. Y.) 267, 28 Am. Dec. 464; *Howland v. Edmonds*, 24 N. Y. 307; *Wheeler v. Warner*, 47 N. Y. 519, 7 Am. Rep. 478; *De Lavallette v. Wendt*, 75 N. Y. 579, 31 Am. Rep. 494. And while one who indorses a nonnegotiable promissory note payable on demand does not in the commercial sense become an indorser with the rights and liabilities of an indorser, he may be held thereon as maker or guarantor, and the statute of limitations runs in his favor from the date of the instrument. *Cottle v. Marine Bank*, 166 N. Y. 53, 58, 59 N. E. 736; *Wheeler v. Warner*, 47 N. Y. 519, 7 Am. Rep. 478; *McMullen v. Rafferty*, 89 N. Y. 456, 458. In this case, Judge Earl said (page 450 of 89 N. Y.):

"The word 'demand' is not treated as part of the contract, but is used to show that the debt is due."

In *Cottle v. Marine Bank*, *supra*, the court said:

"As between maker and holder a promissory note payable on demand is due forthwith, * * * and therefore a demand with tender of the note of the maker is not a condition precedent to the maturity of the cause of action."

If this be so, then these demand notes were due and payable when the checks were given in payment without demand, and, if due and payable, the right of set-off existed, and, it would seem, it must follow that the trust company had the right to receive payment and had at the times of payment a sort of lien upon the deposit. In short, the deposits were actually applied by the depositor and received by the holder of the notes then due and payable in satisfaction of the notes, and, if due and payable, the trust company had the right to receive and retain the money turned over to it. It had the right to charge up these demand notes for the reason they were due. See cases cited. They did not, as the money was turned over to them voluntarily. Its right of set-off then existing is not forfeited for the reason the furniture company turned it over. It would seem that this right of set-off has continued and still exists. Why not? As stated, can we impose a penalty on the trust company for the reason the furniture company had an intent to prefer not known to or shared or participated in by the trust company? At all times after December 15, 1904, on this theory, the trust company had the right to decline to pay checks of the furniture company, except for the balance of the deposits over and above the amount of the demand notes, and could have defended any suit brought by it and set off such demand notes against the deposits, even if no demand had been made.

The money is in the possession of the trust company. It has been there at all times, since the deposits were made. If the furniture company could not have checked it out against the objection of the trust company or recovered it in a direct suit, how can the trustee of the bankrupt furniture company now recover it? His title and right to it

is no greater than was that of the furniture company. True, the payments made by the furniture company were void under the stock corporation law; but so declaring them leaves the money in the hands of the trust company as balance of deposits, and it may set up any defense to the recovery of the money from it by the trustee that it had against the furniture company. If the furniture company had taken the money from its safe or till or some other bank, and paid it to the trust company in satisfaction of the notes with intent to prefer the trust company, the case would be different, and the trustee could recover. As the case stands, he may recover the \$2,000 paid on the note that was coming due in February, 1905. As to that there was no right of set-off, no lien when it was paid, and it was not a deposit when bankruptcy proceedings were instituted. That act did not operate to give to the trust company a right to set off the \$2,000 note against a cause of action the bankruptcy act gives to the trustee to recover the amount of the illegal payment made on that note, not due December 14th or 15th when paid, and paid in violation of the stock corporation law. and as to which note there was no right to a set-off against deposits until bankruptcy intervened. When that right came into existence, there was no deposit. The money had been drawn out with intent to use it to prefer, and paid as a preference within the stock corporation law, and was illegally in the hands of the trust company, which had no lien on or right to it when received.

And I do not think that subdivision "e" of section 67 is so broad, and to be construed so strictly, as to cut off the defense of so-called banker's lien, or right of set-off, existing when the money was paid over on the demand notes. True, the section says:

"And such property shall pass to the trustee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt."

But this does not, in my judgment, operate to destroy the rights of the trust company which received the money to retain same, which right existed prior to and at the time of the illegal payments. But, it is contended that as the lien, or right of set-off, arose and was created, or sprung into existence, within the four months preceding the filing of the petition in bankruptcy, at a time when the furniture company was insolvent to its knowledge and that of its officers, and the money was deposited with intent on the part of such officers to make preferential payments therewith to the trust company, that such lien or right of set-off falls, and the trustee may recover the whole amount claimed. I have found that the trust company and its officers had no intent to demand or receive a preference, that they did not know the furniture company was insolvent, and that they did not have reasonable cause to believe that it was intended to give a preference either by making the deposit or paying over the money on the demand notes or in payment of same. There can be no recovery under section 60 of the bankruptcy act. This lien, or right of set-off, so called, was neither created by or obtained in or pursuant to any suit or proceeding at law or in equity, nor obtained through legal proceedings. The lien, if a lien, does not fall under the provisions of subdivisions "e" or "f" of section 67 of the bankruptcy act. The money was deposited in the bank with an ex-

isting purpose to make preferential payments therewith (preferential under the stock corporation law), but in this intent the trust company did not share. In fact, I am of the opinion that the right of a bank to set off the matured notes of a customer or depositor against his deposits, assuming such deposits are not made for and devoted to a special purpose to the knowledge of the bank, is not a lien on the deposits in the sense of the bankruptcy act. It is a right of set-off, a right to apply the one, the deposit, to the extinguishment of the other, the overdue notes.

However, be this as it may, I am of opinion, on the whole case, that the plaintiff may and should recover the whole amount paid on the note of \$2,000 coming due in February, 1905, with interest from the time of demand by the trustee, but that he cannot recover the amount of the other payments, those made on the demand notes.

There will be a judgment accordingly.

ODBERT et al. v. MARQUET et al.

(Circuit Court, N. D. West Virginia. August 15, 1908.)

1. VENDOR AND PURCHASER — FRAUDULENT REPRESENTATIONS — MATTERS OF OPINION.

A claim for damages or abatement of purchase money for fraudulent representations in a sale of a coal mine and lands cannot be based on a statement by the seller that the vein underlying the land had no faults, where there was no means by which such fact could have been known, and such statement was necessarily merely one of opinion and known to be such.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, §§ 53, 359.]

2. SAME.

Where, in a sale of a coal mine and lands, the vendor also agreed to turn over to the purchasers options which he held to purchase the coal under adjoining lands, representations made by him that there was a vein of coal underlying all of such lands, even if untrue, cannot be made the basis of a claim for damages by the purchasers, or for an abatement of purchase money, where he made no claim to have any special knowledge as to the fact, or to have made any examination.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, § 359.]

3. SAME—ABATEMENT OF PURCHASE PRICE.

Defendant sold to complainants the entire stock of a coal company which owned the coal under certain lands, and represented that the vein was continuous under such lands and of a uniform thickness of four feet, when it was in fact but three feet and three inches as defendant knew, or could have known, having sunk a shaft thereon. *Held*, that there was a failure of consideration to the extent of the difference in value of the vein as it was and as represented, and that complainants were entitled to a corresponding abatement of the purchase price still unpaid.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, § 359.]

4. SAME—LACHES.

The rule that a purchaser can only rescind a contract for the purchase of realty for fraudulent misrepresentations made by the vendor when he acts promptly on learning the facts does not apply when he merely seeks

an abatement of the purchase price, which claim may be asserted at any time before all the purchase money has been paid.

5. EQUITY—PARTIES—JOINDER OF COMPLAINANTS.

Complainants who, together and as a single transaction, purchased all of the stock of a coal company, which carried with it the title to coal lands, although they divided the stock between themselves and gave separate notes for their respective shares of the purchase money, may unite in a suit in equity against the vendor to enjoin a transfer of the notes, and compel an abatement therefrom on account of fraudulent representations made by him in regard to the property.

6. BILLS AND NOTES—RIGHTS OF INDORSEE—ESTOPPEL OF MAKER BY RENEWAL.

The makers of negotiable notes, who, after such notes had been purchased from the payee by a bank, sought and obtained renewals from the bank, giving new notes and taking up the old, are estopped as against the bank to set up the defense of failure of consideration on account of fraudulent representations made by the payee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 356.]

In Equity.

S. H. Odbert, Jr., and George T. Odbert, in August, 1906, filed their original bill in this court against William Marquet, and some months afterwards, by leave of court, they, with W. H. Warner and H. S. Odbert, Sr., joined as plaintiffs, filed an amended and supplemental bill in the cause against said William Marquet and the First National Bank of New Cumberland, in which bill the plaintiffs allege themselves to be citizens of Ohio, the defendant Marquet to be a citizen of West Virginia resident in this district, and defendant bank to be a corporation under the national banking laws, having its principal place of business in New Cumberland, in this state, and district; that on September 11, 1902, plaintiffs purchased from defendant Marquet 2,000 shares of the stock of the Marquet Coal Company, a West Virginia corporation, at the price of \$54 per share, or \$108,000; that said stock so purchased was divided between and held by plaintiffs, 360 shares by W. S. Odbert, 320 shares by H. S. Odbert, Jr., 320 shares by Geo. T. Odbert, and 1,000 shares by W. H. Warner; that the capital stock of the company was \$50,000 divided into 2,000 shares of par value \$25 each, and by said purchase they became the owner of all thereof; that at the time of purchase of this stock there existed a deed of trust upon the property of this company for \$25,000 in favor of F. W. Stewart, assignee of John A. Campbell, of which sum plaintiffs paid \$15,000, leaving \$10,000 unpaid, but not yet due; that plaintiffs assumed to pay off and discharge this trust debt as it should become due; that at the time of plaintiffs' purchase of this stock defendant Marquet owned the property of the Marquet Coal Company for which company a certificate of incorporation had been obtained, but the stock thereof had not been issued, nor had the property been conveyed to it by Marquet; that issue of stock and conveyance of the property was made after sale to plaintiffs; that for said purchase-money consideration H. S. Odbert, Sr., paid certain sums in cash and executed certain notes, payable in one, two, three, and four years, bearing 5 per cent. interest, to defendant Marquet, payable at the First National Bank of Cleveland, Ohio, and Geo. T. Odbert and H. S. Odbert, Jr., respectively, did likewise, while plaintiff Warner executed certain other notes payable in one, two, three, four, and five years, payable with 5 per cent. interest at the Colonial National Bank of Cleveland, Ohio; that the plaintiffs at the time of purchase transferred to Marquet the said H. S. Odbert 220 shares, H. S. Odbert, Jr., 240 shares, Geo. T. Odbert 240 shares, and W. H. Warner 700 shares, of said stock as collateral to secure the payments of said purchase-money notes due from each, respectively, and subsequently H. S. Odbert, Jr., and Geo. T. Odbert, renewed their notes, and each transferred 80 additional shares of the stock as additional security; that the property of said coal company consists of the coal underlying 192 acres of land, also under a tract of 40 acres and the surface of some 60 acres, with buildings and improvements, in Hancock county, W. Va., the tipples, tramways, buildings, machinery, horses, mules, carts, tools, and appli-

ances of all kinds used by the company in mining coal, and a railroad extending from the tippie and mines about two miles to the Pittsburg, Cincinnati, Chicago & St. Louis Railway at New Cumberland, with its locomotives, cars, etc., used in transporting said coal.

It is then charged in said bills that defendant Marquet in selling said stocks to plaintiffs made false representations, knowing them to be false, touching the property of said coal company; that he represented that the title to the property was good and unincumbered, when, in fact, the railroad was in fact located upon land for which said coal company had no title whatever; that it is located upon lands of Mary A. Stewart, Stewart Bros., and E. D. Stewart for a distance of one mile without any right or title, and the loss of such railroad, it is charged, would render the property almost valueless; that Marquet, knowing it to be false, represented that the coal was continuous, that it ran up and over the hills, did not run out, and that there was but one "horse back" on the property, while in fact there are over 100 such on it; that a shaft had been sunk upon the property, and thereby it had been ascertained that the coal seam was four feet in thickness, when in fact it was only three feet three inches, he knowing at the time that a seam of three feet three inches could not be profitably mined there; that he had options on 600 acres of adjoining property which he had turned over to the company and that the coal extended under these 600 acres, when in fact little or no coal extended under these 600 acres as was known by Marquet.

It is then charged that plaintiffs had no personal knowledge of the facts set out, that they relied solely upon the representations of Marquet, who represented these facts falsely to them, knowing them to be false; that said Marquet having given notice to said H. S. Odbert, Jr., and George T. Odbert of his purpose to sell the shares of their stock held by him as collateral on August 20, 1906, at public auction, they on August 13, 1906, presented to this court the original bill herein, and secured a temporary restraining order against such sale and pending a hearing, which was continued on the return day in September, the defendant the First National Bank of New Cumberland instituted at October rules, 1906, in the circuit court of Hancock county, W. Va., a suit in equity against the Marquet Coal Company, the plaintiffs, and others, alleging it to be the holder of said notes and shares of stock transferred to Marquet as collateral and praying that a receiver be appointed for said company, and the said stocks be sold to pay said notes. It is then specifically charged in the amended and supplemental bill that the defendant bank was not an innocent purchaser of said notes and stocks, for shortly after the purchase of the property one of the plaintiffs, taking with him a witness, had notified the cashier of said bank not to discount or purchase said notes or any of them, informing him that the property had been misrepresented, and that payment of the notes would be resisted. An injunction was prayed in the original bill against the sale and disposition of the stock and notes by Marquet and in the amended bill against the prosecution of said equity suit, that the damages and loss sustained by reason of the false representations made by Marquet be ascertained and decreed to plaintiffs, and general relief be granted them.

Restraining orders were granted, and to these bills the defendants Marquet and bank have filed separate answers. In these answers the sale of the stock at the price named in the bill and the execution of the notes therefor are admitted, but all allegations of fraudulent misrepresentations by Marquet as to the property are denied. It is also denied that the title to the railroad is defective or bad, or that the plaintiffs were without full knowledge of the condition and extent of the property and of the seam of coal. It is charged that the bank discounted the notes before due in regular course of business, and without knowledge of any claim of offset or defense by reason of fraud or misrepresentation as charged.

In addition to filing its answer, the bank, by leave, filed its cross-bill, in which it sets forth its ownership of certain notes of the plaintiff Odberts and Warner and of the stock of the coal company as collateral, and charges that the Odberts and Warner have been operating the mines of the company, have removed large quantities of coal and thereby depreciated largely the value of the property; have improperly operated the mines, to its great injury, so that the value of the property has depreciated from \$100,000 to \$40,000; and

that they are negotiating a sale of the two miles of railroad in order to interfere with and prevent a sale of the property. It is prayed that an injunction be granted against such sale of the railroad, and that a receiver be appointed to operate the property. The injunction prayed for in this cross-bill was granted, and the application for receiver was continued from time to time at the instance of the parties. The Odberts and Warner filed their joint answer to this cross-bill, in which they deny that they have improperly operated the mines, and, on the contrary, charge these mines to be in first-class condition, as shown by the reports of the state mine inspector. They deny that the property has depreciated in value; but, on the contrary, charge that they have spent \$40,000 in improvements placed upon it, and have purchased and added to it coal under adjoining lands almost equal in amount to that mined by them, and have improved and equipped mines and railroad until they are in first-class order. They deny that they have been seeking to sell the railroad, that Marquet had any authority under the agreement to sell or convey to the bank the stock certificates pledged to him as collateral, and charge that the sum of about \$32,000 due upon the unpaid notes will not be sufficient to indemnify them the damages sustained by them by reason of the false and fraudulent representations made at the time of sale by Marquet, whom they charge to be insolvent. Marquet filed his answer to this cross-bill, admitting all of its allegations to be true, and joining in the prayer thereof. Replications to all these answers to the original and cross-bills were entered and depositions were taken. Pending the taking of these depositions, the bank sued out an attachment in its equity suit pending in the state court based upon an affidavit of its president and Marquet against funds due the Odberts and Warner, whereupon a petition was filed by them, a rule issued against the bank, its president, and Marquet. Answer was filed thereto by them, affidavits were filed, a hearing was had, and the bank, its president, and Marquet held to be in contempt of the injunction awarded plaintiffs, and they were required to dismiss said attachment and pay the costs of the rule, which they did.

Reese Blizzard, Oliver S. Marshall, and John Marshall, for plaintiffs.
J. B. Somerville, H. M. Russell, John A. Campbell, and J. R. Donehoo, for defendants.

DAYTON, District Judge (after stating the facts as above). Very many difficult and perplexing questions have been raised in this case which have been very ably argued. The evidence is not clear, and upon every material point is conflicting. It has therefore been with great difficulty, and only after long consideration, that I have been able to determine its weight and effect. The plaintiffs charge that Marquet represented the title to the railroad to be good, or that he would make it good. On the other hand, Marquet insists that this railroad was taken in the sale after plaintiffs had had its title examined for themselves by an attorney of their own selection, who reported to them title to it to be good. It seems from the evidence that this railroad runs from 2 to 2½ miles from the main line of the Pittsburg, Cincinnati, Chicago & St. Louis Railway at New Cumberland to the Marquet Coal Company mines; that for about three-fourths of a mile it runs through the lands of the Stewarts, from whom no right of easement or way in writing has ever been obtained. This railroad is not incorporated as such, is not a public carrier, but was built by Marquet for the sole purpose of transporting coal from the mines to the main line. It cannot apparently, from the evidence, exercise the right of condemnation, and, if its right of easement over this three-fourths of a mile through the Stewart lands should be interrupted, it would render it useless for the purpose for which intended, and would unquestion-

ably greatly damage the plaintiffs. Marquet insists, first, that he was allowed by the Stewarts, acting through one of their number, to have this right of way over the lands upon terms and conditions which he fully complied with. This is denied by Stewart, who testifies that the terms and conditions were not complied with, but special damage was done the lands by the road's construction, allowed to be made only with the understanding that the conditions would be complied with, and that suit for damages or ouster is contemplated. Marquet insists, second, that in the sale there was no warranty, express or implied, of title to this railroad, but, on the other hand, plaintiffs took it as it was and with the rights it had. Plaintiffs, as stated, deny this. In weighing this testimony, it seems to me that two facts undisputed must be given especial consideration: First. At the time this railroad was built by Marquet, he and one of the Stewarts, acting for all, did attempt to execute some kind of a written contract touching this right of way, employing a lawyer for the purpose. Plaintiffs have introduced the contract so prepared by the attorney as they claim, but Marquet denies ever having seen this particular writing and that it contains the true conditions for the easement. It is undisputed, however, that, while an effort was made to settle the matter by a written contract, no such contract was ever executed, and it seems to me that the presumption arises from this fact that the evidence of Stewart is true that no settlement for this right of way has ever been made, and that, therefore, it is being used simply at the will of the Stewarts, not by legal right, and may be by them at any time interrupted and denied. It has certainly not yet, in point of time, become a fixed right by prescription, user or statute of limitation. Second. It is to be remembered that originally Marquet sold to the plaintiffs the coal property substantially alone for \$60,000 and retained the railroad; that after so doing, becoming dissatisfied, he went to these plaintiffs, and sought to secure a rescission of this contract, by reason of which action on his part negotiations were opened inter partes which resulted in a new contract whereby plaintiffs took over all the property, including the railroad, at \$108,000 and its transfer to plaintiffs was effected by an assignment of all the stock of the company, 2,000 shares, at a price more than double their par value. From this it would seem clear that substantially this railroad was valued in the transaction at something near or over \$40,000, which would appear to be its full value. This being so, it is hardly conceivable that these plaintiffs would pay such price with a third of the whole line held merely by license and not by right and title without doing so either through ignorance of the facts or by reason of a guaranty that this title would be made good.

It is further insisted that Marquet made certain misrepresentations, in the course of the negotiations, touching the quantity and quality of the coal property, which induced plaintiffs to purchase at a price far in excess of its value and of the sum they would have been willing to pay had they not been misled by such misrepresentations. Touching the quality of the coal, it is alleged that Marquet represented it as containing only one "horse back" or fault, when, in fact, the vein was broken and intermixed with very many clay veins, faults, or "horse backs." It is also insisted that the mines at the time were in bad

condition, especially in the particulars of ventilation and drainage. I do not believe plaintiffs can base a claim for damage or abatement of purchase price on these grounds for these reasons: First. There is absolutely no way of determining, so far as I can learn from the testimony, from either an examination of the exterior surface of the land or from an examination of the mine where the coal has been worked out, when these horse backs, faults, or clay veins may appear in the vein yet to be mined. They seem to be wholly irregular, and governed by no usual or natural conditions or laws. They are not persistent, are different in size and extent, and usually cover small areas. Therefore any representation made by Marquet could be only based upon opinion and desire by which the plaintiffs could not in the nature of things be deceived or misled. Touching the condition of the mines, it is clear the plaintiffs could and did inspect them before purchase, and took them without objection at the time.

It is further insisted by plaintiffs that Marquet claimed to have and agreed to turn over options upon 600 acres of coal underlying adjoining tracts which he represented to be underlaid with coal, but which turned out to be valueless because not so underlaid. This it is insisted was an inducing cause for purchase, and constitutes a just claim for abatement. While having grave doubt in the matter, I am inclined to the belief that such claim cannot be maintained. Marquet had no interest in these options other than the right to buy the coal at the option price. It could not be presumed by plaintiffs that he had any special knowledge touching the quantity or quality of coal underlying these optioned lands, unless he represented himself to have made special examination thereof, which the evidence nowhere shows he did. Finally, it is charged that Marquet represented that the coal underlying the two parcels of land, which under the sale of the stock passed to plaintiffs was continuous, run over the hills and underlaid all the land. I think the evidence preponderates in favor of plaintiffs' contention that such representation was made. What, then, was the effect of it? To find a true answer to this is a very perplexing question. The effect of fraudulent misrepresentations generally as affecting contracts for the sale of realty in this state is most thoroughly considered and determined by the encyclopedic opinion of Judge Green in *Crislip v. Cain*, 19 W. Va. 438, and in *Wamsley v. Currence*, 25 W. Va. 543. The general subject of such fraudulent misrepresentations as affecting contracts in general will be found in a note to *Fargo G. & C. Co. v. Fargo G. & E. Co.*, 37 L. R. A. 593. The case of *Development Co. v. Silva*, 125 U. S. 247, 8 Sup. Ct. 881, 31 L. Ed. 678, is also very interesting as applying the law in such case to a sale of a silver mine. None of these cases, however, give an exact solution of the question involved here. On one hand, it is claimed that no man can see under the ground and determine whether a vein of coal is continuous or not; that no one can tell, for a like reason, whether the vein will maintain its uniform thickness; that, therefore, any expression of opinion to the effect that it is continuous and uniform cannot be fraudulent, although it turn out untrue, cannot mislead, and therefore cannot be cause for abatement. In such case the purchaser buys at his own risk. On the other hand, it is contended

with great earnestness that these veins of coal are generally uniform; that the general dip or inclination can generally be pretty accurately determined, and that after years of mining in a particular vein in a given locality its peculiarities can be pretty thoroughly fixed and determined; that under such circumstances, when Marquet represented this vein to be continuous, to run over the hills, and to be at all points four feet at least in thickness, they had right, from his years of study and work in the vein, to rely upon this representation, and clearly, if they had not done so, they would not have purchased.

I am inclined to take an independent view from either of these. Coal has uniformly been held to be realty. It has been uniformly held that equity will abate the purchase price for a tract of land which has fallen short in acreage where the contract is a sale by the acre. In *Fulton v. Shackleford*, an action at law brought for the purpose of recovering back purchase money paid for coal supposed to be under lands which turned out to have none of merchantable quality under them, while filing no written opinion, I held that the plaintiff, Fulton, was entitled to recover, and that, when a party undertook to sell coal under land, the burden was upon him to show that it was there and in merchantable quantity, and, if it was not, that there was a failure of consideration to the extent of its absence. This was in a case where the supposed coal was sold by the acre, and an attempted survey of it had been made from surface indications. The judgment in this case upon appeal has been recently affirmed per curiam by the Circuit Court of Appeals, no opinion being rendered. In this case no direct sale of the coal was made, but I am constrained to believe that the stock of this company was purchased solely in consideration of the coal supposed to underlie the two tracts of 19½ and 40 acres, and that the vein so underlying these tracts was assumed to be continuous and of at least four feet in thickness; that Marquet knew, or could have known, of the shaft sunk on a part of the land showing that it did not exceed three feet three inches. He was using this shaft as a well to supply water, and before making representations as to the thickness of the vein he could have easily ascertained by a proper investigation the fact. There can be no question but a difference of nine inches in a thin vein of four feet over any considerable part of the territory would very greatly diminish the value of the property both because of the loss of coal, and because of the increased expense incurred in mining the residue. Taking the general estimate of 1,000 tons for every foot thick per acre, it will be seen that these nine inches would represent some 750 tons loss to each acre so deficient. There is nothing in the evidence to disclose the increased cost of mining the residue. I am inclined to believe that, upon a reference, these facts can be fairly ascertained, and that plaintiffs are entitled to claim for the amount necessary to be expended to secure a good title to the railroad and for the lack of coal and reasonable increased cost for mining and for these items only.

But it is insisted most earnestly that plaintiffs have lost all right to these claims by reason of their laches and direct acts of acceptance of the present conditions as they are, and not as represented to be. There can be no question but what this would be true if plaintiffs were seeking to rescind the contract. When one seeks to rescind, he must act

promptly and apply for the relief so soon as he learns of the false representations or failure or part failure of consideration; but I do not understand this rule to apply where abatement alone is sought. The rule and practice in this state is clear that such claim can be made at any time before all purchase money is paid, and such claim is usually allowed out of the last installment of purchase money.

Again, it is insisted that this suit is multifarious, and cannot be maintained because it combines the several claims for such abatement of Warner and the three Odberts. This would be true possibly if this had been a sale of distinct and several interests in lands or coal made to each by several conveyances, but it was not. It was, in effect, the sale of all stock of the corporation for the consideration of the conveyance as a whole of the coal under the two tracts. It is not indispensable that all the parties to a suit in equity should have an interest in all the matters contained in the suit. It will be sufficient in order to avoid the objection of multifariousness, if each party has an interest in some material matters in the suit, and they are connected with the others. *Brown v. Guarantee Trust Co.*, 128 U. S. 403, 9 Sup. Ct. 127, 32 L. Ed. 468. See, also, *Hornor-Gaylord Co. v. Miller & Bennett (D. C.)* 147 Fed. 295, and cases cited.

The final question to be considered is the rights of the First National Bank of New Cumberland in the premises. It is undisputed that, in consideration of the sale of the stock, these plaintiffs executed a number of negotiable notes to Marquet which have been discounted to this bank. It is insisted by them that one of their number in the presence of a witness notified the cashier not to discount or have anything to do with these notes because there would be trouble about them. The cashier testifies, in effect, that this conversation related to a claim at the time being asserted by one Allen against Marquet which Marquet settled, and afterwards these notes now in controversy were discounted by the bank. There may have been a misunderstanding between the parties of this kind, but, be that as it may, I think plaintiffs' contentions in this particular must fail for two reasons: First, because from the evidence I do not deem the notice given as specific enough; and, second, because it is undisputed that these plaintiffs, after it was given and after the original notes had been given, sought and obtained from the bank several renewals with new negotiable notes which would estop in my judgment any such defense so far as the bank, a holder for value, is concerned.

I therefore reach the conclusion that the bank is entitled either to a decree for the full amounts of the notes held by it, or to a dismissal from this suit without prejudice to its right to prosecute any independent action to recover the same as its counsel may determine may be for its best interests. So far as the appointment of a receiver for the corporation's property is concerned, it does not appear that these plaintiffs are insolvent, but, on the contrary, it seems to me that they are able to respond to a personal judgment. If counsel determine that such judgment shall be taken by decree in this cause, I will continue the motion for receiver for a reasonable time to allow such payment to be made, and, if not made, will then determine the motion for receiver. I further conclude that as against Marquet the plaintiffs are

entitled to a decree for damages in the nature of abatement of purchase money for the items hereinbefore set forth, which sum in abatement, if the parties cannot agree upon, must be arrived at by reference to a special master.

In re MAUZY.

(District Court, N. D. West Virginia. September 5, 1908.)

BANKRUPTCY—APPLICATION TO REVOKE DISCHARGE—LACHES.

Creditors *held* barred by laches from the right to have the discharge of a bankrupt revoked, it appearing that they had knowledge of the alleged fraudulent transfers of property by the bankrupt, relied on to invalidate the discharge, before the institution of the bankruptcy proceedings, and instituted a suit to set the same aside which was afterward abandoned, and that they took no steps to have the bankrupt examined, and made no objection to his discharge.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 868.]

In Bankruptcy. On application for revocation of discharge.

C. O. Strieby, for petitioners.

B. H. Heiner and F. O. Blue, for bankrupt.

DAYTON, District Judge. Mauzy, a man doing large business of a mercantile and trading character, a former sheriff of his county, made a general assignment December 2, 1904, for the benefit of his creditors to Hiner, trustee, who instituted suit in the state court seeking its aid in the administration of his trust. Such proceedings were there had that the real and personal estate of Mauzy with the liens, charges, and debts were ascertained by a master commissioner, and, by decree of the state court, sale of such real estate was made and confirmed and distribution of the proceeds to creditors directed. More than two years after, on February 3, 1906, Mauzy, on his voluntary petition filed in this court, was adjudged bankrupt, and on July 24, 1906, without objection, in regular proceedings had, a discharge was granted him. Thompson, Moyer, and Warner, three creditors, on June 7, 1907, filed their petition to vacate this discharge on the grounds: (a) That the bankrupt and his wife are residing in a valuable residence property, which they charge to be that of the bankrupt, but which was conveyed to his mother-in-law for the purpose of defrauding his creditors, and that he has expended near \$2,000 in improvements made thereon; that this conveyance was made to his mother-in-law in accordance with an agreement made with his wife and recorded in 1906 upon a flyleaf of Deed Book No. 42 in the county court clerk's office, which writing is dated May 15, 1903, and is charged to have been fraudulently antedated and recorded. (b) That a large amount of store accounts, judgments, and choses in action belonging to the bankrupt had been fraudulently collected by, or assigned to, his wife or mother-in-law. (c) That the bankrupt some time before his adjudication had sold a house and lot owned by him and had taken the vendor's notes in payment thereof and assigned them to his wife. (d) That on October 17, 1898, the bankrupt purchased 600 acres of land in the joint name of himself

and his wife, who paid nothing therefor, and the half interest so conveyed to his wife was not turned over either to Hiner, trustee, in the assignment nor listed in his bankrupt schedules. It is charged, further, in this petition that these creditors were not chargeable with laches in failing to resist the granting of the discharge because they had no notice of the application of Mauzy therefor, and because, until within a very short time prior to the filing of their petition, they were wholly ignorant of the bankrupt's acts complained of, which concealed and withdrew from creditors the properties referred to. This petition was referred to a referee as special master to take evidence and report. He has filed all the testimony taken, which is very voluminous, and with it a report not recommending the vacation of the discharge, but that certain sums be collected by reason of notes collected by the wife and by reason of improvements made by the bankrupt upon the property held by the mother-in-law. The application to vacate this discharge is based upon section 15 of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428]), which provides:

"The judge may, upon the application of parties in interest who have not been guilty of undue laches, filed at any time within one year after a discharge shall have been granted, revoke it upon a trial if it shall be made to appear that it was obtained through fraud of the bankrupt, and that the knowledge of the fraud has come to the petitioners since the granting of the discharge, and that the actual facts did not warrant the discharge."

After long and careful consideration of all the facts presented in this voluminous record, I am convinced that, no matter what views I may entertain touching the transactions complained of between Mauzy, his wife, and mother-in-law, these petitioning creditors have failed to show themselves free from laches and of knowledge of the facts prior to the granting of the discharge amply sufficient to have enabled them to file objections to Mauzy's original application therefor. It is to be borne in mind that, under this section, the power of the judge to revoke a discharge is confined and limited. It must be exercised (a) upon application of parties in interest; (b) within one year after it has been granted; (c) upon a trial in which it must be shown by petitioners that they have (d) not been guilty of undue laches; (e) that the discharge was obtained through the fraud of the bankrupt; (f) that the knowledge of said fraud has come to the petitioners since the granting of the discharge; and (g) that the actual facts did not warrant the discharge. In each and every one of these particulars the burden of proof is upon the petitioners, and each requirement of the statute is absolutely essential to be proven.

"It will be noted that a revocation of the discharge may be made upon the application of parties in interest who have not been guilty of undue laches, if it shall be made to appear that the discharge was obtained through the fraud of the bankrupt, and that knowledge of such fraud has come to the petitioners since the granting of such discharge, and it shall also appear that the actual facts did not warrant the discharge. All these conditions must exist." *In re Upson* (D. C.) 124 Fed. 980, 10 Am. Bankr. Rep. 758. "The purpose of this limitation is to restrict this process to those frauds which shall be discovered after the discharge." *Collier on Bankruptcy*, § 209. "A discharge will

not be vacated unless the court is satisfied that the creditor or his representatives had no knowledge of the objections at the time the discharge was granted. Where an attorney has knowledge of an objection, it will be presumed that the client knows the same facts." *Loveland on Bankruptcy*, § 865. "A discharge in bankruptcy not being voidable for causes previously known to the creditor, no order to take testimony should be made upon a petition to vacate the discharge, unless the petition shows affirmatively reasonable cause to believe that the creditor was ignorant of the ground specified when the discharge was granted." *In re Bates* (D. C.) 27 Fed. 604. See, also, *In re Ole-son* (D. C.) 110 Fed. 796; *In re Douglass* (D. C.) 11 Fed. 403; *In re Hoover* (D. C.) 105 Fed. 354; *Morrison v. Vaughan*, 119 App. Div. 184, 104 N. Y. Supp. 169, 18 Am. Bankr. Rep. 704; *In re Kolster*, 119 App. Div. 184, 104 N. Y. Supp. 169, 17 Am. Bankr. Rep. 52; *In re Griffin Bros.* (D. C.) 19 Am. Bankr. Rep. 78, 154 Fed. 537; *Matter of Winchester* (D. C.) 19 Am. Bankr. Rep. 227, 155 Fed. 505; *In re Hedley* (D. C.) 19 Am. Bankr. Rep. 409, 156 Fed. 314; *In re Dauchy*, 11 Am. Bankr. Rep. 511, 130 Fed. 532, 65 C. C. A. 78. In this latter case, decided by the Circuit Court of Appeals for the Second Circuit, many of the facts were similar to those presented here. In the opinion rendered by Cox, Circuit Judge, it is said:

"The questions presented were, first, whether the bankrupt since the adjudication, June 24, 1901, knowingly and fraudulently concealed from her trustee real property, located at Lansingburgh, N. Y., and Nantucket, Mass., belonging to her estate in bankruptcy; and, second, whether she knowingly and fraudulently made a false oath when she swore to the correctness of her schedules, which omitted this property. The principal accusation of fraud is based upon the conveyance by the bankrupt of the Nantucket property to her father, and by him to her son, over two years prior to the adjudication in bankruptcy. At the time the petition was filed and the schedules verified the legal title to this property was not in the bankrupt, and had not been for two years and seven months. The transfer to her son, conceding it to be fraudulent as to then existing creditors, has not been made by the act a sufficient ground for refusing a discharge. About this there is no disagreement. In order to establish a fraudulent concealment, it must appear that the property concealed belongs to the bankrupt's estate. It must be shown that the transfer was merely a temporary expedient to place the property beyond the reach of the trustee, the title to be resumed as soon as prudence will permit. In other words, it must be proved that a secret trust exists in her favor, and that her son is under agreement, expressed or implied, to reconvey the property to her when the danger of attack by the creditors has passed. Were we permitted to indulge in speculation and guesswork and substitute suspicion for proof, it would not be difficult to sustain the creditors' contention; but the burden is upon them to establish by clear and convincing evidence that the bankrupt has been guilty of the offenses alleged. In this they have failed. The referee and the District Court concur in finding that there is insufficient proof to show that the bankrupt retained an interest in the property conveyed, and we are constrained to reach a similar conclusion. The law as originally passed, and since the amendments of 1903, does not prevent a discharge in cases of this character. If the law be inadequate or defective in this regard, the remedy is with Congress and not with the courts."

In Re Tiffany (D. C.) 17 Am. Bankr. Rep. 296, 147 Fed. 314, it is held:

"Where an act by a trustee to set aside an alleged fraudulent transfer of property by the bankrupt to his wife, made anterior to the four-months period, results unfavorably to the trustee, creditors, urging the same transaction as a

ground of objection to the bankrupt's discharge, are concluded by the judgment rendered in the trustee's action, although an appeal therefrom has been taken."

The evidence in this case clearly discloses that the 600 acres of land was conveyed to Mauzy and his wife jointly in 1898 by deed duly recorded in that year. This was more than seven years prior to the adjudication in bankruptcy, and, if this half interest was so secured to be conveyed to his wife as a voluntary act, not based on valuable consideration, under the West Virginia statute, it was incapable of being assailed as voluntary conveyance after the lapse of five years. The evidence further shows that the conveyance of the residence property in Franklin to Mrs. Harper, the mother-in-law, originated in an agreement dated the 15th day of May, 1903, between Mauzy and his wife, whereby he recognized himself as having paid \$650 of a total purchase price of \$2,600 upon said property by reason of an exchange of another property, and also recognizes and states himself to be indebted to his said wife in certain sums of money, fully set forth, belonging to her separate estate and amounting to a total of \$1,276.21. And he transfers to her said residence property, credits said debt due her with the said \$650 and its interest, and bound himself to expend the balance in improvements on the property during the year following.

Whatever doubt there may exist as to the time when this agreement was actually recorded or executed, there can be, and is, no dispute that its existence was known by these creditors when the bill was filed in the said court by Hiner, trustee in the general assignment made by Mauzy, and this period was more than two years before this discharge was granted. By this contract title passed from Mauzy to his wife, and her subsequent securing of the legal title to be made to her mother in 1906 can in no way be material to the case under the principles laid down in *Re Tiffany*, supra. But, in addition to this, it is clearly shown that in this proceeding in the state court upon reference to the master these matters were inquired into, all the real estate and personal property of Mauzy was ascertained, the debts and their order or priorities determined and decree entered selling the same, and that no successful effort was made in this proceeding to require said trustee to sue for or seek to obtain any right to sell, by reason of fraud or otherwise, this residence property or the half interest in the mountain farm. And it is further shown in the testimony that many of the creditors, including these petitioners, in a conference at Circleville, agreed to and did contribute to a joint fund raised for the purpose of employing counsel to institute suits, having in view the setting aside of these conveyances as fraudulent, and to secure the interests of Mrs. Mauzy and Mrs. Harper in these properties to be sold for their benefit, and that such counsel were employed, and such suit instituted, but subsequently abandoned and dismissed for want of prosecution.

These facts, and the still further one that no demand was made to have an examination of said bankrupt before the referee touching these matters when his petition in bankruptcy was pending and before discharge had been granted, and that no objections were filed to the granting of such discharge, although it seems clear that petitioners had knowledge of the pending of such bankruptcy proceeding, renders

it absolutely impossible for me, under the well-settled principles established by the decisions, to grant the prayer of this petition and vacate this discharge, but, on the contrary, this proceeding must be dismissed at the cost of petitioners.

UNITED STATES v. PRICE et al.

SAME v. HAAS et al.

(Circuit Court, S. D. New York. August 28, 1908.)

1. WITNESSES—PRIVILEGE OF WITNESS—GRAND JURY—EXAMINATION OF ACCUSED—"PART OF CRIMINAL PROCEEDINGS AGAINST ACCUSED."

It is a rule established by federal decision that the submission of an indictment to a grand jury, and the examination of witnesses before them in relation to the same, are no part of criminal proceedings against the accused within the meaning of the fifth constitutional amendment, but are merely to assist the grand jury in determining whether such proceedings shall be commenced, and where the accused, afterward indicted by the same grand jury, are brought before them as witnesses by subpoena, they are not parties to any proceeding then and there in progress, and must rest their claim of privilege or immunity upon the rights of a witness, and not those of a party.

2. SAME.

Persons subsequently indicted, who were brought before the same grand jury by subpoena as witnesses in the investigation of the matter out of which the indictments arose, and, after being fully advised of their constitutional rights and privileges, were asked merely formal questions which they refused to answer under claim of privilege, were not thereby compelled to be witnesses against themselves in a criminal case, in violation of the fifth constitutional amendment.

On Motion to Quash Indictments.

On or about April 30, 1908, Jesse C. Adkins, Esq., was duly appointed by the Attorney General of the United States to be a special assistant to the United States attorney for this district. In the language of the letter of designation such appointment was "to aid in the investigation of the 'cotton leak matter,' with a view of obtaining indictments—if the evidence warrants—against Moses Haas, Theo. H. Price, and others." The "matter" referred to attracted public attention as long ago as 1905, and was in substance a suspicion that Haas, Price, and others interested in speculative purchases and sales of cotton had obtained through one Holmes, an "Assistant Statistician" in the Department of Agriculture, early if not secret information regarding the planting of cotton and the condition of the growing crop, which information might be useful to them in dealing with persons not so well informed. The May grand jury for this district being in session, it was attended by Mr. Adkins, as well as by the district United States attorney and his regular assistants, and by their suggestion the jurors began an investigation into said "matter." At the time of the occurrences giving rise to these motions, no indictment had been found growing out of "cotton leak" transactions, no complaint or information had been filed, nor had any person been arrested or held for examination by reason thereof. It appears by affidavit that counsel for the United States or some of them were informed that Price desired to make a statement to them, and that Haas was willing to give testimony, if himself guaranteed immunity from prosecution. Later, however, said counsel were advised that Haas had concluded not to testify, and that Price would make no statement to the grand jury. Before Price had definitely made this statement, a subpoena directed to him and requiring attendance before the grand jury was issued, but not legally served. He, however, became fully aware of its existence and tenor. After Haas' alleged change of mind be-

came known to the United States attorneys, a similar subpoena was duly served upon him. Both these subpoenas were in usual form, and required the attendance of Price and Haas, respectively, to testify "all and everything you may know in a certain cause now pending and undetermined in [this] court between the United States and * * * on the part of the United States." Haas appeared in obedience to the subpoena, and Price, after learning through counsel that if he did not come, despite the informality of service, he would ultimately be compelled so to do, also attended in the grand jury room. Both were duly and fully informed of their constitutional rights, and that the jurors were investigating the "cotton leak." Both protested against being sworn. Each was asked whether he knew the other, and both refused to answer on constitutional grounds. A few other wholly unimportant questions were asked, privilege claimed as to each, and the episode then closed without either of the moving parties having uttered any words which could be regarded as evidence against anybody. Thereafter these indictments (based on alleged "cotton leak" wrongdoing) were found against both Price and Haas, and by the same grand jury before which they had appeared.

Both now move to quash said indictments on the ground that the proceedings above outlined constitute an invasion of rights guaranteed by the fifth amendment of the Constitution, in that compelling attendance of persons ultimately indicted, and swearing them as witnesses makes them witnesses against themselves, even though by prompt claim of privilege no words of the slightest evidential value are uttered. Defendants' claim may be thus fairly stated: It is a breach of constitutional privilege to compel the possible defendant in a criminal case to elect before any grand jury having power to indict him, whether or not to claim said privilege.

Nicoll, Anable, Lindsay & Fuller, for Price.

Nash Rockwood, for Haas.

Henry L. Stimson, U. S. Atty., and Jesse C. Adkins, Goldthwaite H. Dorr, and Charles A. Roberts, for the United States.

HOUGH, District Judge (after stating the facts as above). A part of the argument addressed to the court appeared to assert that Price and Haas had been oppressed by the agents or attorneys of the United States. Let it be assumed that discretionary power rests in the court to quash an indictment found by coercion or oppression of jurors or witnesses or by device or trick inconsistent with the fair and honorable administration of law, yet there is nothing even in defendants' affidavits giving color to a suggestion of such conduct in this proceeding. What was done was all in the open, with every opportunity for defendants to consult counsel, and not one of the formal questions put (the examination never got further) was even asked before full and fair knowledge of his legal privilege had been given each of the present defendants, and by one or several representatives of the United States. This conclusion is reached without reading the minutes of the grand jury—a means of information doubtless legal, but in my opinion not to be resorted to if recourse can be avoided, because the grand inquest is not only a supremely important, but wholly independent part of our legal system, and prying into its records directly tends to subordinate that jury to the court and to increase technicality of procedure; two results equally to be deplored.

The real and only questions raised by these motions are narrow but important matters of law; i. e.: Were these defendants by the transactions above stated (1) compelled to be witnesses against themselves

(2) in a criminal case? To avoid side issues it will be assumed (but not decided) that Price attended the grand jury under compulsion.

The second of the queries stated requires consideration of the nature of a grand jury proceeding before indictment found. Defendants assert that by a necessary legal fiction the indictment is drawn, and is physically in existence before the grand jury convenes; that it is then with supporting evidence laid before the jurors, who thereupon find or ignore it. It follows that the "criminal case" begins with the naming of a defendant in the unfound indictment, and theoretically, antedates the grand jury itself. It follows, also, that the person named in such indictment is as much on trial (though in a different way) when before the grand jurors as he is after due arraignment before a petit jury. This view is thought to find support in *People v. Kelley*, 24 N. Y. 74; *People v. Sheriff*, 11 Civ. Proc. R. (N. Y.) 182. I do not, however, find it necessary to consider whether this narrow and technical statement of grand jury proceedings is justified by New York or other state decisions. The true doctrine is, I believe, established by national courts of controlling authority, and is that the submission of an indictment to a grand jury and the examination of witnesses before them in relation to the same are "no part of criminal proceedings against the accused, but are merely to assist the grand jury in determining whether such proceedings shall be commenced." *Post v. United States*, 161 U. S. 583, 16 Sup. Ct. 611, 40 L. Ed. 816; *United States v. Reed*, 2 Blatchf. 435, Fed. Cas. No. 16,134. It must, therefore, be held that Price and Haas were not on trial before the grand jury, were not parties to any proceeding then and there in progress, and must rest their claim of privilege or immunity upon the rights of a witness, and not those of a party.

The constitutional provision is but the affirmance of the common-law maxim, "Nemo tenetur seipsum accusare." It cannot be understood without knowledge of the common-law rule, and is to be interpreted thereby. It is intended solely to prevent disclosures by persons acting as witnesses in any investigation, and has no logical or historical relation to the rights of parties as such. *Counselman v. Hitchcock*, 142 U. S. 574, 12 Sup. Ct. 195, 35 L. Ed. 1110; *Kepner v. United States*, 195 U. S. 100, 24 Sup. Ct. 797, 49 L. Ed. 114; *United States v. Wong Kim Ark*, 169 U. S. 649, 18 Sup. Ct. 456, 42 L. Ed. 890; *Brown v. Walker* (C. C.) 70 Fed. 48; *Story on the Constitution*, § 1288. The immunity of a party in a criminal case rests likewise upon a rule of the common law, long antedating the Constitution, and quite different from the rule regarding self-accusation, viz., the exclusion from the witness stand of all parties to the record, because their interest was thought to be so great as to render them unworthy of belief. *Benson v. United States*, 146 U. S. 335, 13 Sup. Ct. 60, 36 L. Ed. 991.

This rule was not changed by the Constitution, and existed in full force in most English-speaking courts until almost within the memory of men still living. For the federal courts the practice is now regulated by Act March 16, 1878, c. 37, 20 Stat. 30 (U. S. Comp. St. 1901, p. 660), declaring that in all proceedings against persons "charged with the commission of crimes" the person charged shall be a witness "at

his own request, but not otherwise." Thus I think the defect of defendants' argument is shown by authorities controlling in courts whose prime duty it is to authoritatively expound the national Constitution. Price and Haas were not parties, but as witnesses claim a party's statutory (not constitutional) privilege. Regarding these men as witnesses only, it is settled law that no right either constitutional or statutory was infringed by compelling their attendance and administering the oath. *United States v. Kimball* (C. C.) 117 Fed. 156, followed in *United States v. Greene & Doremus*, Sup. Ct. Dist. Columbia (unreported), where a lengthy series of vital questions to each of which privilege was pleaded, was permitted on motions like the present. The reason for this is that the constitutional privilege is personal to the witness, must be claimed by him, may be passed on by the court, and the claimant only becomes a witness by being duly sworn or affirmed as such. *People v. Lauder*, 82 Mich. 109, 46 N. W. 956; *State v. Comer*, 157 Ind. 611, 62 N. E. 452; *State v. Duncan*, 78 Vt. 364, 63 Atl. 225, 4 L. R. A. (N. S.) 1144, 112 Am. St. Rep. 922. The constitutional provision is therefore, as said by Prof. Wigmore in his illuminating discussion of the subject "an option of refusal and not a prohibition of inquiry" (Wigmore on Evidence, § 2268), and, when these defendants were duly and legally summoned to inquiry and put to their option, no right was violated, and the suggestion that they severally appeared in an unfavorable light while claiming privilege before the men who could indict them is especially immaterial in a country where "there is more danger that criminals will escape justice than that they will be subjected to tyranny." *Kepner v. United States*, 195 U. S. 134, 24 Sup. Ct. 797, 49 L. Ed. 114.

It is quite true that the constitutional view, which by confounding the privilege of a witness with the rights of a party (or to speak more accurately the exclusion of a party) makes of a suspect a person sacrosanct, has received much judicial approval. The extent and nature thereof is reviewed in *People v. Gillette* (Sup.) 111 N. Y. Supp. 133, 39 N. Y. Law J. 1293 (June 18, 1908), and from the reasoning of that case I respectfully dissent. Some aid for defendants' contention is thought to be found in such cases as *Stokes v. State*, 5 Baxt. (Tenn.) 619, 30 Am. Rep. 72, where the Constitution was held infringed by asking defendant to make a foottrack before the jury. The numerous cases on demonstrative evidence are, I think, beside the question before the court, but it may be said that I think the better view is set forth in the recent case of *Magee v. State* (Miss.) 46 South. 529. See, also, Wigmore on Evidence, § 2265.

Motion denied.

UNITED STATES v. HAAS et al.

(Circuit Court, S. D. New York. August 28, 1908.)

Nos. 307-310.

1. CONSPIRACY—"CONSPIRACY TO DEFAUD UNITED STATES"—ELEMENTS OF OFFENSE.

An indictment which charges a confederated effort to deprive the national government of the right and privilege of proper service in the Department of Agriculture by corrupting an employé of such department, and inducing him to secretly furnish advance information of crop conditions, contrary to the rules of the department, and to issue false reports to the public as to such conditions, charges a conspiracy to defraud the United States under Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3676).

2. BRIBERY—OFFENSES AGAINST UNITED STATES—PERSON ACTING IN OFFICIAL FUNCTION—"ACTS FOR UNITED STATES IN AN OFFICIAL FUNCTION."

A person employed by the United States as an assistant statistician in the Department of Agriculture, in the performance of the duties with which he is charged by the rules of the department, acts for the United States in an official function, within the meaning of Rev. St. § 5451 (U. S. Comp. St. 1901, p. 3680), making it a criminal offense to bribe any such person to induce him to do or to omit to do any act in violation of his lawful duty.

3. CONSPIRACY—"CONSPIRACY TO COMMIT OFFENSE AGAINST UNITED STATES"—BRIBERY OF OFFICER—"LAWFUL DUTY."

In Rev. St. § 5451 (U. S. Comp. St. 1901, p. 3680), which makes it a criminal offense to give or offer bribes, etc., to induce any officer of, or person acting for or on behalf of, the United States in any official function to do or omit to do any act in violation of his lawful duty, the phrase "lawful duty" is not restricted to a duty imposed by statute, but is broad enough to cover a duty imposed by a lawful superior; and an indictment charging a conspiracy to induce an assistant statistician in the Department of Agriculture to furnish to the accused advance news of crop conditions, and to cause to be published false reports as to such conditions in violation of the rules of the department, to aid defendants in market speculations, by promising such employé a percentage of the profits of such speculations, charges a conspiracy to commit an offense against the United States under Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3676).

On Demurrer. On demurrer by Haas to four indictments found against him jointly with others not joining in the demurrers.

H. L. Stimson, U. S. Atty., J. C. Adkins, G. H. Dorr, and C. A. Roberts, for the United States.

Nash Rockwood, for defendant Haas.

HOUGH, District Judge. At the times in the indictments mentioned one Holmes was an employé of the United States, acting as assistant statistician in the Department of Agriculture. His duties were to consider and tabulate (or assist in so doing) the reports on cotton planting and cotton crop conditions furnished to the department by its local experts, and thus prepare (or assist in preparing) the reports on cotton furnished to the public under governmental authority. Such or similar reports on agricultural conditions have been furnished by the proper department ever since the organization of the Department of the Interior. They were in general terms authorized by the statute (May 15, 1862) establishing that department. This function of the

Interior Department passed to the then created Department of Agriculture in 1892, and both before and since that date Congress has specifically appropriated money for the collection and publication of crop reports. By Act July 5, 1892, c. 147, 27 Stat. 76 (U. S. Comp. St. 1901, p. 294), it is declared that monthly crop reports must be submitted to the Secretary of Agriculture, "who shall officially approve the report before it is issued or published." During all the time referred to in the indictments, it was the written and published rule or regulation of the Agricultural Department (of which judicial notice is taken) that no crop information should be published or divulged by any subordinate without the written approval of a bureau chief, which Holmes was not.

For the purposes of these demurrers, the substance of the indictments may be thus stated: It is alleged that Haas et al. agreed with each other and with Holmes that the latter should—and he did—(1) give Haas et al. advance information concerning cotton, contrary to the rules and regulations aforesaid; (2) cause to be published—and he did publish—with official approval fraudulently obtained, a false crop report; and (3) that for these services Holmes should receive a percentage of the gains of Haas et al., to be made in cotton speculation based upon their private information, or the public's misinformation, so as aforesaid obtained or brought about. The indictments present this agreement between Haas, Holmes et al. as a conspiracy under Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3676) and such conspiracy is charged as being both to defraud the United States and to commit an offense against the United States. They also present the corruption of Holmes, not only as one of the objects of the conspiracy, but as a substantive offense; i. e., violation of Rev. St. § 5451.

Defendants' first proposition is that, inasmuch as it is not shown that the United States was deprived of anything of value by the transactions recounted above, no indictment for conspiracy to defraud under section 5440 will lie. This subject I have recently examined in *United States v. Morse* (C. C.) 161 Fed. 429, and need only repeat my conviction that the subject is not open to further discussion in courts of first instance. The indictment charges a confederated effort to deprive the national government of the right and privilege of proper service in the Department of Agriculture, and that is enough, according to cases too numerous to permit dissent by a trial court.

It is next urged that in issuing crop reports, including cotton statements, the United States was not exercising governmental functions. This contention is overruled on the statement of facts above compiled from the indictments and public statutes.

Premising that a conspiracy under section 5440 to commit an offense against the United States presupposes that a statutory crime was intended by the conspirators, Haas finally argues that section 5451 could not have been violated either in intention or fact, because: (1) Holmes was not an "officer of the United States." (2) Holmes was not "a person acting for or on behalf of the United States in any official function," inasmuch as collecting and disseminating information about cotton was not an official (i. e., governmental) function of the United States, and, if the national government could not exercise

that function, a fortiori, the same could not be delegated to Holmes. (3) Holmes was not prohibited from doing what he did by any statute, consequently he did not commit any "offense against the United States," and it follows that it was not such offense to procure him to commit noncriminal acts. (4) The promise of contingent gain made to Holmes was not "money or other thing of value," nor a "contract, undertaking, obligation, gratuity, or security, for the payment of money or for the delivery or conveyance of anything of value," wherefore, though Holmes may have done wrong and Haas counseled or procured him to do so, the procurement was not in the way proscribed by section 5451, wherefore no one so acting can be reached either directly under section 5451 or indirectly under section 5440.

The premise of these contentions is admitted. Since there are no common-law offenses against the United States, the offense mentioned in section 5440 must be statutory.

(1) Whether Holmes was an "officer" need not be decided.

(2) It is held that Holmes was a person acting for the United States in an official function for reasons plainly inferable from the facts stated above.

(3) Let it be assumed for the sake of argument that Holmes committed no crime (i. e., violated no statute) when he perpetrated any or all of the moral wrongs set forth in the indictments.

But violating "lawful duty" and breaking statutes are not synonymous expressions, and defendants' argument passes too lightly over the language of section 5451, which does make it a crime to induce one acting for the United States to do any act in violation of his lawful duty. It follows that Haas' contention can only be supported by holding that "lawful duty" means duty imposed by statute, and nothing else. This is repugnant to common (and correct) usage. The phrase "lawful duty" is amply wide to cover duty imposed and regulated by a lawful superior. In this sense it was Holmes' lawful duty to obey the rules and regulations of his department duly promulgated and known to him; nor is it material that such regulations should be in writing.

Citations of cases like *United States v. Keitel* (D. C.) 157 Fed. 396, to show that violating a departmental rule is not a crime, do not advance the argument at all. Let it be admitted that such is the law, but that does not show or tend to show that Congress cannot make it a crime to incite or cause another to violate such rule. This question, however, is not fairly presented in this case, and need not be pursued further than to note a query as to the correctness of the ruling in *United States v. Matthews* (D. C.) 146 Fed. 306.

The question really is: What does "lawful duty" mean, and was it Holmes' "lawful duty" to refrain from doing what the indictments assert he did? It would be a strange government wherein the conduct of officials of every grade was regulated in minute detail by statute. "Of necessity usages have been established in every department of the government which have become a kind of common law, and regulate the rights and duties of those who act within their respective limits." *United States v. MacDaniel*, 7 Pet. 1, 8 L. Ed. 587; *Benson v. Henkel*, 198 U. S. 1, 25 Sup. Ct. 569, 49 L. Ed. 919. The indict-

ment avers that Holmes knew the rule of secrecy, and Haas knew it, and with that knowledge induced its violation. That Holmes violated his lawful duty in yielding to temptation seems to me especially clear.

(4) The promise to give or pay Holmes a share of profits if there were any is clearly within the prohibition of section 5451. Of course, the promise was unenforceable, because the consideration was grossly immoral, but the same objection would apply to a formal contract for the payment of a definite sum of money. It may be noted that this statement of the agreement with Holmes is found only in the "overt acts" appended to the indictment proper. It is not necessary to set forth overt acts in an indictment for conspiracy, and, if set forth, they cannot be resorted to in aid of the averments of the charging portion of the pleading, nor can they on demurrer be considered, because they are not strictly part of the indictment. They may on motion to quash afford ground for setting aside the pleading; but that point is not raised here.

No other matter suggested in argument seems to me to need comment.

The demurrers are overruled.

UNITED STATES v. RAISH et al.

(District Court, S. D. Illinois. April 24, 1908.)

POST OFFICE — UNLAWFUL USE OF MAILS — ENFORCING BOYCOTT — "USING THE MAIL TO DEFRAUD"

Officers of a labor union who send letters or circulars through the mails to customers of a manufacturing corporation to induce them to withdraw their custom from it for the purpose of ruining its business or forcing it to pay a fine imposed on it for employing nonunion workmen, whether such fine and boycott were initiated by such officers or by the union with their participation and approval, are guilty of the offense of using the mails to defraud, in violation of Rev. St. § 5480 (U. S. Comp. St. 1901, p. 3896).

[Ed. Note.—Nonmailable matter, see note to *Timmons v. United States*, 80 C. C. A. 79.]

Pending the enlargement of its planing mill, the Wahlfield Manufacturing Company, in order to hold its employes together, employed them in the construction of the work. Some of these men belonged to the local carpenters' union, some to the wood cutters' union, and some were nonunion. Pending the work the defendant Humphrey requested the company to compel all its men to join the carpenters' union, and, on refusal, handed Mr. Wahlfield a letter, which stated that a fine had been imposed on the company of \$500, which would be remitted upon the company's employing carpenters' union men on the job, and told him that, if he did not pay the fine or employ union men, the unions would boycott him. Thereafter circular letters were sent to the company's customers, urging them not to handle Wahlfield's products. Wahlfield had the two defendants, who were president and secretary of the carpenters' union, indicted for attempt to defraud by use of the post office. On the trial the jury were instructed as shown below. Both defendants convicted.

W. A. Northcott, U. S. Atty., and H. A. Converse and J. H. Story,
Asst. U. S. Attys.

John Daly and N. C. Mihigan, for defendants.

HUMPHREY, District Judge (charging the jury). The case you are considering is an indictment in three counts drawn under section 5480 of the federal statutes (U. S. Comp. St. 1901, p. 3696) charging these two defendants, Humphrey and Raish, with having devised and executed a scheme to defraud by use of the post-office department of the United States.

The indictment is in three counts. The first count alleges that the scheme, as devised by these defendants, was that they, taking advantage of their position as officers of a certain labor organization, would cause an assessment of a fine to be placed against the Wahlfield Manufacturing Company, and induce that company to pay said fine under a threat of a boycott if the company did not pay, and that the scheme contemplated the use of the mail, and that certain letters in execution of the scheme did pass through the mail. The second and third counts are based upon a different theory; that the scheme devised was these defendants, taking advantage of their position as members and officers of the said labor organization, would by use of the mails cause a boycott to be put in force against the business of the Wahlfield Manufacturing Company, and thus injure that company in its business. The first count is drawn upon the theory that their intention in the scheme was to induce Wahlfield to pay in order to escape the boycott, which would have been in fraud of the Wahlfield Manufacturing Company. The other two counts are drawn upon the theory that their device contemplated that he would not pay, but would suffer the boycott, and thus be defrauded in his business.

Either of these counts constitutes an offense under the statute. The indictment is no evidence of guilt. It is simply a formal method taken by the prosecuting department of the government to present to the defendants in legal form the charge made against them. If you believe from the evidence beyond a reasonable doubt that the defendants did devise the scheme in question, did cause this fine to be assessed against the Wahlfield Company, and did cause the boycott to be undertaken against the same company and did use the mails in execution of that device, all as charged in the indictment, or in any count thereof, then you will find the defendants guilty. On the other hand, if you do not believe from the evidence beyond a reasonable doubt that the defendants devised the scheme in question to cause the fine to be assessed and the boycott to be put in force, and used the mail in execution thereof, as charged in the indictment, or in any count thereof, then you will find the defendants not guilty.

The burden is upon the government. The government must prove all the material allegations of the charge by evidence which convinces your minds beyond a reasonable doubt. I mean by that that the defendants do not have to prove their own innocence. The government must prove their guilt. The presumption of innocence is with the defendants. You must allow that presumption to remain with them until it has been removed by the proof in the case convincing your minds

of their guilt beyond a reasonable doubt. In order to constitute this offense, it is not necessary that any profit or gain should have come to either of the defendants. In order to constitute this offense, it is not necessary that the scheme should have been successful under either one of these counts.

The law further is, gentlemen, that if the scheme in question was devised by the union, as testified to by some of the witnesses, that, so far as any action was taken at all, it was all taken by the union and under the order and instructions of the union, still, if you further believe from the evidence beyond a reasonable doubt that the defendants or either of them participated in such action of the union or assisted in carrying out such action of the union, and acquiesced in such action of the union, then as to said defendants you will find them guilty just the same as though the action had been individual on their part. Evidence has been introduced tending to prove the good reputation of these two men. Reputation is the most valuable heritage any man can have. You are to consider that in making up your judgments. You are to consider all that the evidence shows as to previous good reputation in making up your judgments as to the guilt or innocence of these defendants. You are the judges of the facts. You find the facts for yourselves. You find them from the evidence, not from any outside inferences or impressions. You take the law from the court, and you are to give to the law, as the court gives you the law, the same force which you give to the facts as you find the facts to be. You have heard the witnesses; seen them upon the stand; listened to their testimony. You have a right to consider what you have seen, and what you have heard as coming from these various witnesses; their manner and appearance upon the stand; their frankness and honesty; their interest in the case, if any has been shown; their prejudices, if they have shown any prejudice; their knowledge of the facts; their opportunity to have a knowledge of the facts about which they have testified; the reasonableness or unreasonableness of the stories they have told upon the stand in answer to questions; and from all these various considerations you make up your judgments for yourselves as to the weight to be given to the testimony of any witness.

You have nothing to do with the punishment. Congress has placed that burden upon the court. The form of your verdict will be, if you find the defendants guilty: "We, the jury, find the defendants guilty." If you find them not guilty, the form of your verdict will be: "We, the jury, find the defendants not guilty." And, if you find one guilty and one not guilty, the form of your verdict will be: "We, the jury find the defendant _____ guilty, and the defendant _____ not guilty"—filling the blanks with the names as you shall find.

Is there on the part of the plaintiff any exception to be taken to the charge of the court?

Mr. Converse: I would like to have the court instruct the jury that the scheme set up in the various counts of the indictment are apt schemes to defraud.

Is there on the part of the defendants any exception to be taken to the charge of the court?

Mr. Daly: We except to the charge given by the court as to the first count of the indictment. As I understood the charge to the jury, the court stated that the indictment said that certain letters did pass through the mail. I think the charge in that count of the indictment is that a specific letter passed through the mails, and we wish to except to that part of the charge of the court. I also wish to except to that part of the charge of the court stating that the scheme did not depend upon any profit or gain upon the part of the defendants or either of them. And also except to the instruction with reference to the action of the union, where, among other things, the court charged that acquiescence in the action of the union would bind these defendants, or either of them, so acquiescing.

The Court: The first exception was that I refer to more than one letter as to the first count; and what was the second?

Mr. Daly: That it was not necessary that any profit or gain accrue to the defendants, or either of them. The third was the acquiescence in the action of the union.

The Court: I meant to instruct you gentlemen, but from the exception made by counsel for the government it appears I did not, and, if I have not already charged you, I now charge you that the court is of opinion that the artifice and scheme described in these three counts are all actionable under the statute.

Mr. Daly: There is another suggestion I desire to except to—that the jury specify the count or counts of the indictment that they may find either or both of these defendants guilty upon, if they so find.

The Court: It is all the same scheme and my thought about that was, if they find them guilty under any count, it will be the same as though they find them guilty under all three counts, for I would have no purpose to cumulate the punishment.

Mr. Daly: We desire to make the request to have the specific finding of the jury as to each count separately. And I desire to except to that portion of the charge of the court in which the court states to the jury that the artifice described in each of these counts is actionable under the statute.

The Court: And the court, having heard the suggestions of counsel, declines to instruct the jury further, to which ruling of the court defendants, by their counsel, then and there excepted.

CONFECTIONERS' MACHINERY & MANUFACTURING CO. v. RACINE
ENGINE & MACHINERY CO.

(Circuit Court, E. D. Wisconsin. June 15, 1908.)

1. EQUITY—AMENDMENT OF BILL—MISTAKE IN DESCRIPTION OF PARTY.

A Massachusetts corporation directed its solicitor to institute a suit for infringement of a patent of which it was owner. Such corporation had succeeded one having precisely the same name, but organized under the laws of Delaware, and through a mistake of fact the solicitor described the complainant in the bill as a corporation of Delaware, but, on the fact appearing in the evidence, by leave of court amended the bill to conform thereto, and the case proceeded to final hearing. *Held*, that the amendment did not change the cause of action, but merely cor-

rected a mistake of fact; that the Massachusetts, and not the Delaware, corporation, was in fact the complainant from the beginning; and that the amendment did not necessitate a dismissal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 561-563.]

2. JUDGMENT — PRIOR ADJUDICATION — PERSONS CONCLUDED — SUIT FOR INFRINGEMENT.

A decree adjudging the validity and infringement of a patent in a suit in which the manufacturer of the alleged infringing article, although not a party to the record, assumed and conducted the defense, employing counsel and paying the costs, is conclusive as to such issues as between a purchaser of the patent pending the suit, and a corporation which succeeded to the business, rights, and liabilities of such manufacturer, and, in fact, paid the final costs and counsel fees in such suit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1193.

Operation and effect of decision in equitable suit for infringement of patent, see note to Westinghouse Electric & Manufacturing Co. v. Stanley Instrument Co., 68 C. C. A. 541.]

3. SAME—RES JUDICATA—MATTERS CONCLUDED.

A decree is not the less conclusive on the issues made by the pleadings and determined because a party has failed to produce evidence on some of such issues.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1251.]

In Equity. On final hearing.

This is a final hearing in equity. The bill is based upon letters patent No. 449,668, alleges infringement of claims 1, 2, 3, and 4, and prays an injunction and an accounting. The patent has expired during the pendency of the suit, but jurisdiction is retained under the authority of *Beedle v. Bennett*, 122 U. S. 71, 7 Sup. Ct. 1090, 30 L. Ed. 1074. The bill also sets up a prior adjudication in the district of Massachusetts, wherein all seven claims of the patent were decreed to be valid, and wherein the question of infringement was determined, which adjudication is alleged to be final and conclusive of all questions raised in the present litigation, and that the present defendant is thereby estopped from asserting its present contentions. The answer is in effect a general denial.

The title to the patent in suit was acquired by a Minnesota corporation of the same name as the defendant in 1891. September 22, 1900, a new corporation was organized under the laws of the state of Delaware, having the same name as the present plaintiff, and expressly organized for the purpose of taking over the assets, property, and good will, and continuing the business, of such Minnesota corporation. The parties in interest were the same and the officers were the same as in the Minnesota corporation. The patent in suit was transferred with other assets. Thereafter the plant and factory of said corporation were transferred to Springfield, Mass., for business reasons, and in October, 1905, a third corporation was organized with the same name, under the laws of the commonwealth of Massachusetts, for the purpose of acquiring the property and transacting the business of its predecessor. All the property, choses in action, and assets of every name and nature, including the patent in suit, were transferred by the Delaware corporation to the Massachusetts corporation; the persons in interest and the officers remaining the same. One Page has been the president and general manager of these three corporations. The business has been carried on without change or interruption, and has covered the manufacture of machines under the patent in suit.

The history of the defendant corporation and the various successions in interest may be stated as follows: Thomas Kane & Co. was a copartnership carrying on the business of manufacturing machinery at Racine, Wis. Mr. Pell and Mr. Kane owned the controlling interest in the firm, and have continued to be in control of such business during the successive changes in

organization. About September, 1902, the partnership was merged into a corporation known as the "Racine Machinery Manufacturing Company," and the present defendant, a corporation, is the successor of such former corporation. Mr. Pell, the president of the present corporation, owned or controlled 96 per cent. of the stock of the defendant corporation. Mr. Naylor, the secretary and treasurer of defendant, was an officer of the first corporation, and was an employé of the copartnership. The same line of business has continued without interruption; the machines alleged to infringe being one of its products. On April 3, 1903, the Delaware corporation, then being the owner of this patent, filed a bill in equity in the Circuit Court of the United States for the District of Massachusetts against a concern known as Kibbe Bros. Company of Springfield, Mass., charging infringement of the patent in suit, and praying for relief by way of injunction and an accounting, etc. Kibbe Bros. appeared and filed an answer on the 26th day of May, 1903; Richard P. Elliott, Esq., appearing as defendant's solicitor. A replication was filed June 20, 1903. The case went to final hearing before Judge Lowell, whose opinion is in evidence herein. The final decree in that case adjudged, first, that the patent in suit, No. 449,668, as to all its claims, seven in number, is a good and valid patent; second, that Neal A. Clecher was the original and first inventor of the invention described and claimed in said patent; third, that the complainant, the Confectioners' Machinery & Manufacturing Company, is the lawful owner of said letters patent; fourth, that the defendant Kibbe Bros. Company has infringed the claims of said letters patent and upon the rights of the complainant under the same; fifth, that the complainant recover of said defendant its costs of the suit; sixth, that a perpetual injunction be issued against the defendant Kibbe Bros. Company, its officers, attorneys, agents, etc., according to the prayer of the bill. The answer of the Kibbe Bros. Company put in issue the validity of the patent and complainant's title thereto, and denied infringement. In pursuance of such decree a perpetual injunction was issued and served upon Kibbe Bros. Company, and is still in force. The machine involved in the Kibbe Bros.' suit was made by Thomas Kane & Co., and by it sold to Kibbe Bros. Company in March, 1902. In October, 1902, the first Racine corporation undertook and agreed with Kibbe Bros. Company to take charge of any suit that might be brought for infringement. After the filing of the bill in that suit, the first Racine corporation April 16, 1903, wrote Kibbe Bros. that they had taken over the management of the suit, and would pay all expenses of such litigation. The entire conduct and control of said suit was assumed by the first Racine corporation, and continued until the dissolution of such corporation. The defendant corporation on the 17th of January, 1906, paid the costs taxed against Kibbe Bros. Company in such suit. The fees and charges of Mr. Elliott, defendant's solicitor were also paid partly by the first corporation, and partly by the second. Kibbe Bros. sustained none of the expenses and had nothing to do with the management of the litigation. Mr. Pell, as president of both Racine corporations, appears to have had charge of the defense throughout. Under the advice of Mr. Elliott, the defendant's solicitor, no appeal was taken. No evidence appears to have been offered on the hearing in that suit by the defendant on the question of infringement.

The present suit was brought January 9, 1907. The present complainant employed Mr. Quinby as its solicitor to bring this suit and draft the bill for it. He inadvertently described the corporation complainant as being organized under the laws of Delaware, whereas, in truth and in fact, the patent in suit was then the property of the Massachusetts corporation; the names of the two corporations being identical. The mistake was not discovered until the proofs of title were offered. At the close of the complainant's prima facie case, Mr. Page, the president of the complainant, and Mr. Quinby, made affidavits explaining how the mistake was made, and thereupon complainant asked leave to amend the bill by striking out the words "State of Delaware," and by inserting in lieu thereof "Commonwealth of Massachusetts," with certain other corresponding changes. Such motion was resisted by defendant, but was granted by the court upon the condition that it recall for further cross-examination any witness or witnesses who gave evidence for the complainant in the prima facie case that defendant might desire to have pro-

duced. Thereupon the defendant asked leave to amend its answer, which leave was granted, and the parties proceeded to complete their proofs and prepared the case for final hearing.

William Quinby, for complainant.

Winkler, Flanders, Bottum & Fawsett (F. E. Dennett, of counsel), for defendant.

QUARLES, District Judge (after stating the facts as above). The defendant, having duly excepted to the order allowing the amendment of the bill of complaint, renews its contention that the legal effect of such amendment was to bring in an additional party, and that the defendant is entitled to a dismissal of the bill.

It is further argued that the suit abated when the Delaware corporation was dissolved, and that the Delaware corporation never was possessed of this cause of action, as the event has proven. This contention is, of course, predicated upon the theory that the Delaware corporation was in the first instance the actual complainant, in which event the position of the counsel would be sound. The doctrine is familiar that a complainant may not, under the guise of an amendment, abandon the entire case made by his bill and present a new and different case. The case of *Shields v. Barrow*, 17 How. 144, 15 L. Ed. 158, is perhaps the leading case, and great reliance is placed upon it by defendant's counsel. We are content with the rule as there laid down:

"Amendments can only be allowed when the bill is found defective in proper parties, in its prayer for relief, or in the omission or mistake of some fact or circumstance connected with the substance of the case but not forming the substance itself; or for putting in issue new matter to meet the allegations of the answer."

In my opinion the amendment did not change the cause of action, but within the rule above stated simply corrected "a mistake of fact connected with the substance of the case," and that it did not work a substitution of parties. That it was a pure mistake or inadvertence must be evident, because, first, the Delaware corporation did not then own the patent; second, the infringement alleged was not available in a suit by the Delaware corporation. It is not conceivable that it was intended to name the Delaware corporation the complainant under such a state of facts. Furthermore, it was the Massachusetts corporation that actually brought the suit. It retained Mr. Quinby for that purpose, and instructed him to sue in its behalf. This Mr. Quinby undertook to do, but, being unfamiliar with dates and facts with which he had to deal, a copy of the bill in the former suit brought by the Delaware corporation against Kibbe Bros. Company on the same patent was furnished as a guide and source of information. In framing the bill he carelessly followed the allegations of the former bill, as to citizenship, designating complainant as organized under the laws of Delaware. The mistake was not discovered by Mr. Page, who verified the bill, or by the attorneys on either side, until the proofs of title disclosed the error. The Massachusetts corporation is here by its correct name, and no change in that regard was necessary; but the place of its existence was erroneously set out. It has often been held

that a defect in the statement of citizenship may be corrected by amendment, although it may be vital on the question of jurisdiction. *Howard v. De Cordova*, 177 U. S. 609, 614, 20 Sup. Ct. 817, 44 L. Ed. 908.

Indeed, such an amendment was made in *Shields v. Barrow*, supra. In the original bill the defendant, Robert Shields, was described as a citizen of Louisiana. By an amendment he was described as a citizen of Mississippi. Such amendment was passed over without criticism by the court. In *Needham v. Washburn*, Fed. Cas. No. 10,082, suit was brought for an infringement of a patent against the defendants as co-partners; but the proof showed that the defendants and others had been organized as a corporation of the same name or designation as the firm. Mr Justice Clifford, who presided, disregarded the mistake, and proceeded to hear the case on the merits, because, as he suggested, the bill might be cured by amendment. In Foster's work on Federal Practice, § 163, it is laid down that in a suit brought in the federal court an amendment may be allowed setting forth the facts that are essential to federal jurisdiction. It is apparent that the amendment has worked no prejudice to the defendant. It has wrought no change in the nature or scope of the defense. It was simply effectuating the intention of the parties, and in my judgment was within the legitimate exercise of judicial discretion. The Tremolo Patent, 23 Wall. 518, 527, 23 L. Ed. 97. By leave of court both parties amended their pleadings and proceeded to complete the proofs. Mr. Foster, in his work on Federal Practice, § 168, says:

"When both parties have conducted the case as if the pleadings contained certain allegations therein omitted, an amendment inserting such allegations may be made at almost any stage of the case."

Under these circumstances, it would be extremely technical to require the complainant to go out of court, and institute a new suit. For these reasons the contention of defendant is overruled.

This brings us to the consideration of the estoppel which is set up against the defendant. As to the proposition of law involved, the case is ruled by *Eagle Mfg. Co. v. Moline Plow Co.* (C. C.) 50 Fed. 195, and the same case in the Circuit Court of Appeals of this Circuit (57 Fed. 992, 6 C. C. A. 673). The comprehensive and lucid opinion pronounced by Judge Jenkins in that case must be accepted as a statement of the law which is final and conclusive here. It would, therefore, be idle to discuss the numerous authorities cited from other circuits.

The only question remaining, then, is whether the proofs here submitted bring the case within the rule. The point is made by the defendant that the estoppel is not available to the present complainant because it purchased the patent before the former adjudication was made, and therefore it cannot be held to be privy within the meaning of the law. The point is not well taken. The date upon which the proposition must turn is the commencement of the suit against Kibbe Bros. Company, and not the date of the adjudication therein. *Carroll v. Goldschmidt*, 83 Fed. 508, 27 C. C. A. 566. The case upon which the defendant predicates its contention is *Ingersoll v. Jewitt*, 16 Blatchf. 378, Fed. Cas. No. 7,039. A loose expression in the opin-

ion, taken by itself, would seem to support defendant's position; but a careful examination of the case will show that the opinion was expressly predicated upon the authority of Freeman on Judgments, § 162, where the learned author lays down the rule as follows:

"That no one is privy to a judgment whose succession to the rights of property thereby affected occurred previously to the institution of the suit."

The distinction here raised was unimportant in the Blatchford Case, because there the licensee acquired title eight months before the commencement of the suit out of which the alleged estoppel arose. It is probable that the agreement of the first Racine corporation with Kibbe Bros. Company to maintain the suit at its own expense was also binding upon the present defendant, its business successor. However that may be, the adoption by the defendant of the policy of its predecessor as to the Kibbe suit, the payment by it of the taxed cost and fees of counsel, with full knowledge of the facts, are in and of themselves sufficient to establish privity as matter of law. *Rumford Chemical Works v. Hygienic Chemical Co.* (C. C. A.) 159 Fed. 436.

The defendant contends, however, that certain of the issues were not contested in the Kibbe Bros.' suit, and that as to such issues the decree is not conclusive; citing *Cromwell v. County of Sac*, 94 U. S. 351, 24 L. Ed. 195. It is unnecessary to open up again the discussion as to the true interpretation of this famous opinion because the evidence shows that Mr. Elliott appeared at the hearing for defendant and cross-examined the witnesses. He also filed a printed brief on the final hearing, which is in evidence here, wherein he says:

"Defendant offered no evidence in defense, believing that complainant had failed to prove the infringement alleged in the bill of complaint."

He thereupon discussed the evidence and cited many authorities, claiming that the defendant was entitled to a decree dismissing the bill. This amounts to a contest, although no affirmative proof was elicited. The concluding paragraph of Judge Jenkins' opinion in the case above cited would seem to dispose of this proposition. "The decree of the court is not the less conclusive because a party has failed to produce all the evidence at command, or because of newly discovered evidence."

The only ground for asserting a difference in the issues in the two cases is that all the claims of the patent were involved in the Kibbe suit, while here only four of the seven claims are in issue. Certainly, as to the claims common to both suits, the estoppel must prevail.

For these reasons I am constrained to hold that the defendant is estopped and precluded from raising the issues which it so elaborately presented, as to the validity of the claims of this patent, and as to infringement; and that the complainant is entitled to a decree for an accounting in accordance with the prayer of its bill, with costs. The patent having expired, no injunction can issue in the case. It is so ordered.

MASON v. NATIONAL HERKIMER COUNTY BANK OF LITTLE FALLS.

(District Court, N. D. New York. September 14, 1908.)

BANKRUPTCY—VOIDABLE PREFERENCE—INDIRECT PAYMENT OF CREDITOR.

A bankrupt corporation made a note to another corporation which indorsed and discounted the same with defendant bank. Within four months prior to the bankruptcy, and when both corporations were insolvent and known to be so by defendant, the indorser paid the note which was not then due, and charged the amount to the bankrupt, which had goods or a credit for goods with the indorser of greater value than the amount of the note; the effect being to diminish the bankrupt's assets by that amount. The bankrupt was a party to the arrangement; the officers of the two corporations being practically the same. *Held*, that the effect of the transaction and its intended effect was a preferential payment by the bankrupt to defendant which was recoverable in equity by the trustee.

In Equity. Suit in equity to set aside a transfer of property by the bankrupt, the Newport Knitting Company, to the National Herkimer County Bank of Little Falls, N. Y., in payment of a certain note before due and at a time when the said Newport Knitting Company was insolvent and its insolvency was known to the bank, and to recover this said property as an illegal preference.

Henry J. Cookinham, for complainant.

Myron G. Bronner and A. M. Mills, for defendant.

RAY, District Judge. The Newport Knitting Company was incorporated about September 11, 1900, under the laws of the state of New York, with a capital stock of \$30,000 divided into 300 shares, with its principal place of business at Newport, Herkimer county, N. Y., to carry on a knitting mill, woolen and cotton factory, and manufacture, buy and sell knit goods, cloth, yarns, wool, and cotton, etc. Its incorporators and directors were Titus Sheard, Frank Senior, H. P. Snyder, Orville P. Purdy, and Edwin I. Stimson, and 100 shares were issued to Purdy, 45 shares to Sheard, 45 shares to Senior, 45 shares to Snyder, 20 shares to Stimson, and 20 shares to Weyman Walker. One hundred and seventy-five shares were paid for on machinery and supplies sold to it by the H. P. Snyder Manufacturing Company, and it seems nothing was paid for the other shares, although it was asserted there was a consideration. There was another corporation, known as the Titus Sheard Corporation, and it is said the Newport Company was a subsidiary of the Sheard Company, as I shall designate the two. One witness who ought to know the facts so spoke of and designated it. The directors and officers of both corporations were substantially the same. Titus Sheard was the president and financial head of both. Stimson was his son-in-law and Senior his nephew. Subsequent to July, 1901, the books of account of the Newport Knitting Company were kept in the office of the Titus Sheard Company at Little Falls, and in the same room by the same person. Titus Sheard was a director of the defendant bank, and had been for many years prior to the transaction complained of, and was a personal friend of its president, David Burrell, and its cashier, Geo. D. Smith. In the summer of 1903 the Sheard

Company was financially embarrassed, and Burrell, the president of the bank and one C. A. Miller, one of its directors, undertook to assist it in liquidating its affairs. Consultations were had, and these resulted in an agreement by which, August 8, 1903, that company, in effect, transferred all its property and effects to the bank.

There was a series of notes, among which was one of \$5,773.05 discounted January 8, 1901, at defendant bank, made by the Newport Knitting Company, indorsed by the Titus Sheard Company, and discounted by said Sheard Company for its own benefit. Partial payments were made, and renewals had until May 11, 1903, when it was renewed for four months, and on August 22, 1903, and before it was due, it was renewed for three months. This is the note in question here the payment of which is alleged to have been made, in fact, by the Newport Knitting Company on the 26th day of September, 1903, before due and as a preference. The amount of the note was then \$4,953.33, less the accrued interest. It was paid by the check of the Titus Sheard Company from funds in the bank to its credit, but such payment, or the amount of the note, was at once charged to the account of the Newport Knitting Company, which then had goods or credit for goods with the Titus Sheard Company in excess of the amount of the note. The effect of this transaction was to lessen the assets of the Newport Knitting Company by the amount of the note \$4,953.33 in payment of its own note, and transfer that amount of its assets to the Titus Sheard Company in payment to it of the \$4,953.33 which it paid the bank, and to the bank which by virtue of the transfer before mentioned had become or became possessed of all the assets and property of the Titus Sheard Company. The Newport Knitting Company and its creditors did not get the said \$4,953.33. The defendant bank got the whole of it. Such was the well-known legal and intended effect. Both the Titus Sheard Company and the Newport Knitting Company were then insolvent, and this fact was well known to the bank and its officers. The operations of the Knitting Company were then practically suspended, and were never resumed, and the Titus Sheard Company was being practically wound up by the bank which knew the relations of the two companies. About the middle of October, 1903, proceedings for the voluntary dissolution of the bankrupt, Newport Knitting Company, were instituted. December 30, 1903, a petition in bankruptcy was filed against the Newport Knitting Company, and an adjudication was had January 23, 1904. There can be no doubt that the Newport Knitting Company knew of, assented to and took part in the payment of the note in the manner aforesaid. There can be no question that it and the Titus Sheard Company, knowing their financial condition and insolvency, intended a preference to the bank, and that the bank was seeking and intended to obtain and receive a preference over the other creditors of the Newport Knitting Company.

The position of the defendant bank is that the Titus Sheard Company, liable on this note to the bank as indorser, had the right under its agreement, referred to, to pay it and paid it from its own prop-

erty; that the Newport Knitting Company, as maker, was liable to it, and it had the right to make the set-off and charge the amount to the maker; that the bank received nothing from the Newport Knitting Company, and is not liable to its trustee; that even if the Titus Sheard Company, being insolvent, made a preferential payment to the bank, this action does not concern that, and even if the Newport Knitting Company made a preferential payment to the Titus Sheard Company, the action must be against it, and cannot be maintained against the bank. The Titus Sheard Company disappeared. But, as I look at this case, under the evidence the payment was, in fact, made by the Newport Knitting Company. It knew of it and intended it in the mode described. Its property, in legal effect, was used to make the payment. The effect in equity is not changed for the reason it was done in the manner described. If the Titus Sheard Company had given its check to the Newport Knitting Company—that is, if Sheard, president, and the treasurer had given a check signed by themselves as such, representing the Sheard Company, to themselves as representing the Newport Knitting Company in payment on account and the Knitting Company had turned that over to the bank—no question could be raised. A short cut was taken by common consent, and the check was passed to the bank and the amount charged to the Knitting Company so that it in fact paid the note. The Circuit Court of Appeals may hold that such a transaction legally evades the provisions of the bankruptcy act, but I cannot. It was a preference pure and simple intended as such by all the parties to the transaction.

It was voidable, not void. This action is to declare it void, and I so hold. The transaction is declared void, and the trustee is entitled to recover the amount paid on the note.

In re BUNTARO KUMAGAI.

(District Court, W. D. Washington, N. D. September 3, 1908.)

1. ALIENS—NATURALIZATION—POWER OF COURTS.

To become a citizen of the United States by naturalization is not a right, but a privilege, which can be granted by the courts only under provision of laws enacted by Congress.

2. SAME—PERSONS ELIGIBLE—PERSONS OF JAPANESE RACE—"WHITE PERSONS."

Rev. St. § 2166 (U. S. Comp. St. 1901, p. 1331), authorizing the naturalization of aliens honorably discharged from the military service of the United States, as limited by section 2169 of the same title, as amended in 1875 (Act Feb. 18, 1875, c. 80, 18 Stat. 318 [U. S. Comp. St. 1901, p. 1133]), by providing that "the provisions of this title shall apply to aliens being free, white persons and to aliens of African nativity, and to persons of African descent," does not extend the right of naturalization to a person of the Japanese race, although having an honorable discharge from the army of the United States.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, pp. 7446-7447.

Citizenship under state and federal laws, see note to City of Minneapolis v. Reum, 6 C. C. A. 37.]

Hearing on Application of a Japanese Person Holding a Certificate of Honorable Discharge from the Regular Army of the United States to Become a Naturalized Citizen of the United States. Application denied.

Buntaro Kumagai, in pro. per.
A. J. Balliet, Asst. U. S. Atty.

HANFORD, District Judge. This applicant for naturalization is an educated Japanese gentleman, and, in support of his petition to be admitted to citizenship, he presents a certificate showing that at the expiration of a term for which he enlisted as a soldier in the regular army of the United States he was honorably discharged. There appears to be no objection to his admission to citizenship on personal grounds, and the court has given no consideration to any questions which might be raised of a formal character; the intention of the court being to rest its decision denying the application on the single ground that Congress has not extended to Japanese people not born within the United States the privilege of becoming adopted citizens of this country.

It is the inherent right of every independent nation to determine for itself and according to its own Constitution and laws what persons shall enjoy the rights and privileges of citizenship, and our Constitution declares that:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside."

This is a broad provision, and comprises children of all aliens subject to the jurisdiction of our government without distinction as to race or color; the only exceptions being children of alien parents not subject to the jurisdiction of the United States. *United States v. Wong Kim Ark*, 169 U. S. 665, 18 Sup. Ct. 456, 42 L. Ed. 890. By our Constitution the power to provide for the naturalization of aliens is vested in Congress, the courts have no power to admit aliens to citizenship, otherwise than in accordance with the laws which Congress has enacted, and aliens cannot demand admission to citizenship as a right. They can only claim the privilege of becoming adopted citizens under the provision of laws enacted by Congress. The general policy of our government in regard to the naturalization of aliens has been to limit the privilege of naturalization to white people, the only distinct departure from this general policy being soon after the close of the Civil War, when, in view of the peculiar situation of inhabitants of this country of African descent, the laws were amended so as to permit the naturalization of Africans and aliens of African descent. In the year 1862 (Act July 17, 1862, c. 200, § 21, 12 Stat. 597) a law was enacted in recognition of services of aliens who enlisted in the military service of this country, authorizing naturalization of aliens who should be honorably discharged from military service and that law became incorporated in title 30 of the Revised Statutes of the United States as section 2166 (U. S. Comp. St. 1901, p. 1331). As original-

ly enacted by Congress, section 2169 merely extended the privilege of naturalization to Africans and aliens of African descent, but by the act of 1875, to correct errors and supply omissions in the Revised Statutes, that section was amended to read as follows:

"The provisions of this title shall apply to aliens being free white persons, and to aliens of African nativity and to persons of African descent." Act Feb. 18, 1875, c. 80, 18 Stat. 318 (U. S. Comp. St. 1901, p. 1833).

As both sections are comprised in title 30, this amendment of section 2169 provides a rule of construction applicable to section 2166, and, being the latest expression of the will of Congress on the subject, it is controlling, and limits the privilege of naturalization to white persons and those of African nativity or descent. The use of the words "white persons" clearly indicates the intention of Congress to maintain a line of demarkation between races, and to extend the privilege of naturalization only to those of that race which is predominant in this country. In re Ah Yup, Fed. Cas. No. 104; In re Saito (C. C.) 62 Fed. 126; In re Yamishita, 30 Wash. 234, 70 Pac. 482, 94 Am. St. Rep. 860.

As this applicant is of a different race, the court is constrained to deny his application on the ground that the laws enacted by Congress do not extend to the people of his race the privilege of becoming naturalized citizens of this country.

In re HIGHFIELD.

(District Court, M. D. Pennsylvania. September 2, 1908.)

No. 1,133, in Bankruptcy.

1. BANKRUPTCY—EXEMPTION—JURISDICTION OF COURT.

While a bankruptcy court has no jurisdiction over property claimed by the bankrupt as exempt; once the right to it has been established, it may, preliminary to that, determine whether for any reason the right cannot be asserted.

2. SAME—EXEMPTION CLAIMED FROM FUND IN COURT—CLAIM OF LANDLORD UNDER LEASE WAIVING EXEMPTION.

Where the property of a bankrupt has been sold, and the bankrupt asserts a right to his exemption from the fund in court produced by such sale, the court has jurisdiction to determine his right as against other claimants of the fund, and the claim of a landlord who had a lien on the property for rent, and in whose favor the bankrupt had waived his right of exemption in the lease, is entitled to preference over the claim of exemption.

In Bankruptcy. On exceptions to report of referee allowing bankrupt's exemption.

Charles H. Welles, Jr., for landlord.

W. H. Leach, for bankrupt.

ARCHBALD, District Judge. The bankrupt's goods were sold by the receiver for \$1,700, but there have been numerous expenditures which bring it down to less than \$1,000. There was due to the landlord at the time the bankruptcy proceedings were instituted, for rent of the premises, the sum of \$1,750, which has been reduced to \$1,535

by the proceeds of certain other goods which were appraised and left on the premises upon some sort of an understanding that the bankrupt was going to take them for his exemption, but which were distrained and sold by the landlord, whereupon the bankrupt concluded not to. Later on, when he filed his schedules, he claimed his exemption in cash out of the money in the trustee's hands which was allowed him. To this the landlord objects, as it cuts down the fund to which he must look for his rent, already meager; the bankrupt having waived his exemption in the lease, to say nothing of having acquiesced in the announcement at the receiver's sale that he was going to take the goods in the basement. The question is whether in view of these facts the bankrupt is entitled to maintain his claim.

The referee finds that there was nothing in his alleged acquiescence, and, as the case goes off on another point, there is no occasion to discuss it, if, indeed, it could be considered doubtful. But the referee also holds that the court has no authority over property claimed as exempt except to appraise and set it off, leaving it to the state courts to work out and enforce conflicting claims with regard to it. This is no doubt true so far as concerns specific goods or property sought to be retained as exempt by the bankrupt. *Lockwood v. Exchange Bank*, 190 U. S. 294, 23 Sup. Ct. 751, 47 L. Ed. 1061; *In re Brumbaugh* (D. C.) 12 Am. Bankr. Rep. 204, 128 Fed. 971. But even here the court will undertake to inquire and decide whether by reason of fraud he has not forfeited his rights. *In re Duffy* (D. C.) 9 Am. Bankr. Rep. 358, 118 Fed. 926; *Matter of Alex* (D. C.) 15 Am. Bankr. Rep. 450, 141 Fed. 483; *In re Schafer* (D. C.) 18 Am. Bankr. Rep. 361, 151 Fed. 505; *In re Ansley* (D. C.) 18 Am. Bankr. Rep. 457, 153 Fed. 983. And, if so, it is difficult to see why it may not do so, also, where the question is whether for any reason he has not waived or lost them. The distinction would seem to be that, while the bankruptcy court has no jurisdiction over the property claimed as exempt, once the right to it has been established, it may, preliminary to that, determine whether for any reason the right cannot be asserted. *In re Coddington* (D. C.) 11 Am. Bankr. Rep. 122, 126 Fed. 891; *In re Sloan* (D. C.) 14 Am. Bankr. Rep. 435, 135 Fed. 873; *In re O'Connor* (D. C.) 16 Am. Bankr. Rep. 784, 146 Fed. 998.

In the case in hand there is no question of goods or the right to distrain or have execution of them or of enforcing a lien against them, all of which, when it arises, must be left to proper proceedings in the state courts after the bankruptcy court has found the bankrupt entitled to maintain his claim and turned the property over to him. Here there is a fund which the court is called upon to distribute to the parties entitled to it. Three hundred dollars is claimed on the one hand by the bankrupt by virtue of his state exemption, and, on the other hand, by the landlord, for rent, as to which the bankrupt has clearly waived it. It would be a strange conclusion to reach that the money must be given to the one who, as against the other, has clearly no right to it, upon a supposed construction of the law by which the court is deprived of jurisdiction over exempt property. Jurisdiction is not wholly cut off. The court in a proper case, as we have seen, is still charged with the duty of inquiring whether the bankrupt has not lost

or forfeited it, and in line with this it may also decide as between rival claims for a fund in court whether the one as against the other has not waived it. The bankrupt was denied his exemption on this ground by Judge Buffington as against the landlord having a lease which, the same as here, contained a waiver. In *re Hoover* (D. C.) 7 Am. Bankr. Rep. 330, 113 Fed. 136. And there was a similar ruling by this court in *Re Renda* (D. C.) 17 Am. Bankr. Rep. 521, 149 Fed. 614, from which the present case is not to be distinguished. As is there said, the bankrupt having come into court to get his exemption, the right of others who also lay claim to the fund may properly be considered, and there is no occasion to send them elsewhere for relief, which in the present case, as it may be added, would be to absolutely deny it. The money in court stands for the goods out of which it was realized, and the landlord, being deprived of his right of distress, is entitled to the same consideration and treatment as if he had been free to exercise it. In *re West Side Paper Co.* (C. C. A.) 162 Fed. 110.

The exceptions are sustained, the exemption is refused, and the fund is awarded to the landlord on his claim for rent.

UNITED STATES v. SMITH.

(District Court, M. D. Alabama, N. D. June 8, 1908.)

OFFICERS—SOLICITING POLITICAL CONTRIBUTION IN PUBLIC OFFICE—FEDERAL STATUTE.

The personal delivery to a postmaster in his office of a sealed letter containing a request for a contribution for a political campaign constitutes a criminal offense, under Act Jan. 16, 1883, c. 27, § 12, 22 Stat. 407 (U. S. Comp. St. 1901, p. 1223), which forbids any person to solicit in any room or building occupied in the discharge of official duties by any officer or employé of the United States, "in any manner whatever," any contribution for any political purpose whatever.

Defendant, Allie C. Smith, was indicted under Act Jan. 16, 1883, c. 27, § 12, 22 Stat. 407 (U. S. Comp. St. 1901, p. 1223), "to improve the civil service," for soliciting, in the post office at Clanton, Ala., a contribution of money for a political purpose from F. O. Dudley, the postmaster there. Being arraigned, the defendant made a statement of the facts, which the government admitted to be correct, and thereupon asked the advice of the court whether his conduct fell within the statute, offering to abide the opinion of the court as to the law upon the facts, and to plead guilty or not guilty accordingly.

Smith is an attorney at law. He held no office or employment under the United States, and was the chairman of the Republican campaign committee of Chilton county, and conducting a political campaign in that county. He wrote letters in his law office to a number of persons, including Postmaster Dudley, soliciting campaign contributions, and after putting them in envelopes, and sealing and properly addressing the letters, took them to the post office to get stamps and mail them. While in the post office, putting stamps upon the batch of letters, the postmaster came in the room and spoke to him. Smith thereupon handed Dudley the letter addressed to him, saying, "This will save a stamp." The letter thus delivered read as follows:

"Oct. 5, 1906.

"Postmaster, Clanton, Ala.—Dear Sir: Believing that now is a propitious time, we are undertaking to wage a fierce political campaign in our county, not only for the purpose of electing our entire ticket, but to build and establish a strong Republican party in our county that will be invincible hereafter. For these purposes we ask your liberal contribution to a campaign fund. Remit your contributions to the undersigned.

A. C. Smith,

"Chairman Republican Campaign Committee Chilton County."

The postmaster took the letter, and Smith, without advising him as to its contents, immediately left the post office, not having in any way solicited any contribution of him, save as the delivery of the letter, sealed in the envelope, addressed to the postmaster, amounted to such solicitation. The defendant was indicted December 19, 1907, without any preliminary examination.

E. J. Parsons, U. S. Dist. Atty.

A. C. Smith, pro se.

JONES, District Judge (after orally stating the facts as above). Section 12 of the statute (Act Jan. 16, 1883, c. 27, 22 Stat. 407 [U. S. Comp. St. 1901, p. 1223]) "to improve the civil service" forbids any one to solicit, "in any manner whatever," any contribution of money or any other thing of value for any political purpose whatever, in any room or building occupied in the discharge of official duty by certain officers or employes of the United States—among them, a postmaster. To constitute the offense the statute creates, it is not necessary that the solicitation be made verbally. The illegal solicitation may as well be made by a written request personally delivered in the forbidden place. An effort to get money in that way for a political purpose offends the letter and policy of the statute as clearly as the most persistent and earnest verbal solicitation. Excepting a written solicitation out of the statute requires us to ignore the policy and to run counter to the letter of the statute. It forbids the solicitation "in any manner whatever."

When the defendant, while in the post office, intentionally handed the postmaster a letter, knowing that it contained a request for a political contribution from the person to whom the letter was delivered, he undoubtedly violated the statute. The solicitation was then complete, in a place where it was unlawful to ask for a political contribution. It is entirely immaterial that the letter was not then opened, or that the postmaster was not then advised of its contents, or, for that matter, that the request in the letter was never afterwards acted upon or discussed between the parties. The guilty intent to violate the law flows from the knowing and intentional doing of the acts which the statute forbids. Ignorance of the statute, or of the extent of its provisions, is no excuse. Upon the admitted facts, the court would be bound to charge the jury that the defendant is guilty.

The law, taking into consideration that there may be a much higher degree of criminality in some instances than in others, gives the court most extended discretion as to the measure of punishment. When the letter was written and carried to the post office, there was no thought of delivering the letter personally to the postmaster. Unquestionably the letter would not have been delivered in person, but mailed, as originally intended, if it had not been for the chance meeting of

Smith with the postmaster in the post office, while the other letters were being stamped. Personal delivery to him in the post office was an afterthought, and in a sense accidental. This is not the case of an officer preferring a solicitation for a political contribution from some other officer or employé who is under his authority, or in any other way dependent upon him. The solicitation, under the circumstances, cannot be said to amount to an indirect coercion, as might have been the case if the contribution had been solicited of Dudley by some superior officer, or by one who had supervision over him in any way. The act of the defendant was not *malum in se* in any view of it, and was, at most, an unpremeditated and inadvertent violation of the statute. The violation of the statute is a technical, rather than a substantial, offense. Under the circumstances, respect for the civil service law will not be enhanced by punishing the defendant as though there had been a serious infraction of its policy. The prosecution of the defendant has called attention to the statute and the purpose of the government to enforce it. The defendant has been put to some expense; and undergone the mortification of being arraigned in court upon a criminal charge. Anything more than a nominal fine, under the circumstances, would savor of harshness. The precedent of a nominal fine, under the circumstances of this case, will not encourage violations of the law in the future. The defendant is a man of high character, and there is no need of any punishment to reform him in any way, or prevent his indulging in the evil practice in the future. The example has been sufficient.

The defendant, in deference to the opinion of the court, having pleaded guilty, is sentenced to pay a fine of \$1.

NOTE BY THE COURT.—A few weeks before the instant case was decided, the Supreme Court in *U. S. v. Thayer*, 209 U. S. 39, 28 Sup. Ct. 426, 52 L. Ed. 673, reversing *U. S. v. Thayer* (D. C.) 154 Fed. 508, had decided the question involved, though neither court nor counsel were then aware of the decision. The holding, *arguendo*, in that part of the opinion discussing the question of punishment, that Smith's conduct would not have fallen within the condemnation of the statute, if he had merely deposited the letter in the mail, without personal delivery, is not in harmony with the construction placed upon the statute by the Supreme Court, and is therefore unsound.

1. MINES AND MINERALS—INJUNCTIONS—NATURE OF REMEDY—INJUNCTIONS ANCILLARY TO EJECTMENT.

Code Civ. Proc. Alaska, § 386, provides that when it appears by affidavit that defendant is doing, or threatening to do, or procuring or suffering to be done, some act in violation of plaintiff's rights respecting the subject of the action and tending to render the judgment ineffectual, an injunction may be allowed to restrain such act, etc., and section 1 declares that the distinctions between actions at law and suits in equity are abolished, and that but one form of action for the enforcement or protection of private rights or the redress or prevention of private wrongs is authorized. *Held*, that plaintiffs in ejectment to recover certain mining ground were entitled, under such sections, to an injunction ancillary to such action restraining defendants' mining operations on the ground in controversy pendente lite, on a showing that the ground was chiefly valuable for placer mining, and that defendants' continued mining operations thereon would result in irreparable injury to plaintiffs.

2. SAME—DAMAGES FOR DETENTION.

Plaintiffs' claim for damages in ejectment for the unlawful withholding of possession of mining ground claimed by defendants did not affect plaintiffs' right to an injunction to preserve their property from further depletion by defendants' mining operations pendente lite.

3. SAME—WRIT—SCOPE.

Where an injunction ancillary to ejectment to recover certain mining ground restrained defendants from rocking and sluicing or in any manner working in or on the premises in controversy, it did not prevent defendants from working dirt, taken from the ground in dispute, and removing to other property.

4. SAME—REALTY—SEVERANCE.

Dirt dug and hoisted to the surface and still deposited on the ground in dispute was still a part of the realty and was covered by the terms of the injunction.

5. SAME—MOTION FOR INJUNCTION—AFFIDAVITS—INSOLVENCY.

On an application for an injunction pendente lite ancillary to ejectment to recover certain mining ground, to restrain defendants' mining operations, it was not necessary that the affidavits allege that defendants were insolvent; the injury claimed by their continued mining operations being in itself irreparable.

Ross, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Second Division of the District of Alaska.

The appellees were plaintiffs in the court below in a suit in ejectment. The appellants were the defendants in the suit. The complaint was filed January 4, 1907. Defendants' answer was filed March 14, 1907. Plaintiffs' reply to defendants' answer was filed May 14, 1907. In the complaint it was alleged that the plaintiff was the owner in fee (subject only to the paramount title of the United States) and entitled to the possession, under and by virtue of a valid mining location, of a certain mining claim designated as the Roosevelt placer mining claim, in the Cape Nome recording district of Alaska. The claim was described in the complaint by courses and distances. It appeared from a later part of the record that the portion of the Roosevelt claim entered upon by the defendants was a section of the claim involved in a conflict with the Bon Voyage claim, leased by the defendants from the parties claiming to own the latter claim. The plaintiffs in their complaint further

*Rehearing denied October 26, 1908.

alleged that, at the time of the commencement of the action, the defendants still wrongfully withheld possession of the said tract of land to the damage of the plaintiffs in the sum of \$100,000. The prayer of the complaint was that the plaintiffs be adjudged the owners in fee and entitled to the possession of the premises, and that they have and recover damages in the said sum of \$100,000 for the unlawful detention thereof. Defendants, in their answer, denied the allegations of plaintiffs' complaint, and set up as an affirmative and separate answer, their possession of the ground in controversy under certain leases executed by the owners of the Bon Voyage claim. The reply of the plaintiffs to defendants' answer denied the averments of the answer and affirmatively alleged an amended location of the Roosevelt claim on June 21, 1905, which included, covered, and appropriated the premises described in the complaint.

While these issues were being formed by the pleadings, the plaintiffs, on May 11, 1907, filed in court their own affidavits, together with a number of other affidavits, in support of a motion for an order on the defendants to show cause why an injunction pendente lite should not issue, restraining them from working or mining the premises in controversy, or from rocking or in any manner extracting gold from the gold-bearing gravel in the dump or dumps situated upon the fractional claim adjoining the Roosevelt claim, which said gold-bearing gravel and dumps of pay gravel it was alleged by plaintiffs had been extracted and removed from the premises in controversy during the winter seasons of 1906 and 1907. In answer to the order to show cause, the defendants set up by affidavits the facts relating to their claim of right to the possession of the premises; admitted that they had entered upon the premises in controversy and commenced to work, mine, and operate the same in June, 1906, and had continued to mine and operate the same openly, notoriously, and adversely to all the world and particularly to the plaintiffs; admitted that while operating said claim the defendants had extracted from the premises in dispute, at a depth of about 120 feet below the surface of the earth, a large quantity of gold-bearing earth, sand, and gravel, which defendants had severed from the bed in which said gold-bearing earth, sand, and gravel lay, and hoisted the same through shafts upon said premises and deposited the same on the dump upon said premises, which said dump had always been, since the same was there placed, and then was, within the exclusive control, ownership, and dominion of the defendants, and was claimed by them adversely to the whole world. On the showing made the order to show cause was issued, and, pending the hearing of the order to show cause, a temporary restraining order was issued, restraining the defendants from doing any of the acts complained of in plaintiffs' motion. On May 22, 1907, the temporary restraining order was modified so as not to enjoin the defendants from sluicing upon any ground not in dispute in the action. The order to show cause was heard by the court on May 27, 1907, upon the verified pleadings in the case and upon affidavits on behalf of both the plaintiffs and the defendants, and on June 1, 1907, the court granted the motion for an injunction pendente lite, and ordered the defendants to absolutely desist and refrain from rocking, sluicing, mining, or in any manner working in or upon the premises in controversy. From this order the defendants have prosecuted the present appeal.

Ira D. Orton and Albert Fink (Campbell, Metson, Drew, Oatman & MacKenzie, and E. H. Ryan, of counsel), for appellants.

Elwood Bruner, J. Allison Bruner, and P. M. Bruner (Edward Lande and John P. Allen, of counsel), for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). The plaintiffs brought this suit in ejectment to recover the possession of a portion of a mining claim which the defendants had entered and ousted the plaintiffs. The value of the ground in controversy consists in the gold-bearing earth, sand, and gravel contained therein. The

defendants admit they are severing and extracting this gold-bearing material and depositing it in a dump on the premises. The extraction and removal of this gold-bearing material from the ground will necessarily destroy its value and render ineffectual any judgment that may be obtained in an ejectment suit for the possession of the ground. The plaintiffs, to protect their interests in this respect, have appealed to the remedy by injunction.

It is contended, on behalf of the defendants: (1) That the plaintiffs are limited in their remedy to a judgment in the action of ejectment restoring to them the possession of the premises in controversy, and to damages for their detention; (2) that plaintiffs are not entitled to equitable relief in an ancillary proceeding that would be broader than the relief to which they would ultimately be entitled under the prayer of the complaint; (3) that ore severed from the body of the mine and placed upon the surface loses its character as real property and becomes personalty from the time of its severance; and (4) that equity only interferes by way of injunction to prevent future mischief, and not to remedy that already done. Much of the argument urged in support of the first two propositions is derived from the methods of procedure formerly prevailing in jurisdictions where courts of equity administer equitable remedies and courts of law legal remedies, and where distinctions had been maintained in the administration of legal and equitable remedies. In the present case, the plaintiffs seek a statutory remedy in a jurisdiction where there is but one form of action, and where there is no distinction in the administration of legal and equitable remedies.

In the Alaska Code of Civil Procedure it is provided that an injunction may be allowed by the court or a judge thereof at any time after the commencement of the action and before judgment:

"(1) When it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief or any part thereof, consists in restraining the commission or continuance of some act, the commission or continuance of which during the litigation would produce injury to the plaintiff; or (2) when it appears by affidavit that the defendant is doing, or threatens or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights concerning the subject of the action, and tending to render the judgment ineffectual; or (3) when it appears by affidavit that the defendant threatens or is about to remove or dispose of his property, or any part thereof, with intent to delay or defraud his creditors."

It is further provided that, in any such case, "An injunction may be allowed to restrain such act, removal, or disposition." Section 386, Code Civ. Proc. Alaska.

The injunction in this case was issued upon affidavits under the second subdivision of the section as indicated above. The entire section is identical with section 420 of the Oregon Code of Civil Procedure, from which it was taken (B. & C. Ann. Codes & St.); but it has not the same relation to the judicial system of Alaska that the corresponding section has to the judicial system of Oregon. In Alaska, the distinction between actions at law and suits in equity and the forms of all such actions and suits are abolished, and but one form of action for the enforcement or protection of private rights and the redress or prevention of private wrongs is provided. Section 1, Code Civ.

Proc. Alaska. In Oregon, the distinction between forms of actions at law is abolished (section 1, Code Civ. Proc. Or.; B. & C. Ann. Codes); but the distinction between an action at law and a suit in equity is still preserved, and it may be conceded that, had this action been brought in the state of Oregon, no injunction would have issued upon the affidavits in the case, for the reason that it would have been the introduction of an equitable remedy in an action at law, and such a proceeding is unknown under the judicial system of that state.

In Pomeroy's Code Remedies, the author, in section 76, discusses the question how far the abolition of all distinction between actions at law and suits in equity had affected the process of stating causes of action and praying for and obtaining remedies by the plaintiff. The author says:

"Under the former system a legal primary right, when invaded, could only be redressed by an action at law, and a legal judgment alone was possible; while an equitable right must be redressed or protected in an equity suit and by an equitable remedy. A union or combination of the two classes, either wholly or partially, in one action was unknown, unless permitted by some express statute, and was utterly opposed to the theory which separated the two departments of the municipal law."

Then, referring to the system of uniting and combining legal and equitable causes of action in one suit, the author says:

"The new system not only permits but encourages—and in spirit, I believe, requires—such a union and combination, for one of its elementary notions is that all the possible disputes or controversies arising out of, or connected with, the same subject-matter or transaction should be settled in a single judicial action."

In section 495, the author says:

"In a suit to recover possession of land, a separate cause of action may be added to restrain a threatened trespass and commission of waste."

This new system of combining and uniting legal and equitable causes of action had its origin in the state of New York, where it is provided in the Code of Civil Procedure of that state:

"There is only one form of civil action. The distinction between actions at law and suits in equity, and the forms of those actions and suits, have been abolished." Section 3339, Stover's Ann. Code Civ. Proc. N. Y.

This system has since been adopted in a number of the states and territories, including California and the territory of Alaska. In the New York Code of Civil Procedure, section 603 is substantially the same as subdivision 1, and section 604 is substantially the same as subdivisions 2 and 3, of section 386 of the Alaska Code. In other words, the latter section had its origin in the New York Code of Civil Procedure, as did the section providing for a single form of action. There is this further observation to be made concerning these two sections of the New York Code: Section 603 has the title "Injunction, when the right thereto depends upon the nature of the action," and 604 has the title "Injunction, when the right thereto depends upon extrinsic facts." In section 386 of the Alaska Code, these titles have been omitted, but this distinction between subdivision 1 and subdivisions 2 and 3 is plainly implied by the language used.

whether the act which the defendant is doing or threatening to do, or procuring or suffering to be done, and which it is the purpose of the injunction to restrain, is an act "in violation of the plaintiff's rights respecting the subject of the action." In *Campbell v. Ernest*, 64 Hun, 188, 19 N. Y. Supp. 123, the action was upon a judgment. An order was obtained by the plaintiff upon affidavits enjoining defendant from disposing of his property pending the action. The Supreme Court, holding that the plaintiff was not entitled to the injunction, said:

"In no proper or legal sense can a defendant do or permit any act in violation of the plaintiff's rights respecting the subject of the action, in an action on contract for the recovery of money only. The plaintiff in such an action has no rights, as against the property of the defendant, until he obtains a judgment, and until then he has no legal right to interfere with the defendant in the use and sale of the same. It would be a new and dangerous innovation to hold that the plaintiff, upon the commencement of an action on an account against a merchant, could procure an order of the court to restrain him from selling his goods pending the suit, because such sales would diminish the chances for the collection of the judgment when obtained, and yet such is the logical result of the doctrine which would sustain this order."

While this decision does not apply to the facts of the present case, it makes it very clear that the statute is designed to furnish a remedy in just such a case. "The subject of the action" is the mining ground in controversy and the mineral therein contained, and the injunction is for the purpose of preventing the removal of the mineral, which constitutes the value of the mining ground, and which it is the right of the plaintiffs to have preserved. If it be true, as alleged in the complaint in ejectment, that the plaintiffs are the owners of the ground, it would certainly be in violation of their rights "respecting the subject of the action" for the defendants to destroy the estate by removing its value.

The California Code of Civil Procedure was taken largely from the New York Code. It provides in section 307 for one form of civil action, and in section 526 for the remedy by injunction, substantially as in the New York Code. This remedy has been frequently applied to actions at law to prevent the destruction of the substance of the estate pending litigation relating to title, and naturally, in a mining state, we find the law applied to controversies relating to the possession of mining ground.

The *Natoma Water Co. v. Clarkin*, 14 Cal. 544, was an action in ejectment to recover possession of certain premises. The plaintiff, upon filing its complaint, obtained an order upon the defendants to show cause why an injunction should not issue restraining them from the commission of trespass in the nature of waste pending the action. The court said:

"This blending of an action at law with a petition for ancillary relief to the equity side of the court, is admissible under our system of practice."

In *More v. Massini*, 32 Cal. 590, the complaint contained two counts. The first was for damages caused by trespass upon land prior to a conveyance thereof to the plaintiff. The plaintiff claimed the dam-

ages by assignment. In the second count, the plaintiff alleged that he was the owner of the lands, that they were in his possession, that the defendants threatened to enter thereon and to quarry and remove asphaltum therefrom, and that they would do so unless restrained. An injunction was prayed for. A demurrer was interposed on the ground that neither count stated a cause of action, and that there was a misjoinder of causes. The lower court sustained the demurrer, and, the plaintiff declining to amend, judgment was entered against him, and he appealed. In the Supreme Court the judgment was reversed, and a new trial granted. In discussing the sufficiency of the second count, the court said:

"The gravamen is a threatened trespass upon land. The trespass is in the nature of waste, and it will be committed unless the defendant is restrained. Should the threat be fulfilled, the plaintiff would be deprived of a part of the substance of his inheritance, which could not be specifically replaced. In the class to which this case belongs, no allegation of insolvency is necessary. The injury is irreparable in itself"—citing *Merced Mining Company v. Fremont*, 7 Cal. 322, 68 Am. Dec. 262; *Hicks v. Michael*, 15 Cal. 116; *Leach v. Day*, 27 Cal. 646; *People v. Morrill*, 28 Cal. 360.

With respect to the objection that there was a misjoinder of causes of action, the court said:

"Trespass upon land is a legal injury; to threaten to enter upon and waste it is an equitable injury; but both may be joined in the same complaint, nevertheless, for the statute reason that they both are 'injuries to property.'"

In *Haggin v. Kelly*, 136 Cal. 481, 69 Pac. 140, the action was ejectment for the possession of a mining claim. The prayer of the complaint was for an injunction enjoining and restraining defendants during the pendency of the action from mining on said claim, and from taking and removing ore therefrom, and that on the final hearing the injunction be made permanent, and for the restitution of the lands and mining claim. The answer of the defendant placed in issue the ownership of the claim, admitting the earlier right to the title in plaintiffs, but alleging that plaintiffs' title had been lost, first, by forfeiture, and, second, by abandonment. A jury was impaneled to try the issues thus presented, but the court held that the case was in equity, and not in law, and that the jury was impaneled only for the purpose of advising the court upon the issues of fact. The jury found in favor of the plaintiffs, but the court disregarded the findings of the jury, and found in favor of the defendants, and entered judgment accordingly. The Supreme Court held that the action was at law and in the form of ejectment, that the equitable relief of a restraining order against waste during the pendency of the litigation did not change the nature of the action, but was ancillary merely and permissible under the pleadings, citing *Natoma Water Co. v. Clarkin*, 14 Cal. 544; *Curtis v. Sutter*, 15 Cal. 259; *Hughes v. Dunlap*, 91 Cal. 385, 27 Pac. 642. The court held, further, that the added prayer of the complaint, that upon the conclusion of the trial the temporary injunction be made permanent, was unnecessary and superfluous, for, if plaintiffs established their claim, defendants would be ousted, and they would be restored to possession, and there would be no occasion for a permanent injunction. This

case is peculiarly applicable to the questions involved in the present case. It determines that an action at law for the possession of real property may be maintained with the ancillary remedy by injunction to restrain waste, and that the equitable relief of an injunction pending litigation is not in conflict with a judgment in the action of ejectment restoring plaintiff to the possession of the premises in controversy.

In *Lindley on Mines*, vol. 2, § 872, the law of injunction as an ancillary remedy to an action at law is stated as follows:

"It was formerly the practice in equity, in cases of alleged trespasses on land, not to restrain in the use and enjoyment of the premises by the defendant when the title was in dispute, but to leave the complaining party to his remedy at law. A controversy as to title was deemed sufficient to exclude the jurisdiction of the court. This doctrine has been gradually modified in modern times, and it is now a common practice to grant an injunction in cases where irremediable mischief is being done or threatened, going to the destruction of the substance of the estate, such as the extracting of ores from a mine, or the cutting down of timber, though the title to the premises be in litigation. The authority of the court is exercised in such cases, through its preventive writ, to preserve the property from destruction, pending legal proceedings for the determination of the legal title."

In *Tornanses v Melsing*, 106 Fed. 775, 45 C. C. A. 615, and *Kjellman v. Rogers*, 106 Fed. 775, 45 C. C. A. 615, this court referred to the fact that in *Kjellman v. Rogers* the judge had granted an injunction and appointed a receiver upon an ordinary complaint in ejectment without a single allegation even of equitable nature. The proceedings under review in that case were had in a district court of Alaska, and, upon a proper showing on appeal, had been superseded by a judge of this court; the judge of the Alaska court having refused an appeal. The receiver appointed by the Alaska court had refused to obey the writ of supersedeas, and had been cited to show cause why he should not be punished for contempt. The receiver had been appointed by the Alaska court to take possession of certain valuable mines near Nome, among others, the mine involved in the case of *Kjellman v. Rogers*. In the latter case, he was required to give a bond in the sum of \$5,000. The mine was at the time in the possession of the defendant, and it was shown by affidavits that the mine was yielding \$5,000 per day. The order of the court was that the person in possession of the mining claim should deliver to the receiver its immediate possession, control, and management, together with the personal property situated upon the claim, and that the defendant be enjoined from in any manner interfering with the mining or working of the claim by the receiver or with his control and management thereof, and this was done on a complaint that did not even ask for the appointment of a receiver or for an injunction. The injunction was manifestly for the purpose of enabling the receiver to work the mine without molestation, deplete it of its mineral, and destroy its value. These extraordinary proceedings were so clearly in violation of the statute that they were characterized by this court as having no parallel in the jurisprudence of this country, but it was clearly not intended to say that an injunction could not have been issued upon a proper showing and in a reg-

the court said:

"Courts take judicial notice of the general physical and climatic conditions of the country within their jurisdiction. We therefore know judicially, as well as from the record in these cases, that the sole value of the mining claims in question consisted in the mineral contained in them. The extraction of that is therefore the taking of the very substance of the estate, and when all of it is removed nothing of value will remain in the claims."

We conclude from these authorities that the plaintiffs are not limited in their remedy under the Alaska Code to a judgment in the action of ejectment restoring them to the possession of the premises in controversy, but, upon the showing made by the plaintiffs and the admissions of the defendants, the plaintiffs are also entitled, under section 386, to the equitable relief of an injunction pending litigation.

The claim of damages alleged in the complaint for the unlawful withholding of the possession of the claim does not affect the question whether the plaintiffs are entitled to an injunction to preserve the estate from further depletion. It is alleged in plaintiffs' affidavits that the premises in dispute are valuable only for the gold-bearing gravel contained therein, and that the operations of the defendants in mining, working, sluicing, rocking, and extracting gold therefrom is an irreparable injury and damage to the plaintiffs. The essential value of the injunction in this case is to prevent further irreparable damage pending the determination of the legal rights of the parties to this ground. Whether they are entitled to damages for the withholding of possession prior to the injunction being ordered is a question to be determined upon the trial of the case upon the merits.

The contention of the defendants that the ore severed from the body of the mine and placed upon the surface loses its character of real property and becomes personalty from the time of its severance is untenable in this case. It is difficult to determine from the record whether the sand and gravel referred to by counsel as "ore" is still on the ground in dispute, or has been removed to ground described as a fractional claim between the Roosevelt and Golden Bull claims. The affidavits of both plaintiffs is to the effect that it has been so removed. If so, it is not within the terms of the injunction order appealed from, which restrains the defendants from rocking and sluicing or in any manner working in or upon the premises in controversy and particularly set forth in plaintiffs' complaint. The defendant Crabtree, on the other hand, appears to admit in his affidavit that the sand and gravel which has been taken from a lower part of the mine is still on the surface of the ground in dispute. Assuming that the latter statement is correct, we are of opinion that the removal of this sand and gravel from one part of the mine to another is not such a severance from the realty as to make it personalty. The gold contained in the sand and gravel is still to be separated therefrom by rocking and sluicing. It is still a part of the placer mine to be worked like any other part, and it is this work-

ing of the mine that the injunction is intended to restrain pending the litigation as to title.

In *Erhardt v. Boaro*, 113 U. S. 537, 5 Sup. Ct. 560, 28 L. Ed. 1113, in a suit in equity ancillary to an action for the possession of a mining claim, the court upheld an injunction restraining the defendants from mining on the claim, or extracting ore therefrom, or removing any ore already extracted, until the final determination of the action at law.

In *United States v. Parrott, McAllister* 271, 27 Fed. Cas. No. 15,998, the court, in ordering an injunction to restrain waste, said:

"The ground on which the court has felt it to be its duty to interpose by injunction in this case is to preserve the premises from waste and destruction, while the title to it is undecided. It has also considered it its duty to enjoin against the removal of the ores which have been already extracted and remain on the premises."

In *High on Injunctions*, vol. 1, § 731, the rule is stated as follows:

"While the general rule requiring complainant to show a good title extends to trespass against mines, yet it may be relaxed somewhat in a case of irremediable mischief, where the injury goes to the destruction of the very substance of the estate, and in such a case the injunction will not be limited to the prevention of future trespass, but will restrain the removal of ore already extracted from the mine."

It is true, as contended on behalf of the defendants, that the purpose of the injunction in this case was to prevent future mischief, not to remedy that already done. It was intended to preserve the status quo until the title of the property is determined, and this includes the working of the sand and gravel on the surface of the ground, as well as that beneath the surface.

The absence of an allegation in the affidavits filed in support of the motion for injunction charging that the defendants were insolvent is immaterial. The alleged injury is irreparable in itself. *More v. Massini*, supra; 1 *Beach on Injunctions*, §§ 35, 40.

The order of the District Court granting an injunction pendente lite is affirmed.

GILBERT, Circuit Judge (concurring). Congress has abolished the distinction between actions at law and suits in equity in Alaska, and has enacted a statute authorizing, pending an action, the provisional remedy of injunction upon certain prescribed conditions. The question here is: What is the proper construction of that statute? It provides for the issuance of an injunction pendente lite in two distinct classes of cases: First, cases where it appears by the complaint that the plaintiff is entitled to such relief; and, second, in any case when it appears by affidavit that a defendant is doing, or threatening to do, certain designated things, which would tend to render the judgment ineffectual. The language of the statute is so plain that discussion of its meaning would seem to be unnecessary. In the second class of cases providing for the remedy during the pendency of the action, there is no mention of the complaint or of any additional or supplemental pleading. The statute does not say that it shall appear from a complaint that the plaintiff is entitled to the temporary relief.

It declares that it shall be granted on affidavits in any action where the specified injury is threatened. The fact should not be lost sight of that the life of the injunction so authorized in the second class of cases is to end with the judgment. It is a provisional remedy only. It is not in a strict sense a preliminary injunction—that is to say, it is not preliminary to a permanent injunction—and the fundamental rule that a permanent injunction must rest upon proper pleading in a bill or complaint has no application. Without such a statutory provision the remedy could not, of course, be accorded in an action at law. But there is nothing anomalous in such legislation. Before any of the codes were adopted in the states, there was in force in New York, under the Revised Statutes of that state, a provision that in an action of ejectment the court might, upon affidavit, enjoin waste by the defendant pending the action. It seems never to have occurred to a court, to hold, or to counsel practicing under that statute to suggest, that, in order to avail himself of the protection of the remedy so afforded, the plaintiff must insert in the declaration in ejectment any averment other than those required by the rule of common-law pleading. The temporary injunction was obtained upon a declaration and upon an affidavit setting forth the facts to show the propriety of the restraining order. *Bush v. Phillips*, 3 Wend. (N. Y.) 428; *People v. Alberty*, 11 Wend. (N. Y.) 161. A similar practice has obtained in some of the states where, under a Code system, provision has been made for the issuance of a temporary injunction in actions at law. Thus, in *Riemer v. Johnke*, 37 Wis. 258, it was held that a plaintiff in ejectment may be entitled, as a provisional remedy, to an order restraining trespass or waste during the pendency of the action. In *College Corner et al. v. Moss et al.*, 77 Ind. 139, which was an action at law, the court said:

"The statute makes no provision for a temporary injunction when no cause therefor is shown in the complaint, except where the defendant threatens or is about to remove or dispose of his property. In such case it seems that where the facts are presented by affidavit, after the action has been commenced, an injunction may be issued to prevent the threatened injury."

I am unable to see how the decisions in *McHenry v. Jewett*, 90 N. Y. 58, *Heine v. Rohner* (Sup.) 51 N. Y. Supp. 427, and *Goldman v. Corn* (Sup.) 97 N. Y. Supp. 926, have any relation to the question presented in this case. They are all cases arising under and controlled by section 603 of the Code of Civil Procedure of New York. They were all equitable suits; two of them being suits to obtain permanent injunction, and the other a suit for a decree of specific performance. Section 603 provides:

"Where it appears from the complaint that the plaintiff demands and is entitled to a judgment against the defendant restraining the commission or continuance of an act, the commission or continuance of which during the pendency of the action would produce injury to the plaintiff, an injunction order may be granted to restrain. The case provided for in this section is described in this act as a case where the right to an injunction depends upon the nature of the action."

The decisions in those cases had no bearing whatever upon section 604, which makes provision, as does the second clause of the

Alaskan statute, for a temporary injunction upon affidavits showing that the defendant threatens or is about to procure or suffer to be done an act during the pendency of the action "in violation of the plaintiff's right respecting the subject of the action and intending to render the judgment ineffectual."

It seems to me, from a consideration of the statutes and the decisions that under the provision of the Alaskan Code, it is unnecessary, and in fact it would be improper pleading, to insert in the complaint, in a case which is in its nature an action at law, the particular facts on which the plaintiff predicates his application for a temporary injunction, or even a prayer for such relief; but if, indeed, it should be held otherwise, I am of the opinion that the court below committed no error in granting the injunction, for a sufficient basis for it was set forth in the affidavit of one of the plaintiffs in the court below. It was an affidavit containing the title of the court and the cause, and it alleged all of the facts necessary to show that the plaintiffs were entitled to injunction pending the action. It further alleged that the plaintiffs had no plain, speedy, or adequate remedy at law, and it prayed that an injunction be issued restraining and enjoining the defendants, and each of them, their servants, etc., from mining or sluicing within the described premises. In *Morgan v. Quackenbush*, 22 Barb. (N. Y.) 72, it was held that, under the rule of chancery practice that an injunction can only be granted when it appears by the complaint that the plaintiff is entitled to the relief demanded, an injunction pendente lite might be granted in the absence of such averment in a complaint, upon an affidavit which contained all the requisites of a complaint. Of the affidavit in that case, the court said:

"It contains the title of the cause. It specifies the name of the court and the county where the plaintiff proposes to try the action, and the names of the parties. It then states the facts upon which the plaintiff relies to constitute his cause of action, and demands the relief to which the plaintiff supposes himself entitled. This makes a complaint. * * * If a paper contains, as this does, everything essential to constitute a complaint, the form in which it is presented furnishes no sufficient ground of objection."

ROSS, Circuit Judge, dissenting.

RUSHMORE V. MANHATTAN SCREW & STAMPING WORKS.

(Circuit Court of Appeals, Second Circuit. July 27, 1908.)

No. 264.

1. TRADE-MARKS AND TRADE-NAMES—WORDS SUBJECT TO APPROPRIATION— DESCRIPTIVE TERMS.

The words "Flare Front," as applied to automobile lamps, the shell of which flares in front to inclose a large glass, are descriptive, and cannot be monopolized by a single manufacturer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, § 6.

Arbitrary, descriptive, or fictitious character of trade-marks and trade-names, see note to *Searle & Hereth Co. v. Warner*, 50 C. C. A. 823.]

patented design, may maintain a bill for an injunction, profits, and damages against a defendant who sells an automobile search light inclosed in a similar shell, although his name appears prominently thereon as maker, and he has never represented that his lamps were made by complainant, if it is shown that the similarity of the shells does, or is likely to, deceive purchasers.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, § 86.]

Noyes, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the Southern District of New York.

On appeal from an order granting a preliminary injunction enjoining the defendant, its officers, employees, and agents "not to manufacture, sell, or use, exhibit or advertise, any automobile lamp or lamps having inclosing cases or shells made in imitation of, or resembling, or a colorable variation of, the Rushmore 'Flare Front' search-light lamp, exhibited to this court herein, and of which a sample has been offered, marked 'Exhibit A,' except in so far as such lamps may be the genuine lamps made by complainant, and not to use, in connection with any lamp made in imitation of, or resembling, or a colorable variation of, said Exhibit A Rushmore lamp, the words, 'Flare Front,' and not to print or publish, or have printed or published, in catalogues or advertisements or elsewhere, any cut or representation of any lamp in imitation of, or similar to, said Exhibit A Rushmore lamp, and not to print or publish, in any catalogue or advertisement or elsewhere, the words 'Flare Front' or similar words in connection with the representation of any lamp made in imitation of or similar to said Exhibit A lamp, except in so far as such representation and such words may be used to advertise, or in connection with, genuine Rushmore lamps made by complainant."

Hans v. Briesen (Arthur v. Briesen, of counsel), for appellant.
Alfred Wilkinson, for appellee.

Before COXE and NOYES, Circuit Judges, and ADAMS, District Judge.

COXE, Circuit Judge (after stating the facts as above). In December, 1905, the complainant adopted a design for the shell of an automobile lamp and in the following January exhibited it at the exhibition of automobiles at Madison Square Garden, New York. This is the complainant's lamp in controversy. Its exterior is pleasing to the eye and it is unquestionably a high grade lamp, but there is nothing strikingly novel or ornamental about it. In general contour it resembles the search light which has for years been in use upon excursion boats and vessels of war, the principal difference being in the addition, by the complainant, of the so-called "Flare Front." The glass front of the lamp being larger in diameter than the body of the lamp except as it flares out near the front to meet and inclose the glass. No patent has been granted to Rushmore either for a combination, for a new article of manufacture or for a design for the shell of the lamp. It is possible that had application been made a design patent might have been granted and sustained. In *West Disinfecting Co. v. Frank*, 149 Fed. 423, 79 C. C. A. 359, this court recently held valid a design patent for a somewhat similar structure.

appearance the Rushmore lamp. If a valid design patent had been issued to the complainant we have no doubt that the defendant's lamp would infringe and, believing as we do that the points of difference are unimportant, we will consider the question involved upon the theory that the shells of the two lamps are substantially identical.

The defendant has adopted "Phoebus" as its trade-mark and its lamp is known to the trade as the Phoebus lamp. All of its lamps have conspicuously displayed on the top thereof a name plate with a black background inscribed "Phoebus, the lamp of Quality, Model 601, Manhattan Screw & Stamping Works, N. Y." The officers of the defendant deny that they, or any one connected with the defendant, have ever in any way represented their lamps as those of the complainant. There are allegations in the bill, made upon information and belief, that the defendant has palmed off its lamps upon innocent purchasers as the Rushmore lamps, but there is nothing in the affidavits worthy of the name of evidence to establish these allegations. The affidavits, in our judgment, also fail to establish an exclusive right to the use of the name "Flare Front." The complainant says in his affidavit, "I am aware that what might be called 'flaring fronts' have been used on other forms of lamps entirely different in appearance from my Exhibit A lamp, for instance the old carriage lamps, but I am positive that I am the first who has ever used these flare fronts on any lamp similar in appearance to my Exhibit A." Assuming the correctness of this statement we do not think the fact that complainant was the first to put a flaring front on a shell of his design entitles him to a monopoly of these words. We regard them as descriptive merely and are of the opinion that an injunction should not issue at least until proof, more cogent than anything which now appears in the record, is presented, showing that they have acquired a secondary meaning. So far then as the prayer for an injunction is based upon the use of the name "Flare Front" and the allegation that the defendant has actually deceived purchasers by representing that its lamps were made by the complainant, the most that can be said is that the questions are involved in doubt. This court has uniformly held that an injunction should not issue in a doubtful case. *Hall Signal Co. v. Railway Signal Co.*, 153 Fed. 907, 82 C. C. A. 653; *Cleveland Foundry Co. v. Silver*, 134 Fed. 591, 68 C. C. A. 87; *Hildreth v. Norton*, decided Feb. 11, 1908 (C. C. A.) 159 Fed. 428.

As we read the opinion of the judge of the circuit court he finds no actual fraud and no evidence that the defendant is now using the word "Flare Front." He says: "Assuming that at the present time the defendant is not using the word 'flare front,' is not selling its product as Rushmore lamps, and is not using in any way either of these words or phrases, the question is whether plaintiff is entitled to be protected from unnecessary imitation of nonfunctional parts of his well-known lamp. It seems to me that under the cases of *Enterprise Manufacturing Co. v. Landers*, 131 Fed. 240, 65 C. C. A. 587, and *Marvel Co. v. Pearl*, 133 Fed. 160, 66 C. C. A. 226, he is so en-

titled." We are thus confronted with the naked question of law—Can one who manufactures and sells a well-known article of commerce, like an automobile search light inclosed in a shell of graceful but unpatented design, maintain a bill for an injunction, profits and damages against a defendant who sells automobile search lights inclosed in a similar shell, with his name prominently appearing thereon as the maker, and who has never represented that his lamps were made by the complainant? We feel constrained to answer this question in the affirmative upon the authority of *Enterprise Co. v. Landers*, supra, and *Yale & Towne Mfg. Co. v. Alder*, 154 Fed. 37, 83 C. C. A. 149. Both of these cases were decided by this court and we see no way to distinguish them, on principle, from the case at bar. We are of the opinion, however, that to answer this question in favor of the complainant carries the doctrine of unfair competition to its utmost limit. If it be pushed much farther those engaged in trade will be encouraged to run to the courts with trivial complaints over the petty details of business and thus will grow up a judicial paternalism which in time may become intolerable.

This cause or one involving the question at issue may be easily brought here on appeal from final decree and heard at the next term. After the witnesses have been cross-examined we may be able to tell with much greater certainty whether the competition of which the complainant complains is produced by the similarity of the shells of the two devices or by the fact that defendant is selling its lamps at a much lower price. It appears from the record that purchasers of automobiles belong to the wealthy class who are not particular about the price paid so long as they secure durable and efficient machines. They are not the class of buyers who might purchase a padlock, for instance, after a casual inspection, and it is not easy to understand how such fastidious buyers with the Phoebe name plate before them can be deceived into thinking that they are purchasing the Rushmore lamp. If it should appear, after full hearing, that the effect of the injunction will be to stifle legitimate competition rather than to punish unfair competition we will not hesitate to dissolve it, but, upon the affidavits now before us, the majority of the court is of the opinion that the case is controlled by the former decisions of this court.

The order should be modified by excluding from its provisions the prohibition against the use of the name "Flare Front" and, as so modified, is affirmed.

NOYES, Circuit Judge (dissenting). I cannot concur in the opinion of the majority of the court. The complainant manufactures an automobile lamp of a particular shape, bearing his name, and known as the "Rushmore lamp." The defendant manufactures a lamp of a similar shape, with its name conspicuously displayed upon it, which is known as the "Phoebe lamp." The complainant has no design patent, and his case must stand, if at all, as a case of unfair trading, in which the essential element is deception—the palming off of one's goods as those of another. But how a purchaser could be deceived into buying

an automobile lamp plainly marked with the name and trade-mark of the defendant in the belief that it was the complainant's lamp is more than I can comprehend. The mere similarity in the shape of the lamps in my opinion is not sufficient to produce such a result. The majority, however, in view of earlier decisions of the court, are of the opinion that the similarity in itself establishes a case of unfair competition. But, whatever view may be taken of those decisions, I think the complainant, upon the proof as it stands, has failed to bring himself within them. Certainly they do not hold that when the shape of an unpatented article possesses advantages from the viewpoint of mechanical utility it is unfair or unlawful to imitate it. Possibly upon full hearing the complainant may be able to show unnecessary imitation of nonfunctional parts, but I am not satisfied from the affidavits that he has yet done so.

In my opinion the order granting the preliminary injunction should be reversed.

MONITOR DRILL CO. v. MERCER et al.

(Circuit Court of Appeals, Eighth Circuit. August 21, 1908.)

No. 2,828.

1. SALES—CONTRACT—ABSOLUTE OR CONDITIONAL SALE.

A contract of sale of personal property, which fixes the price and obligates the purchaser to pay the same, but expressly provides that title shall remain in the seller until such payment, except as to such as is resold, the proceeds of which shall at once become the property of the seller, is one of conditional, and not of absolute, sale; and its character is not changed by a provision that in case of default the seller may retake possession of all the property unsold and the proceeds of that sold, and that the latter shall be reduced to cash and applied on the purchaser's indebtedness; any surplus being paid to the purchaser.

2. SAME.

The taking of notes and collateral security for the purchase price of property sold under a contract of conditional sale does not affect such feature of the contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 1413.]

3. SAME—PROPERTY HELD UNDER CONDITIONAL SALE—RECLAMATION BY SELLER.

Property held by a bankrupt in Minnesota under a contract of conditional sale, although unrecorded, may be reclaimed by the seller; the failure to record rendering the contract voidable under the state statute only as against lien creditors.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 1353.]

Appeal from the District Court of the United States for District of Minnesota.

George S. Grimes (George W. Buffington, on the brief), for appellant.

N. H. Chase (M. H. Boutelle, on the brief), for appellees.

Before SANBORN and VAN DEVANTER, Circuit Judges, and W. H. MUNGER, District Judge.

W. H. MUNGER, District Judge. This is an appeal from a judgment of the District Court, affirming the order and findings of the referee in bankruptcy. By the facts as shown it appears that the Western Implement Company, a corporation, and the Monitor Drill Company, a corporation, in January, 1906, entered into two certain contracts, by the terms of which the Monitor Drill Company, designated the first party, agreed to sell to the Western Implement Company, designated the second party, certain agricultural implements at certain prices, to be delivered f. o. b. at its factory in St. Louis Park, Minn. Provisions in each of said contracts, appearing in the following order, and the only ones necessary to be considered for the proper determination of the case, were as follows:

"Terms: Party of the second part agrees to settle with party of the first part for all goods purchased under this contract, on or before June 1, 1906, as follows: * * *

"Fourth. Settlement for each and all machines sold by party of second part shall be made at or before delivery, either by cash or the purchaser's note, secured by chattel mortgage covering the property sold, and other personal property of equal value, if possible, which notes and chattel mortgages shall be taken upon blanks to be furnished party of the second part by party of the first part, and at said settlement time party of the second part shall pay to party of first part the proceeds of such sales made for cash in cash, and shall be entitled to the discount above mentioned therefor, and party of second part shall at said settlement time turn over and deliver to party of first part each and all said notes and chattel mortgages securing the same, taken in settlement for machines sold by party of second part as collateral security to the note of party of second part, and party of second part shall also, at said settlement time, give party of first part a special conditional sale agreement, covering unsold machines at each of its local places of business. * * *

"Conditions. It is specifically understood and agreed that the title to each, every, any, and all machines and parts thereof, delivered to party of the second part under the terms of this contract, is in and shall continue to remain in the party of the first until it shall receive full payment in cash therefor; that if party of second part resells any of said machines, or parts thereof, then the full proceeds thereof, be such proceeds book accounts, notes, or cash, or other personal or real property, shall, in lieu of such machines or parts thereof so sold, immediately be, become, and remain the sole and exclusive property of party of the first part until the full indebtedness of party of second part to party of first part is paid in cash. And until such indebtedness of party of the second part shall be paid in full to party of the first part, and until said proceeds and the whole thereof have been actually delivered to party of the first part, the possession and control thereof by party of the second part shall be that of a trustee for the use and benefit of the party of the first part, and not otherwise. * * *

"Default. If party of second part falls, refuses, or neglects to make due and prompt settlement, or performs or permits a breach of this contract in any respect, or if party of first part receives information concerning party of second part derogatory to his credit, financial standing, or reputation, and upon the termination of this contract, through the lapse of time or otherwise, party of the first part may demand and shall be entitled to receive forthwith from party of second part the possession of all machines and parts thereof, and extras and repairs, and all proceeds, of whatsoever nature, or kind, from the resale by party of second part of any machines or parts thereof by him received under this contract, without reimbursing party of the second part for any claim for storage, handling, freight, express, insurance, or any other charge, of whatsoever nature or kind. Party of first part in such case shall reduce such proceeds to cash and apply the same, after deducting actual expenses in so doing, to the payment of the indebtedness due it from the party of the second part, and shall deliver the surplus, if any, to party of the second part."

and showed that the first party had delivered to second party, under the contracts, goods to the value of \$15,653.07. At said settlement second party paid first party \$2,048.92 in cash, being the cash received from the sale of goods. At the same time second party executed to first party four promissory notes—one for \$4,787.15, one for \$2,456 (which notes represented goods sold by second party on credit), one note for \$3,500, and one note for \$2,861; said last two notes representing the value of goods on hand and unsold by second party. At the time of said settlement second party gave to first party, as collateral security for the two notes representing goods sold on credit by second party, notes and mortgages aggregating the sum of \$5,322.84, of which amount \$3,308.84 were notes and securities of second party which were not taken and received by it for goods so sold. In October following proceedings in involuntary bankruptcy were instituted against said Western Implement Company, and in December following it was duly adjudged a bankrupt, and defendants duly appointed trustees. The trustees took possession of the goods unsold, and the Monitor Drill Company demanded the delivery of said goods to it by the trustees. Being refused, it filed its petition with the referee in bankruptcy for an order upon the trustees to deliver the portion of the goods which it had delivered to the bankrupt under the provisions of said contracts, and which remained unsold. A hearing was had, the referee held said contracts evidenced not conditional, but absolute, sales, the interest of petitioner being that of an equitable mortgagee, that as mortgages they were void under the laws of Minnesota, and denied the prayer of the petition. An appeal was taken to the District Court, where the decision of the referee was affirmed. From the judgment of the District Court this appeal has been prosecuted.

The principal question involved is whether said contracts constituted an absolute sale by the Monitor Drill Company to the Western Implement Company of the property in question, or whether said contracts evidenced a conditional sale only of the property. The chief features of the case were disposed of by this court in the case of *Dunlop v. Mercer*, 156 Fed. 545, where it was held that a contract nearly similar in its terms, entered into by the bankrupt with the Waterbury-Zimmer Implement Company, evidenced a conditional sale. In that case it was said:

"The agreement has every element of a conditional sale—a vendor, a vendee, agreed prices, an obligation of vendee to pay them, an obligation of vendor that upon condition that the vendee pays the agreed price, but not otherwise, the title of the vendor shall vest in the purchaser. Thus it evidenced a sale in which the vesting of the title in the vendee was made subject to a condition precedent, and it became a contract of conditional sale."

So in this case there was a vendor, a vendee, agreed prices, obligation on the part of the defendant to pay them, obligation of the vendor that, upon condition that the vendee paid the agreed price, but not otherwise, the title of the vendor should vest in the purchaser.

It is said on the part of counsel for the trustees that, if the provi-

163 F.—60

sion in the contracts in question above quoted under the title "Default" were eliminated, the contracts might, under the decision of this court, constitute conditional sales. It is claimed, however, on the part of the trustee, that such provision in the contracts qualifies the other provision quoted under the head "Conditions," so that by construing the two provisions together the contracts were not of conditional sale only, but constituted an absolute sale, giving to the vendor only an equitable lien. The portion of the contract above quoted under the heading "Conditions" is clear, specific, and unambiguous to the effect that the title to the property shall remain in vendor until fully paid for, and evidences clearly a contract of conditional sale only. The portion of the contracts quoted under the heading "Default," which authorizes the vendor under certain conditions to retake possession of the unsold portion of the property, in no way qualifies the conditional sale feature of the contract. The taking of the notes for the purchase price, and the taking of collateral security, did not in any way qualify the conditional sale features of the contracts. This was expressly held in *Bierce v. Hutchings*, 205 U. S. 340, 27 Sup. Ct. 524, 51 L. Ed. 828.

The provision authorizing the vendor to take possession of proceeds of whatever nature derived from the sale of the portion of said property sold by said party of the second part, and reduce such proceeds to cash, and apply the same, after deducting the expenses of so doing, to the indebtedness due from the party of the second part, and deliver the surplus, if any, to second party, does not qualify in any respect the title to the portion of such property remaining unsold. This is fully established in *Harkness v. Russell*, 118 U. S. 663, 7 Sup. Ct. 51, 30 L. Ed. 285, and *Bierce v. Hutchings*, *supra*. If the taking of such collateral security did not destroy or qualify the conditional sale feature of the contracts, as was said in the last-cited case, then we fail to perceive how the converting into cash of the securities obtained upon sales and applying the same upon the notes of second party would have such effect.

It is to be borne in mind that the contracts before us do not provide that the portion of the property remaining unsold, if retaken by the party of the first part, shall be sold and the proceeds applied upon the notes given by the second party. There is no provision in the contracts requiring the first party to make a sale or other disposal of the portion of the property remaining unsold which it should retake. But it is urged that the effect of the settlement in August was a novation of contract. Such contention has no force, as it was provided in the contract that a settlement should be had and notes given as was done. It would only be natural for the parties, even when the sale was conditional, to provide that at the close of the sale season a settlement should be made and an account taken to determine what portion of the goods had been sold by second party and an adjustment made with respect thereto.

It is true this settlement was not made on or before June 1st, as stipulated in the contracts, but was made August 25th following, and that at such settlement a special conditional sale agreement, covering

unsold machines, was not given as stipulated; but in view of the clear, specific, and unambiguous terms of the provision headed "Conditions," we think neither of these matters operated to take from the original contract the characteristics of a conditional sale, so clearly stamped upon it by that provision. Parties may modify parts of a contract without affecting the remainder.

It was alleged in the answer of the trustees that they were informed and believed that at the time said contracts were executed it was understood and agreed by the parties thereto that the same should have no force and effect except in the event of the financial embarrassment, insolvency, or bankruptcy of second party, in which latter event it was understood and agreed that the first party (petitioner) should claim said merchandise, or the proceeds thereof, under the purported claim of title evidenced by said agreements. Of this contention that the contracts were tainted with fraud, no allusion has been made in the briefs, and we would be warranted in concluding that the same was abandoned; but we have carefully examined the evidence and record, and think the contention not tenable. The contracts being conditional sales, the failure to properly acknowledge and record them is not fatal, because the state recording statutes render such agreements voidable only against creditors who have a lien on the property, and here no creditor had a lien prior to the bankruptcy proceedings.

It follows that the decree of the District Court must be reversed, with directions to set aside the order of the referee and to direct the trustees to surrender to the Monitor Drill Company the property in question.

HEROLD v. KAHN et al.

(Circuit Court of Appeals, Third Circuit. May 6, 1908.)

No. 49.

For former opinion, see 159 Fed. 608.

PER CURIAM. We have considered the petition of the defendants in error in which they ask that the judgment of this court in the above case shall "be amended by adding thereto after the words 'is hereby affirmed' the words 'with interest until paid at the same rate per annum that similar judgments bear in the courts of the state of New Jersey, and that the said Circuit Court re-enter said judgment for the said plaintiffs de novo for the amount of said original judgment, together with interest thereon at the rate of 6 per cent. per annum from the 11th day of December, 1906, down to the date of re-entry of said judgment.'"

We are of opinion that the petitioners are entitled to the interest which they claim, and as the United States district attorney accepted service of the petition upon May 4, 1908, and it was filed two days thereafter, and as no answer has been made thereto, we deem it proper to make, and accordingly do make, the following order:

HARTFORD et al. v. HOLLANDER et al.

(Circuit Court of Appeals, Second Circuit. August 25, 1908.)

No. 239.

PATENTS—INFRINGEMENT—SHOCK ABSORBER FOR SPRING VEHICLES.

The Truffault reissue patents No. 12,437 (original No. 695,508), for a frictional retarding means for spring vehicles, and No. 12,399 (original No. 743,995), for an anti-vibration device for vehicles, both held valid and infringed.

Appeal from the Circuit Court of the United States for the Southern District of New York.

For opinion below, see 158 Fed. 103.

Dunn & Turk (Thomas W. Bakewell, Arthur J. Baldwin, and Clifford E. Dunn, of counsel), for appellants.

Before COXE, WARD, and NOYES, Circuit Judges.

PER CURIAM. This is a suit for the alleged infringement of reissue letters patent Nos. 12,437 and 12,399, issued January 16, 1906, and November 7, 1905, respectively, to J. M. M. Truffault, assignee of the complainants. The first patent is for frictional retarding means for spring vehicles; the second, for anti-vibration devices for vehicles. Infringement of complainant's trade-mark "Shock Absorber" and unfair competition are also charged. The Circuit Court found that the first-mentioned reissue patent was invalid, and that the charges of unfair competition and trade-mark infringement were without merit, and dismissed the bill.

Upon this appeal the appellant only has appeared. Being, therefore, without the benefits accruing from a presentation of both sides of the case, we deem it advisable only to consider the particular grounds upon which the Circuit Court acted, and shall not consider ourselves precluded from examining anew other questions and reaching a different conclusion should another case be fully presented. Infringement of the first patent in suit by the defendants' device is obvious, and the patent, in the absence of anything urged to the contrary, appears to be valid unless the reasons stated by the Circuit Court establish invalidity.

The original patent of which the first patent in suit is a reissue was granted in 1902. In this patent the first two claims are the broadest, covering the combination with the spring of a vehicle of nonpneumatic frictional means for producing a retarding effect upon its movement. These claims were comprehensive enough to cover friction in any form other than pneumatic in which it might be applied in retarding spring action. The specifications with the accompanying drawings

(1) A rod provided with a piston, the circumference of which engaged the interior of a portion of the tricycle frame in which compression springs arranged to act as springs for the tricycle were located. The friction between the piston and the interior of the frame tended to retard the action of the springs.

(2) Upwardly extending arms carrying friction pads were attached to the fork of the tricycle and gripped the frame above, "thus also aiding by friction to retard the upward movement of the wheel with a yielding resistance."

(3) A movable connection between the frame and the running gear of the tricycle also furnished a frictional means for retarding the spring action. This was accomplished by arms coupled at one end to a bar at the rear of the front wheel and reaching to the branches of the fork. The coupling was provided with conical surfaces and washers, so that "the cones * * * bear frictionally on the washers and offer yielding resistance to the rotation of the bolt in the eye." In other words, the coupling was a rotary friction device which retarded the movement of the spring, and the tension of which could be regulated by a nut.

In 1905 the inventor applied for a reissue of this patent which was granted in 1906. At this time he was evidently only interested in the third means for retarding spring action shown in the original patent—the rotary device. The reissue patent contains 10 claims, but all either specifically or necessarily apply only to the rotating form of frictional retarding means. It would seem evident, therefore, that the reissue limited the claims of the patent. The original claims purported to cover any nonpneumatic frictional device. The reissue limits the claims to the rotary type of device.

The Circuit Court, however, said:

"In the original patent the inventor disclosed three ways of using friction to retard shocks and claimed their combined use, produced from a unitary motive power. He neither said nor claimed that any one of them would do what he wanted to do. The third described means was incidental to and supplemental of the others. We had no notion that alone it was all sufficient."

From these premises the court necessarily reached the conclusion that the inventor by narrowing his claims had actually broadened his invention and that the reissue was invalid. This finding of the Circuit Court is based upon the fact which we have noticed that the inventor illustrated his three frictional devices as acting in conjunction upon a tricycle. And there is foundation for this finding. Not only do the drawings show all the devices acting together, but there is much in the specifications indicating an expectation that they would be so used.

Still, taking the claims, specifications, and drawings together, and in view of the principle that doubt should be resolved in favor of the patent, we are of the opinion that the original patent covered the rotating device separately, as well as when acting in conjunction with the other devices, because:

and by varying details of mechanism.

(2) The specifications state that the invention is particularly for use upon motor cars where it is obvious that only the rotating form could be employed.

(3) The sixth claim of the patent covers specifically the rotating device and the first two claims are broad enough to cover such form.

It follows, therefore, in our opinion that the reissue of the first patent is not invalid upon the ground stated by the Circuit Court, and, as we find infringement, the decree must be reversed. The second patent in suit is not open to the objections already considered as a reissue patent, and is not referred to in the opinion of the Circuit Court. Nothing is urged here to show the invalidity of such patent and infringement seems clear. From an examination of the record we think the second patent valid and infringed, but in so ruling shall, as already stated, consider ourselves free to reach a different conclusion should another case arise in which the defenses are fully presented.

The decision of the Circuit Court with respect to the claims of unfair competition and trade-mark infringement was correct.

The decree of the Circuit Court is reversed, with costs, and the cause is remanded, with instructions to enter a decree in favor of the complainant with respect to both patents in suit for an injunction, accounting, and costs.

LEWIS BLIND STITCH MACH. CO. v. PREMIUM MFG. CO.

(Circuit Court of Appeals, Eighth Circuit. August 21, 1908.)

No. 2,825.

1. **PATENTS—DOUBLE USE.**

The application of a device to a new use, that is so closely related to a prior one that the applicability of the device to the new use would occur to a person of ordinary mechanical skill, is only a case of double use, and does not involve invention.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, §§ 16, 17, 31, 32.]

2. **SAME—MONOPOLY NOT AFFECTED BY NONUSER.**

A patentee is under no obligation, during the life of his monopoly, to use or place upon the market a device or machine embodying his invention.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 268.]

3. **SAME—EQUIVALENTS.**

A patent for an invention, which is neither primary nor a slight improvement on the prior art, but possesses substantial patentable novelty, covers a reasonable range of equivalents.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, §§ 24, 43.]

4. **SAME—INTERPRETATION.**

In interpreting the claims of a patent, proper regard should be had to the natural import of the terms in question, the context and the specification.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 241.]

Of the Lewis patents No. 731,695, No. 731,696, and No. 746,853, claims 1, 3, 11 to 17 inclusive, 21 and 22 of the first patent are held invalid for want of patentable novelty; claims 2, 4, 18, 19 and 20 of that patent are held valid and infringed; claims 1 and 2 of the second patent are held not infringed; claim 2 of the third patent is held infringed, and claims 8 and 9 of that patent are held not infringed.

(Syllabus by the Court.)

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

James H. Bryson and A. C. Fowler, for appellant.

F. R. Cornwall and H. H. Bliss (Montague Lyon, S. L. Swarts, and Paul Bakewell, on the brief), for appellee.

Before VAN DEVANTER, Circuit Judge, and W. H. MUNGER, District Judge.

VAN DEVANTER, Circuit Judge. This is a suit for the alleged infringement of three letters patent, granted to John G. Lewis, of St. Louis, Mo., for improvements in sewing machines used in blind stitching, wherein the stitches enter and emerge on the same side of the cloth without penetrating to or showing on the other side. Of these letters patent, No. 731,695 was granted June 23, 1903, on an application filed October 18, 1897; No. 731,696 was granted at the same time on an application filed October 23, 1902, and No. 746,853 was granted December 15, 1903, on an application filed January 27, 1900. All were subsequently assigned to the complainant. The defendant is the user of a blind-stitch sewing machine, constructed in measurable accordance with the specification of letters patent No. 679,553, granted July 20, 1901, to Charles A. Dearborn of New York City on an application filed March 22, 1901; and the defense of the suit has been assumed by the Union Specialty Manufacturing Company, the present manufacturer of such machines. The defenses interposed are want of novelty and noninfringement. Upon a consideration of the proofs the circuit court dismissed the bill, and the complainant has appealed. A brief memorandum opinion, shown in the record, discloses that the circuit court was disposed, in a general way, to regard the Lewis improvements as possessing sufficient of novelty to sustain the patents therefor, but as coming so late in the art and being so slight as not to embrace the somewhat modified forms of construction in defendant's machine, citing *Railway v. Sayles*, 97 U. S. 554, 24 L. Ed. 1053, and *Sander v. Rose*, 58 C. C. A. 171, 121 Fed. 835.

In the beginning the bill charged infringement of claims 1 to 4 and 10 to 22 of the first Lewis patent, claims 1 and 2 of the second Lewis patent, and claims 2, 8, 9, and 14 of the third Lewis patent, but claim 10 of the first patent and claim 14 of the third have since been withdrawn from consideration. The art of blind stitching by machinery did not originate with Lewis, but was disclosed in several prior letters patent, some antedating his first application about 20 years. Most of the earlier machines were adapted to sewing leather, felt, and the like, and were incapable of successfully blind stitching the more flexible and thinner materials from which clothing is made. One

It was adapted to sewing welts or hems upon hosiery, underwear, and other knit goods, but the stitching done by it not infrequently penetrated to the other side of the goods, and it also produced such a groove, or drawing of the material, along the line of sewing as to make the seam quite noticeable on the fair side. These objections, although not of much importance as respects undergarments, were sufficient to prevent the use of the machine in making outer garments. Another machine, designed to be used in sewing flexible cloth, but not shown to have been ever actually so used, was that of Hoffman and Meyers, covered by letters patent No. 207,035. But it was not adapted to blind stitching garments in which there are occasional cross-seams, as in trousers' bottoms; for its construction and adjustment were such that, when any such increased thickness in the material was encountered, the outer layer—that is, the one in which the stitching is to be blind—would move away from the path of the needle, and would not be caught by the stitches. Still another machine is said by the defendant to have been used by one Gammons in successfully blind stitching hosiery, trousers' bottoms, and the like, before the date of Lewis' invention, but the evidence thereof is of such a character that, when it is considered that Gammons, a year or so thereafter, applied for and obtained letters patent covering his machine, without disclosing or claiming its applicability to such work, we feel constrained to hold that this alleged prior use is not established with the requisite certainty. The Barbed Wire Patent, 143 U. S. 275, 12 Sup. Ct. 450, 36 L. Ed. 161; Deering v. Winona Harvester Works, 155 U. S. 286, 15 Sup. Ct. 118, 39 L. Ed. 153. Besides, the Gammons machine, like that of Hoffman and Meyers, belongs to the class in which the construction and adjustment are such that they will not do satisfactory work over cross-seams. While fully recognizing that the earlier machines and patents show a steady and marked progress in the art of blind stitching by machinery, we are yet of opinion that Lewis was the first to devise a machine capable of doing satisfactory work upon the more flexible and thinner fabrics, and of successfully overcoming the obstacles presented by cross-seams and like inequalities in the thickness of the material operated upon. In point of result, these are the distinguishing features of the improvements covered by his first letters patent. He says in the specification:

"The object of my invention is to provide a blind stitching machine which will work properly on any kind of cloth on which blind stitching can be done by hand, and which shall be simple of construction, and not liable to get out of order. My invention consists in the combination, with a suitable stitch forming mechanism, of a normally stationary back guide—i. e., a guide on the back or opposite side of the cloth from that which the needle enters—and means of holding the work up to said guide, and in various other novel features and details of construction all of which are described in the following specification and pointed out in the claims affixed hereto."

And again:

"The (back) guide 43 is cylindrical in form and slightly tapering, so as to form a stretching device for the work. * * * The needle 85 is formed, as

a line with the center of the needle, is on a line or nearly on a line with the side of the needle."

And still again:

"As the back guide is stationary during operation, work can be done on very thin cloth, and the machine can be run at a very high rate of speed, neither of which results can be accomplished by machines having the reciprocating or rotary guides heretofore used. The operation of the machine is also made more perfect by the form of the needle used. The point of the needle must pass through the center of the layer of goods next the guide, and if the ordinary form of needle with the point on the center line were used, the goods would be wedged between the guide and the rounded portion of the needle, with the result that thin goods would be cut through, so that the stitch would show."

Claims 2, 4, 18, 19, and 20, in varying terms, specify, among other elements, a normally stationary back guide and means for holding the work in position around such guide. Several prior patents are cited against these claims, but we regard the combination specified in each as unanticipated and otherwise patentable. The essence of the invention is in the mechanism whereby the moving cloth is held closely around the back guide, and the outer layer, in which the stitching is to be blind, is held in such a fixed and continuous relation to the path of the needle that not only can such stitching be satisfactorily done on more flexible and thinner cloth than before, but the stitches can be made to penetrate the added material at cross-seams, and to catch properly in the outer layer as elsewhere.

Claim 1 differs from those just mentioned, in that it omits the means for holding the work in position around the stationary back guide, and for that reason we think it was without the requisite novelty. And we think that claims 3, 17, 21, and 22 must also fail, for they omit the requirement that the back guide be normally stationary.

Claims 11 to 17 call for a needle which is wholly or partially side-pointed, and this is relied upon as having given patentable novelty to them. But we feel constrained to hold otherwise. True, when the cloth is thin, there is an advantage in having the needle side-pointed, but such needles were old in the sewing machine art, and their applicability to the present use was plainly suggested by the Wilcox machine, covered by letters patent No. 230,212, dated July 20, 1880. It was a machine for sewing covered wire upon hats and other articles, the pertinent portion of the specification being as follows:

"With machines using the ordinary needle, having the point in the central line or axis, the stitching cannot be made as close to the wire as desirable, since the bevel near the point would, if the latter passed close to the wire, force it sidewise, tearing the covering of the wire, or breaking or bending the needle. In this invention a needle having the point in the plane of one of its sides (that next to the wire) is employed."

Although that was a different use, we think it was so closely related to the present one as to come within the rule that, if the new use be so nearly analogous to the old one that the applicability of the devise to its new use would occur to a person of ordinary mechanical skill, it is only a case of double use. *Mast, Foos & Co. v. Stover*

It is objected that no machine, conforming to the specification of the first patent, was ever used or placed upon the market by Lewis or the complainant, the fact being that complainant's commercial machine embodies some of the features of each of several of Lewis' patents and pending applications. But that this objection is not tenable is made perfectly plain in the recent decision in *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U. S. 405, 28 Sup. Ct. 748, 52 L. Ed. 1122, where it is held, following prior decisions, that, during the life of his monopoly, a patentee is under no obligation to use or place upon the market a device or machine embodying his invention.

The question of infringement turns upon the character of Lewis' invention. We regard it as neither primary nor a slight improvement on the prior art, but as possessing enough of patentable novelty to command a reasonable range of equivalents. The defendant's machine embodies every element or its equivalent, of the claims which we sustain, and accomplishes substantially the same result in substantially the same way. Probably there would be no infringement, if it fully conformed to the specification of the Dearborn patent No. 679,553, but it does not, and it is because of this that it accomplishes substantially the same result as the Lewis invention. The specification of the Dearborn patent does not call for mechanism adapted to so hold the moving cloth that the outer layer, in which the stitching is to be blind, will have a fixed and continuous relation to the needle path, but calls for a back guide yieldingly supported by a coil spring, so that it will automatically move backward to accommodate any increased thickness of the material incident to cross-seams. As this movement would permit the outer layer of cloth, which is next to the guide, to move away from the path of the needle, thereby preventing the stitches from catching therein, the manufacturer, as is shown by the machines produced in evidence, resorts to the expedient of making the supporting spring so strong and unyielding that the guide is not affected by cross-seams, but remains normally stationary, any increased thickness of the material being accommodated by an opening in the presser foot, which, with that feature in its construction, is the equivalent of Lewis' means of holding the work in position around the guide. There is also a marked difference in form between defendant's back guide and that of Lewis; but as both operate to guide and stretch the goods preparatory to the stitching, and as defendant's guide is appreciably rounded, both in the direction of the feed and transversely thereto, we think this difference is not enough to destroy the equivalence or to avoid infringement of such of Lewis' claims as are limited to a guide having its face rounded transversely to the direction of the feed, or having a rounded tapering face.

We now come to the second patent. It is later than the Dearborn patent, in measurable accordance with which defendant's machine is made, but that fact is immaterial, because in respect of the matter

now to be considered, defendant's machine does not conform to the Dearborn patent. Two claims are said to be infringed, but they are so nearly alike that we need refer only to the one, which reads:

"2. In a sewing machine a back guide, around which the goods are adapted to be held, a needle co-operating with said back guide, means for reciprocating said needle longitudinally and means for causing said needle to recede laterally from said back guide after its point has entered the material."

It is not questioned that defendant's machine embodies all the elements of this combination, save the last, but it is insisted that that element is omitted. Of course, if that be true, there is no infringement. The defendant's needle is slightly inclined, and the path in which its point reciprocates past the back guide is nearer thereto than is the like path of its shaft. As the needle passes the guide, the distance between them slightly increases from the point to the other end of the needle; the purpose in this being to avoid any wedging or cutting of the goods between the guide and the body of the needle. The reciprocation of the needle is longitudinal, no lateral motion being imparted to it in any way. So the question arises, does such a machine embody means for causing the needle to recede laterally from the guide, within the meaning of the claim? We think the answer must be in the negative, and for these reasons: First, it requires some straining of terms to speak of defendant's needle as receding laterally from the guide, the natural import of such words being that the needle is moved sidewise, which is not the case with defendant's needle. Second, the connection in which the word "means" is used in describing this element of the combination, and also the preceding one, indicates that it has a similar meaning in both, and refers to some mechanism other than the needle, the latter being separately specified as one element. Third, the specification, to which reference may be had for the purpose of ascertaining the true meaning of the claim (*O. H. Jewell Filter Co. v. Jackson*, 72 C. C. A. 304, 140 Fed. 340), shows beyond any question that the words "recede laterally" and "means" are used with the meanings just attributed to them; that is, they refer to a sidewise movement of the needle and to operating mechanism whereby that movement is produced. It follows that defendant's machine wholly omits one element of the patented combination, and hence the charge of infringement fails.

We come then to the third patent, three claims in which are said to be infringed. One of them reads:

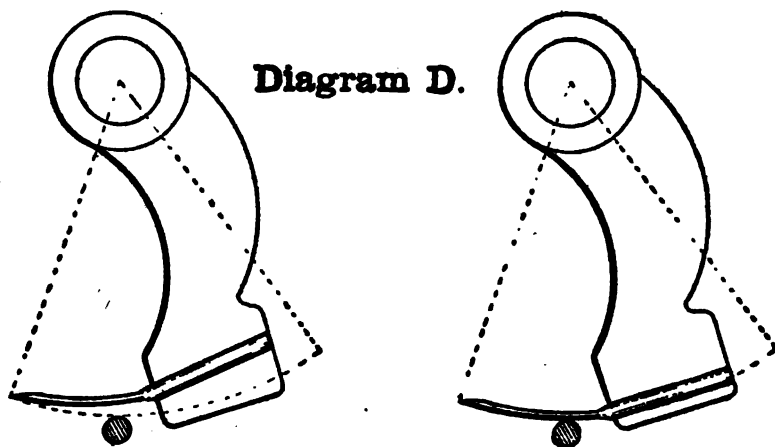
"2. In a sewing machine for blind stitching, a guide for the goods and stitch forming mechanism, said stitch forming mechanism being provided with a needle inclined to the path of its reciprocation."

And in the specification it is said of the inclined needle in this combination:

"The needle 49, instead of being set straight in the needle bar 29 in the usual manner, is inclined forward (that is, slightly toward the back guide around which the cloth is held), as shown in Figs. 1 and 15. This inclination of the needle enables the point of the needle to be brought close to the back guide, so as to pierce very thin goods, and at the same time prevents the shaft

of the needle from chafing against the back guide, which would tend to cut through the goods and allow the stitches to show."

The defendant does not question the validity of this claim, but only that its needle is so inclined as to sustain the charge of infringement. Its needle is curved and reciprocates in circular paths, while the one shown in Lewis' drawings reciprocates in straight lines, but that a curved needle may be given such an inclination as to enable its point to be brought close to the back guide, so as to pierce very thin goods, and at the same time to prevent its shaft from chafing against the guide and cutting through the goods, is plainly shown in a drawing having the inclination somewhat exaggerated for purposes of illustration, which we here reproduce from one of the briefs:



There is some difference of opinion among the witnesses as to whether or not defendant's needle is so inclined, but a careful consideration of the evidence bearing thereon fully satisfies us that it is, and also that its inclination is not accidental, or the result of straining in use, as suggested by defendant, but is produced by an intentional construction and adjustment of the lower part of the arm carrying the needle, as is shown by other machines and needle arms of the same manufacture produced in evidence. We hold, therefore, that infringement of this claim is established.

Claims 8 and 9 of this patent relate to an entirely different subject-matter, and we deem it sufficient to say in respect of them that, if they can be regarded as possessing patentable novelty, the interpretation which must be placed upon them, in view of the prior state of the art, is such that the defendant's machine cannot be held to infringe either of them.

The decree of the circuit court is affirmed as to claims 1, 3, 11 to 17, inclusive, 21 and 22 of the first patent, claims 1 and 2 of the second patent, and claims 8 and 9 of the third patent, and is reversed as to claims 2, 4, 18, 19, and 20 of the first patent, and claim 2 of

the third patent, with directions to enter a decree for complainant upon the claims as to which the former decree is reversed, the complainant to recover one-half of its costs in this court, and the decree in the circuit court to be without costs in that court to either party up to the time of such decree. See *Ide v. Trorlicht, etc., Co.*, 53 C. C. A. 341, 115 Fed. 137; *Fairbanks, Morse & Co. v. Stickney*, 59 C. C. A. 209, 123 Fed. 79; *Johnson v. Foos Mfg. Co.*, 72 C. C. A. 105, 141 Fed. 73.

RICHARDS et al. v. MEISSNER et al.

(Circuit Court, W. D. Missouri. September 11, 1908.)

No. 2,954.

1. PATENTS—SUIT TO OBTAIN PATENT—ISSUES AND PROOF.

A suit under Rev. St. § 4915 (U. S. Comp. St. 1901, p. 3392), to obtain the issuance of a patent to complainant, is subject to the ordinary equity rule that the evidence must be relevant to the issues made by the pleadings, which in such case can relate only to complainant's right to a patent, and he is not entitled to introduce proof to defeat defendant's right, as well as his own, by showing that because of the prior state of the art neither party was entitled to a patent.

2. SAME — QUESTIONS OF FACT — CONCLUSIVENESS OF DECISION OF PATENT OFFICE.

The decision of the Patent Office and the Court of Appeals of the District of Columbia in interference proceedings, awarding priority of invention to one of two applicants for a patent, is controlling as to such question of fact as between such parties in a subsequent suit brought under Rev. St. § 4915 (U. S. Comp. St. 1901, p. 3392), unless the contrary is established by evidence which carries thorough conviction.

In Equity. On final hearing.

See 162 Fed. 485.

E. Hayward Fairbanks, Wm. Steell Jackson, and Gage, Ladd & Small, for complainants.

Rector, Hibben & Davis and Frank Hagerman, for defendants.

SMITH McPHERSON, District Judge. This is a patent case, wherein both Richards, the complainant, and Meissner, the defendant, claim to be original inventor, and entitled to the patent. The Pneumatic Tool Company is an assignee of complainant, and the defendant Allen is the Commissioner of Patents. The alleged invention is of and relating to pneumatic hammers.

Richards filed his application in the Patent Office December 24, 1900, and Meissner filed his application six weeks before, or November 12, 1900. A party by the name of Clements had also filed his application, but by reason of a lack of diligence was dismissed from the proceedings now to be mentioned; and there were other parties with applications, who for one reason and another were dropped out. Under section 4904 of the Revised Statutes (U. S. Comp. St. 1901, p. 3389) interferences were declared, and the matter was heard before the examiner of interferences of the Patent Office. Much evidence was taken, resulting in a decision by that officer in favor of Meissner.

The case was then carried to the three examiners in chief, who decided the case in favor of Meissner. Then the case was carried to the Commissioner of Patents, who decided the case in favor of Meissner. Thereupon the case was taken under Act Feb. 9, 1893, c. 74, 27 Stat. 434, to the Court of Appeals of the District of Columbia, and that court decided the matter in favor of Meissner. At the conclusion of each of the four hearings written opinions were filed, now within the record in this case in this court.

Thereupon a bill of complaint was filed in this court under section 4915 of the Revised Statutes, which provides that, when a patent is refused a party both by the Patent Office and the Supreme Court of the District of Columbia (now the Court of Appeals), the applicant may have remedy by a bill in equity; the question being whether a patent should or should not issue to complainant. The answer is to the effect that Meissner is the original inventor, and sets forth fully the proceedings in the Patent Office and before the Court of Appeals. The evidence, which is voluminous, has been taken, and the case is now for final decree. But wholly outside of the pleadings an issue has been presented for decision, and it will first be considered.

It is said in argument, by reason of evidence taken by complainant in rebuttal, that owing to the prior state of the art a patent should not be issued to either Richards or Meissner. It is now contended, in effect, that in a patent case, owing to the interest the government and the people have in the subject-matter, pleadings are not necessary to form such issues. It is likewise in effect contended that a complainant, when in doubt as to his own case, can destroy the case of defendant by destroying his own by rebuttal evidence; that the general rule that the evidence must be relevant to the issues is said to not apply to a case under section 4915 of the Revised Statutes. If complainant had grounded his bill of complaint on this theory, and prayed for a decree to the effect that the hammer was not patentable, I apprehend that all lawyers would agree that such a bill would be vulnerable to a demurrer; and, when coupled with allegations such as are found in the bill of complaint herein, it will scarcely be said that such a bill would not be multifarious.

The evidence was taken in rebuttal over defendants' objections, pursuant to an order of Judge Trieber. The writer hereof ordered this evidence stricken out, but with directions, in the event of an appeal, should complainant be defeated, of having the evidence sent to the appellate court. And complainants' counsel still insist by argument that owing to other patents, and particularly the English patent to Lake, the defendant should have no patent—in other words, that all the litigation before the Patent Office and the Court of Appeals for the District of Columbia was a mere academic debate, and that in this court such shall be the decree.

Some of the authorities relied on by complainants will be noticed. *Davis v. Garrett* (C. C.) 152 Fed. 723, was on an application for a decree pro confesso, and the court ruled that, before granting a decree, the record made on the interference proceedings should be exhibited. *Leslie v. Tracy* (C. C.) 100 Fed. 475, was a case as to the

ion of the Court of Appeals, the question of the patentability was before the court, and found to exist solely by reason of one matter, and Judge Kohlsaas, not being able to agree with that opinion, dismissed the bill. But he did not so decide on the evidence, but on questions of law.

The case of *Hill v. Wooster*, 132 U. S. 693, 10 Sup. Ct. 228, 33 L. Ed. 502, is relied on with confidence by complainants' counsel. That was a case of alleged interference of a matter so trivial and common and so well known as that, if a patent had been issued, it would have been held void on its face. The opinion shows that the trial court held *Wooster* to be entitled to a patent. From that decree *Hill* appealed, and over *Wooster's* objection there was a reversal, not because of the prior state of the art, but in the language of the opinion:

"We are of opinion that they [*Hill* and associates] are entitled to have the decree below reversed, on the ground that it was not a patentable invention to add a lower compartment to a box creamery on legs."

It is said that the authorities cited in the opinion in *Thompson v. Boisselier*, 114 U. S. 1, 5 Sup. Ct. 1042, 29 L. Ed. 76, are in aid of complainants' contention. But this is a mistake. Those cases show "that it is not the object of the patent laws to grant a monopoly for every trifling device which would naturally and spontaneously occur to any skilled mechanic or operator in the ordinary progress of manufactures." It is one thing for complainant to move to dismiss his own bill of complaint; but it is a very different thing to insist that by reason of matters not covered by the pleadings, on evidence first appearing in a so-called rebuttal by complainant, a decree on his motion shall be entered to the effect that neither complainant nor defendant has any rights under the patent laws.

Such a holding, in so far as I am advised, as yet has not been made by any court, and as it seems to me to be wholly illogical, and at war with the elementary rules of both pleading and evidence, of and concerning a patent which should be issued to either *Richards* or *Meissner*, and which could only be avoided by showing the prior state of the art, and showing that fact by evidence, and not by a reliance upon things of common knowledge and judicially noticed by the courts.

The voluminous evidence has been fully considered, with much labor because of its prolixity. Impeachments and contradictions on many immaterial matters make a great many pages. Many pages are devoted to what the practice once was, and what it now should be, before the Patent Office; and a large per cent. of the pages are with reference to points not at all pivotal as to the correct decision to be made. The arguments, while strong and powerful in many respects, yet some of them are subject to the criticisms to be mildly suggested, are quite vitriolic, and as though written with muriatic acid, instead of ink. The employés of the Patent Office it is said are poorly paid, and therefore the decisions are entitled to but little weight, while the Court of Appeals for the District of Columbia is a court of but little concern, if what I read in argument is to be given much weight. No complaint is made of all these things. They are mentioned as a partial

excuse by me for not earlier deciding this case, owing to the unnecessary pages I have been required to read and the labor required in separating the wheat from the chaff.

The evidence before the Patent Office and the Court of Appeals is in the record of this court. Additional evidence has been introduced, partly of the character of that above noticed, and partly of a cumulative character, and the question now is whether the results shall be changed by awarding the patent to Richards, instead of to Meissner. But for section 4915 of the Revised Statutes no one could doubt but that the decision of the Court of Appeals for the District of Columbia was the end of the litigation, because that court had jurisdiction of the subject-matter and of the parties thereto, who with their privies are now before this court litigating the same questions as in that court litigated; and the force of this is not lessened from the fact that there is no provision for an appeal from that court to the Supreme Court, because the right to an appeal is not a common-law right, but can only exist when expressly conferred by statute, so that the decision of the District of Columbia court is *res adjudicata*, except as controlled by section 4915 of the Revised Statutes. And that the bill in equity filed herein is not an appeal is conceded by counsel by both parties—by defendants' counsel by contending that the decree by the Court of Appeals of the District of Columbia is either in effect or practically conclusive, which could not be so if this proceeding is an appeal; and by complainants' counsel by insisting that the records and evidence in the other hearings are neither material nor competent in this proceeding, and by offering evidence as if the case were for the first time heard.

It is a rule well-nigh or quite universal in its application and enforcement that, when questions of fact are submitted for findings to an officer or tribunal, such findings of fact, when free from fraud, accident, or mistake, are conclusive, and cannot be modified or set aside by a court, provided always that the officer or tribunal had the statutory authority to make such findings pursuant to official duties. All the profession so understand the rule, and the cases are numerous and within the reach of all in which the rule has been enforced. And this rule is not lessened in its force by saying "that a mistake," to defeat such findings of fact, are erroneous or mistaken findings of fact. If that were so, then the rule itself would not exist, because it can be said, and will be said in all cases by the party against whom such findings were made, "were and are erroneous." The end of litigation is never satisfactory to the defeated party, and he says the final judgment was a "mistake." But the word "mistake" means as the same is used in equity jurisprudence.

It cannot be denied, nor is it earnestly contended, that either the Commissioner of Patents or any of his subordinates, or the Court of Appeals, erred in matters of law. The findings of fact are what are complained of, and they are sought to be avoided by impeachments, cross-examinations, and distance between clients and attorneys; and to both build up and to break down witnesses, loss of memory, as well as a better recollection, the greater the time, are presented by testi-

is entitled to weight, however, is only cumulative to that which was in the other proceeding; and such evidence, some of which is worthless, other entitled to some weight, and other cumulative to facts known in the other proceeding, comprise the evidence in the case now on hearing. Each side charges the other with delivering and presenting false testimony. And so it is as to both parties much can be said as to who was first in invention, as well as to the dates declared. That Meissner first filed is not disputed.

But this proceeding is not a trial de novo as on appeal in some jurisdictions, nor is it so removed from the other proceeding as that such other decisions can be cast aside as though of no force. This very question was before the Supreme Court in *Morgan v. Daniels*, 153 U. S. 120, 14 Sup. Ct. 772, 38 L. Ed. 657; and Justice Brewer, in writing the opinion, concluded all discussions when he wrote:

"It is something in the nature of a suit to set aside a judgment, and as such is not to be sustained by a mere preponderance of evidence. *Butler v. Shaw* (C. C.) 21 Fed. 321, 327. It is a controversy between two individuals over a question of fact, which has once been settled by a special tribunal intrusted with full power in the premises. As such it might well be argued, were it not for the terms of this statute, that the decision of the Patent Office was a finality upon every other matter of fact. In *Johnson v. Towsley*, 13 Wall. 72, 86, 20 L. Ed. 485, a case involving a contest between two claimants for land patented by the United States to one of them, it was said: 'It is fully conceded that when those officers [the local land officers] decide controverted questions of fact, in the absence of fraud, or imposition, or mistake, their decision on those questions is final, except as they may be referred on appeal in that department.' Upon principle and authority, therefore, it must be laid down as a rule that, where the question decided in the Patent Office is one between contesting parties as to priority of invention, the decision there made must be accepted as controlling upon that question of fact in any subsequent suit between the same parties, unless the contrary is established by testimony which in character and amount carries thorough conviction."

Believing as an original question that Meissner is entitled to the patent, but passing that by, believing that it cannot be said that the evidence of Richards makes such a showing which in character and amount carries thorough conviction that he is entitled to a patent, it follows that the bill of complaint should be dismissed.

THE CLAN GRAHAM et al.

(District Court, D. Oregon. September 2, 1908.)

No. 4,817.

1. SHIPPING—INJURY OF STEVEDORE—LIABILITY OF VESSEL.

A ship with an open between-decks having transverse beams across was under no duty to stevedores or others working about the vessel to lay a decking upon such beams nor was it negligence to permit dunnage, consisting of loose timbers and planks to be temporarily stowed on the beams while preparing the vessel for loading which would render her liable for the injury of a stevedore by stepping upon the end of one of such loose planks which tipped with his weight and allowed him to fall into the hold, where the presence of the dunnage was apparent, and it did not have the appearance of a permanent decking.

163 F.—61

is relieved from liability for an injury to an employé of the stevedores arising from a danger created by the manner in which they did the work.

3. MASTER AND SERVANT—INJURY TO SERVANT—NEGLIGENCE OF FELLOW SERVANT.

A firm of stevedores loading a ship by contract which furnished its employes with candles to be used in their work as in their own judgment they might be required cannot be held liable for the injury of an employé alleged to have been caused by insufficient light in the place where he was working, and which had been lighted by a fellow servant.

In Admiralty.

See 153 Fed. 977.

Giltner & Sewall and William La Force, for libelant.

Williams, Wood & Linthicum and Gammans & Malarkey, for The Clan Graham.

Wm. D. Fenton and A. M. Dibble, for Brown & McCabe.

WOLVERTON, District Judge. This is a libel for the recovery of damages arising from injury to the person of the libelant. The respondents Brown & McCabe, who were stevedores, were under contract with the respondent Clan Graham to load her with wheat. The libelant was a longshoreman, and in the employ of Brown & McCabe to assist in loading. It is averred that the Clan Graham was an open ship between decks, with iron cross-beams running from one side to the other; that said cross-beams were partly covered over with between-deck hatches or planks, which made it appear safe for persons walking thereon; that libelant while proceeding along between decks at about 7:30 o'clock on the morning of December 28, 1905, fell through an opening contiguous to the forward hatchway to the hold below, whereby he was injured; that, the morning being dark, the libelees failed and neglected to provide sufficient light to light up the between-decks, and carelessly and negligently failed to cover said opening, or to notify libelant thereof, or to provide a safe place for libelant to walk over in order to do his work in loading the vessel. Besides a denial of the material charges of the libel, the Clan Graham avers that Brown & McCabe were independent contractors for the loading of the vessel, and that, if any liability was incurred, it was by them, and not by the vessel, and, further, that the libelant was himself negligent contributing to his injury. Brown & McCabe plead contributory negligence and assumption of the risk incurred by libelant's employment.

By the evidence it appears that the Clan Graham is an open between-decks vessel, being constructed with beams running across ship, from one side to the other, except where hatchways intersect them, in which event the beams extend from the side of the ship to the hatchway. These beams are placed four feet apart, and have a top surface of eight inches, upon which the men walk from side to side of the ship when necessary. Four longitudinal girders extend fore and aft—one along each side of the vessel, and one upon each side of the hatchways. The forward hatchway is 12 or 14 feet in width, and the central gird-

ers run close alongside of it. The side plates or girders are three feet in width on the top, and the central girders two feet in width. Other plates run diagonally across, but it is unnecessary to describe these further. Forward of the forward hatch the beams are decked over with permanent decking bolted to them. The space between the girders abreast the forward hatch on either side is left entirely open and without decking in the ship's primary construction. On the morning of the accident Rosh, a co-servant of the libelant, preceded libelant down the hatchway, taking with him some candles handed him by Fred Jorgenson, the foreman of Brown & McCabe. Rosh lighted one of the candles, and placed it on some dunnage lying on the permanent deck, and gave the others to another workman, who went below in the hold. Libelant came down on the between-deck, and he says that he walked across from forward of the hatch into the starboard wing of the ship, reaching a point nearly opposite the center of the hatch, and there hung up his coat, and made his way back again to near the forward end of the hatch. He then went to the after part of the hatch, where workmen were putting up a spar, and helped them to pull up and tighten a rope. Some one having given the order, he left the starboard side of the hatch, near the corner aft, to go again into the wing, but forward, for a spar, and, when he had gone a little way only, he stepped on a board or plank, which tipped with his weight and let him through the deck into the hold below, causing a fracture of his leg, and other injuries. The men about the hatch at the time were engaged in arranging a chute for conducting sacked wheat into the hold to be loaded. Libelant says he had gone three or four feet when the plank tipped with him, and locates the opening through which he fell starboard and opposite near the center of the hatch. Other witnesses who saw the opening from below after the accident locate it about the same place. The lighted candle was placed on the pieces of dunnage about 4 feet forward of the hatch, and near midway between the hatch and side of the ship; thus fixing its location from 12 to 14 feet almost directly forward of the place through which libelant fell. Libelant further testifies that the decking looked to be solid; that the between-decks had the appearance of being a closed hatch ship clear back flush with the hatch; and that he did not know that the ship was open deck around the hatches, otherwise, he was apprised that the beams were open abaft the hatch. There was solid footing around the hatch on the sides and aft for the width and space of 18 inches to 2 feet.

Kerns, a witness for the libelant, testifies that there was a floor of planks extending from the side of the hatch into the starboard wing, but that there was dunnage in the wing also; that later, in the progress of loading the ship, these planks and dunnage were all removed; and that the men worked right up through between the beams. Albert Rosh relates that he lit the candle and put it on the dunnage; that there was a good deal of dunnage in the wing of the ship, and for this he could not tell whether the ship was open deck or not; that the solid deck extended back to the forward end of the hatch, and because of the dunnage he could not tell whether it extended farther or not. He further relates that the dunnage, consisting of sticks of lumber and

of the ship up towards the wing, made one pile." After lighting the candle, and placing it in position on the dunnage, witness went into the wing of the ship, walking along to the starboard, but forward of the hatch, and deposited his coat and hat there, and returned to the hatchway. In making his way over and back he stepped over planking, boards, and other dunnage. Other witnesses have testified relative to the decking and the appearance about the hatchway, but this statement will suffice to elucidate the situation very clearly, and in one aspect of the case it only remains to apply the law for a determination of the controversy.

The negligence complained of is in not providing the libelant with a safe place upon which to walk in doing his work, in leaving an opening in the decks uncovered, and in failing to properly light the between-decks, or to notify the libelant of such opening. It has been suggested that there is a variance between the allegations of the libel relative to the opening and the proofs, for that the proofs show that no opening existed, but that libelant stepped on the end of a plank, which tipped up with him, and let him through the deck. If, however, there is any variance, I am disposed to treat it as immaterial, and to decide the case wholly upon its merits. In order for the libelant to succeed on this phase of the controversy, it is necessary for him to establish some duty which the respondent owed him, and a neglect of that duty to the libelant's detriment. The ship being of open between-decks construction, certainly respondent did not owe to the libelant the duty of laying down solid decking between the hatchway and the wing. It owed no one such duty. Longshoremen know very well what it is to work in an open between-decks ship, and they do not expect or require further protection under foot than is ordinarily to be found in a ship of that construction. So that I say it was not incumbent upon the Clan Graham, as a duty owing to the libelant, to lay a decking between the hatch and the wing abaft the front end of the hatch. Libelant contends, notwithstanding, that planking was laid between the hatch and the wing, so as to give it the appearance of a solid or usual decking, and the libelant was misled into the use of it; that, having so covered the beams, it was negligence to leave the opening. Allowing that the allegations of negligence are resolvable into this form, they are not sustained by the preponderance of the evidence. The Clan Graham would not be permitted to lay a trap for workmen about its decks by giving that the semblance of decking which in reality was not, and, having misled the workmen, repudiate liability; but it is quite probable that no attempt was ever made to plank the beams over in the space designated, except in a temporary way to permit of its use in stowing dunnage for the time being. There is always more or less dunnage about a ship of that kind, and in cleaning out her hold for receiving cargo the dunnage is casually stowed away, and shifted from place to place, until its further use is required. On this occasion a good deal of dunnage was stowed in that wing of the vessel. Rosh found it there, placed his candle upon a piece of it, and stepped over other pieces in walking to the wing of the ship to deposit his coat and

walked on the solid permanent decking, which extended back flush with the forward end of the hatch; and I am inclined to think that libelant took almost the same course when he deposited his coat in the wing. He must have encountered dunnage then, and was fully aware of its presence. When, however, he started to get the spar, he stepped off on the loose planking, which in itself was dunnage, and lost his balance, and went down. There was no occasion, I am impressed, for any one mistaking the temporary planking for solid decking extending back to that point; and, when the libelant stepped out in that direction, he went with full knowledge that he was passing over dunnage stowed upon the beams of the ship. There was, therefore, no duty neglected on the part of the Clan Graham in not providing solid flooring at the place where the libelant fell through; nor did she mislead the libelant into a dangerous place by providing a decking of the semblance of the permanent deck further forward. Hence the respondent is not chargeable with negligence in leaving the opening complained of, or the particular plank in a condition that it tipped up with the weight of the libelant when he stepped upon it.

The foregoing conclusion is supported by the case of *The Hadje* (C. C.) 50 Fed. 225, where it was held that it was not negligence to allow the between-deck beams of the vessel to be uncovered by a deck, or to use such beams for the stowage of loose planks for a temporary purpose, or to leave the ends of loose deals unsupported at the place where the libelant fell, that the deals were not so placed as to justify libelant in believing that he was proceeding upon a deck, and that the libelant used the deals for a purpose for which they were not intended, without necessity, and with fair notice, from the manner in which they lay, that they were not intended to be so used. In its main features the conclusion is supported, also, by *The Gladiolus* (C. C.) 22 Fed. 454. As has been indicated, the ship *Clan Graham* was not in duty bound to cover the beams in the between-decks opposite the forward hatch. The deck was not so covered in its original construction, and the libelant was undoubtedly aware that the vessel was open between decks. He must have known, also, that that particular space was then being used for the temporary stowage of dunnage, and, before walking off in that direction, he should have used greater precaution. At any rate, the ship has not been derelict in any duty that it owed the libelant, and hence is not liable on account of the beams being undecked or loosely covered with dunnage.

Now, as to the other features of the controversy, namely, the alleged neglect in furnishing the lighting, and failure to properly light the surroundings so that libelant could safely go about his work. The men about the hatch were at the time libelant was hurt engaged in putting a chute in place, running down the hatchway, for conducting wheat in sacks into the hold of the ship, and libelant was one of the men engaged in that particular service. The work was of a temporary nature only, and, when completed, the men were to go below and assist in stowing the cargo, with the exception of one, who would be stationed in the hatchway to attend to shifting the sacks as they came down, so as to

pass them on below. Rosh was a co-laborer with the libelant, and the lighting between decks was a matter which he assumed to attend to. He was handed more candles than he used in that locality, sending all but one of them below. Thus he passed judgment upon the amount of light necessary for doing the temporary work at the hatch. Furthermore, he attended to placing the light, and presumably considered it advantageously placed, and possessing power to sufficiently light up the surroundings for doing the temporary work in hand. It was a matter of his judgment, and not of that of Brown & McCabe, or of their foreman. The custom had been on occasions when lights were needed for the foreman to furnish the men with candles. They could take as many as they deemed sufficient to light the surroundings wherein they were called upon to do work, and it was left entirely to their judgment how the candles were to be placed so that they would shed the necessary light for their convenience and safety. There was therefore no duty in the premises cast upon Brown & McCabe to light the surroundings for their workmen in the hold of the ship. It was only incumbent upon them to have at hand sufficient candles to light the ship where needed, so that the workmen at their will could get them, and as many as their judgment suggested were necessary for their convenience and safety. This Brown & McCabe did, and Rosh took all the candles that he deemed needful, and evidently used what he thought would properly light the between-decks for the temporary purposes desired. If there was fault in his judgment, Brown & McCabe were not responsible for it. In that particular work Rosh was a co-servant with the libelant, and the fellow-servant doctrine, whereby the master is not liable for the negligent acts of one fellow servant conducing to the injury of another, applies. So, therefore, Brown & McCabe were not rendered liable for not properly lighting the between-decks.

Furthermore, under the evidence, it clearly appears that Brown & McCabe were independent contractors with the Clan Graham for loading the vessel. Hence the Clan Graham was also not responsible for insufficient lighting of the between-decks, and incurred no liability by reason of the casualty. It has been determined that the vessel in the first instance is required to furnish a safe place in which the workmen are required to perform their services, and a reasonably safe passageway to and from such place, but, when it has employed an independent contractor to load and stow the cargo, and has turned the ship over to the contractor in a safe condition, then it is relieved of any fault that may arise through the work of the servants of the contractor; the rule being that a vessel in charge of stevedores or independent contractors is not liable in admiralty to such stevedores or independent contractors, or to their employes, for injuries, unless a contractual relation exists between the vessel and the person injured, or on account of the failure on the part of the owner, or those in charge of the navigation of the vessel, to perform maritime duty or obligation, as a result of which injuries are received. *The Saranac* (D. C.) 132 Fed. 936. To the same purpose, see *The Auchenarden* (D. C.) 100 Fed. 895, and *The Thyra* (D. C.) 114 Fed. 978. See, also, *The William F. Babcock* (D. C.) 31 Fed. 418; *The Theresina* (D. C.)

These considerations lead to a dismissal of the libel, and such will be the order of the court.

PACIFIC POSTAL TELEGRAPH-CABLE CO v. OREGON & C. R. CO. et al.

(Circuit Court, D. Oregon. September 2, 1908.)

No. 3,204.

1. EMINENT DOMAIN—CONSTRUCTION OF STATUTE—"LAND."

In the eminent domain statute of Oregon, which authorizes certain classes of public service corporations to condemn land for their use, the word "land" is comprehensive, and includes any interest in land, and under it an easement or right of way may be condemned.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, § 104.

For other definitions, see Words and Phrases, vol. 5, pp. 3975-3984; vol. 8, pp. 7700-7701.]

2. SAME—LANDS SUBJECT TO PRIOR PUBLIC USE—TELEGRAPH COMPANIES.

Under B. & C. Comp. (Or.) §§ 5074, 5075, as amended by act Feb. 25, 1907 (Sess. Laws 1907, p. 239), and section 4750, as amended by Act Feb. 17, 1903 (Sess. Laws 1903, p. 111), which authorize telegraph companies generally to condemn lands necessary or convenient for their purposes, a telegraph company may condemn a right of way for its line over the right of way of a railroad company, also secured by condemnation under the same statutes, where the taking will not materially impair or interfere with the use of such right of way by the railroad company.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, §§ 107-120.]

On Demurrer to Complaint.

Frederick V. Holman, for plaintiff.

Dolph, Mallory, Simon & Gearin, Ben C. Dey, and Wm. D. Fenton, for defendants.

WOLVERTON, District Judge. The defendant Oregon & California Railroad Company is the owner of an easement or right of way, 100 feet in width, more or less, upon which its line of railroad is constructed running from Portland, in Multnomah county, Or., in a southerly direction to the south boundary of the state, a distance of 366.61 miles; such road being now in operation. Plaintiff is a corporation having its principal place of business in the city of New York, state of New York, and is engaged in the construction, maintenance, and operation of electric telegraph lines through various parts of the United States. It is alleged that, within the scope of its purposes, it is necessary for the plaintiff to construct, maintain, and operate a line of electric telegraph from Portland, in Multnomah county, Or., to and beyond the southern boundary of the state of Oregon, and that it is most convenient and practicable to construct, maintain, and operate such line upon the easement and right of way of said defendant railroad company. The proposed manner of construction is that the poles shall be erected 35 feet from the center line of the defendant's main

track wherever the width and conditions of the right of way will permit thereof, and not nearer than 15 feet therefrom, and not nearer than 15 feet from the center line between the rails of all side tracks, switches, turn-outs, etc., where the width, conditions, and location of said side tracks, etc., will allow of the same going so far; it being averred that the erection of plaintiff's said electric telegraph line as proposed "will in no way or manner interfere with the use or occupation by the defendants of the said right of way, nor will it interfere with the operation of cars or trains along the main line, side tracks, switches, turn-outs, turn-tables, spurs, etc., of the said railroad."

The complaint is tested by a demurrer, and the principal points of controversy presented are, first, whether power and authority is conferred, under the Oregon statute, upon one public service corporation having the right of eminent domain to condemn a right of way or easement over and along the priorly acquired right of way or easement of another such corporation; and, if so, second, whether an easement or right of way, being once procured, by condemnatory proceedings or otherwise, may be incumbered, through condemnatory action, with another easement or right of way, for the use and purposes of another and different public service corporation.

The authority for condemning land for use as a right of way is given to railroad corporations and to telegraph and telephone companies by virtue of sections 5074, 5075, B. & C. Comp., as amended by Act Feb. 25, 1907 (Sess. Laws 1907, p. 289), and by Act Feb. 17, 1903 (Sess. Laws 1903, p. 111), being an amendment of section 4750, B. & C. Comp. Section 5074, as amended, provides that a corporation organized for the construction of any railway shall have a right to enter upon any land between the termini thereof for the purpose of examining, locating, or surveying the line of such road, doing no unnecessary damage thereby. Section 5075 provides that any corporation mentioned in section 5074 as amended may appropriate so much of said land as may be necessary for the line of such road, not to exceed 200 feet in width. The amendatory act of 1903 provides that any corporation organized for the purpose of building, maintaining, and operating a telephone or telegraph line for the transmission of messages for hire shall have the right to enter upon lands within the state of Oregon for the purpose of examining, locating, and surveying the line thereof, doing no unnecessary damage thereby, and may appropriate and condemn such lands, not exceeding 25 feet in width, as may be necessary or convenient for such purpose. By another section, namely, section 4748, B. & C. Comp., the right and privilege is extended to any person, persons, or corporation to construct, maintain, and operate telegraph lines along the public roads, highways, and streets of the state, or across rivers or over any lands belonging to the state, free of charge, and over lands of private individuals as subsequently provided. Then follows section 4750, alluded to above, being amended as indicated. It is stoutly contended, the statute having used the word "land" or "lands," that without more it does not authorize an easement in land only to be taken and appropriated for railroad or telegraph purposes; or, in other words, that, an easement or right of way

does not grant the right or privilege of condemning it for any other purpose. Condemnatory proceedings by a railroad or telegraph company for the purpose of appropriating land to its use result ordinarily in an appropriation of an easement only; for, when the use lapses, the easement reverts to the original holder of the land. It has been held by the Oregon Supreme Court that:

"A title that may be freed from public use cannot be acquired by a private corporation by eminent domain. So land can only be taken for the particular use for which it is sought to be appropriated; * * * that is, in this case, for the purpose of a railway, an easement was all that was called for, and all that the respondent could acquire." *O. R. & N. Co. v. Oregon Real Estate Co.*, 10 Or. 444.

So that, in legal contemplation, the railway or telegraph company by an appropriation under the statute does not obtain a title to the land as land, but an easement only in the land, and whenever the use ceases the easement reverts. But, however this may be, it seems that the term "land" is comprehensive enough to include an easement in land. The term "land" being of broader significance, must necessarily include the lesser estate.

Mr. Lewis, in his work on Eminent Domain, § 285, says:

"The term 'land' in statutes conferring power to condemn is to be taken in its legal sense, and includes both the soil and buildings and other structures on it, and any and all interest therein. An easement merely may be taken under authority to take land."

In the case of *State ex rel. N. H. & D. R. Company v. Railroad Commissioners*, 56 Conn. 308, 15 Atl. 756, it is said that:

"The word 'lands' is comprehensive, and may include everything that may be classed as real estate. A highway or street is a public easement in land. It attaches to it, and cannot exist separated from it, so that it is, in fact, a part of the realty. When the statute authorizes the taking of land, unless there is something indicating a contrary intent, it authorizes the taking of all the incidents and appurtenances of land. * * * When the statute uses the word 'land' in granting to a railway a power to exercise the right of eminent domain, it will be presumed to use it in its comprehensive sense as including all interests attached to it or growing out of it."

So in a case from Pennsylvania—*Philadelphia, etc., Railroad Company v. Williams*, 54 Pa. 103—the court says:

"It is argued, also, that the charter authorizes the taking of land only which is corporeal, and not a right of way which is incorporeal. This refinement is too subtle for our comprehension. It is difficult to understand how a right to enter upon land and locate and construct a railroad thereupon can be arrested by the existence of an incorporeal hereditament issuing or served out of it. One would suppose that in taking the land the way itself is taken. 'Omne majus continet in se minus' seems to forbid any other conclusion. If the land itself which supports the way can be taken, I can see no reason why its incident, the right of way over it, is not equally affected by the same taking for the use of the public."

When, therefore, the statute gives authority for taking land, it carries with it by necessary implication the authority to take any less interest or estate in the land in the same way and to like effect as the land itself may be taken.

Springfield v. Connecticut River Railroad Company, 4 Cush. (Mass.) 63, State, Mayor, and Aldermen of Jersey City v. Montclair Railroad Company, 35 N. J. Law, 328, and some others analogous thereto; but it does not seem to me that they are to the purpose. The first case is one where a railroad company sought to condemn a public park, which had been donated to the public by the person dedicating the village, and it was there held that the statute granting power to acquire title to "any real estate required for the purposes of the corporation" was not broad enough to authorize the taking of public grounds held by the municipality for public purposes and not in its private capacity. The next case involved the attempted condemnation of a public highway for railroad purposes, and it was determined upon the same principle as the preceding case. The last case was for the condemnation of a portion of a reservoir, the public property of and in use by Jersey City, a municipality, and was decided the same way; the court saying:

"The presumption is in favor of the public, and against the necessity of taking the highway longitudinally by a private corporation, although for a public purpose such as a railroad. * * * In a highway the public have only an easement. In this [the reservoir] they own the fee, and it is devoted to a most important public use. It is like the courthouse ground in a county; and to take them would require an express indication of the Legislature or an implication equally conclusive. But, applying the rule in relation to highways in its most liberal sense, the company cannot take the strip in question."

The use for railroad purposes was so inherently inconsistent with the public use to which the lands had been devoted in these cases that it was deemed essential that there should be clear statutory authority for appropriation to the former use before such a power could be exercised as against the public. The case of Minneapolis W. Railway Company v. Minneapolis & St. L. Railway Company, 61 Minn. 502, 63 N. W. 1035, merely decides that, when property has already been appropriated for public use in a lawful and proper exercise of the power of eminent domain, it cannot be taken for another public use which will thereby wholly or to an appreciable extent defeat the former use, unless the power to make such second appropriation is expressly granted or arises from necessary implication. It is clear that section 4748, B. & C. Comp., is not adequate by its terms and conditions to authorize the condemnation of one right of way by another company for other purposes. The case of New York City & Northern Railway Company v. Central Union Telegraph Company, 21 Hun (N. Y.) 261, is authority for this construction.

I conclude, therefore, that counsel's first contention is not maintainable as a legal proposition, and that the use of the term "land" or "lands" by the statute is not inhibitive of a condemnation of the right of way or easement in land; but, upon the other hand, that the statute authorizes a condemnation, not only of land, but also of any lesser estate or interest therein.

The second question, I take it, must also be resolved in the affirmative. Starting with the general statutory authority conferred by legis-

lative enactment as previously indicated, the rule seems to be very well stated in 15 Cyc. p. 616, as follows:

"In the absence of some statutory provision expressly or by implication forbidding it, property devoted to one public use may under general statutory authority be taken for another public use, where the taking will not materially impair or interfere with or is not inconsistent with the use already existing, and is not detrimental to the public. It is not material that some inconvenience may result to the prior occupant, if the conditions are such that the two uses can stand together. The rule that power must be conferred expressly or by necessary implication applies only where the second use will destroy or injure the use to which the land was originally appropriated."

Mr. Cook states the rule thus:

"Where one corporation has taken land or property under the power of eminent domain, or holds such land or property for public use, another corporation cannot take such land or property under the power of eminent domain unless the statute expressly or by necessary implication authorizes the latter corporation to do so. * * * Subject to the above rules, the right of eminent domain may be exercised over land already owned by corporations which have acquired it by the same power." 3 Cook on Corporations (5th Ed.) § 906.

In a subsequent section (934) the same author has this to say:

"But, where the statutes of the state merely authorize telegraph companies to condemn generally, without giving expressly and distinctly the right to condemn railroad property for such telegraph right of way, there is more doubt. The tendency is to sustain such a condemnation. It has been very recently held that, even though the statutes of the state do not expressly authorize a telegraph company to condemn a right of way on a railroad right of way, yet, if the statutes authorize a telegraph company to condemn generally, this, together with the post road act of Congress which the telegraph company has accepted, is sufficient to authorize a condemnation on a railroad right of way; it being shown that the railroad business is not interfered with thereby."

As bearing upon the exact question presented by the record here, the law is further enunciated in 15 Cyc. p. 625, as follows:

"It is very generally held that a telegraph company may condemn for the construction of its line a right of way which has been previously condemned by a railroad company for its right of way, where the construction and operation of the telegraph line will not destroy or materially interfere with the use of the way for the railroad. If the use by the railroad company is not materially interfered with or destroyed, this power may be exercised under a general statutory authority to condemn land."

These general rules would seem to be conclusive of the question in hand, but a reference to the adjudications will be instructive. Almost the exact case is disposed of by the Court of Appeals in this circuit in *Oregon Short Line R. Co. v. Postal Tel. Cable Co.*, 111 Fed. 842, 49 C. C. A. 663. The case was appealed from the Idaho district. The statute of that state (section 5213, Rev. St. 1887) confers the authority to condemn for a public use, provided it be shown, first, that the taking is necessary for such use; and, second, if already appropriated to some public use, that the use to which it is sought further to have it applied is a "more necessary public use." But it was held that the statutory provision imported nothing into the law beyond what was required by the general rules applying to the subject. As the case is so nearly in point, I may be pardoned if I quote extensively from the

opinion of the learned judge who announced the decision of the court. He says:

"It is said that the court erred in ruling that property already condemned to a public use under the right of eminent domain cannot, in the absence of express legislative authority, be condemned to a second public use; that the judgment in the first condemnation proceeding is an adjudication of the question of the necessity of that use, and that no second judgment can be had subversive of the judgment so rendered. * * * But, by section 5210, telegraph companies are given the authority to exercise the right of eminent domain. This provision, standing alone, unaffected by other statutory enactments, would confer upon a telegraph company the authority to condemn a right of way along and upon the right of way of a railway company, provided that it did not in any way interfere with the use to which the right of way was already dedicated. The rule is supported by abundant authority, and may be thus expressed: Property dedicated to a public use cannot be taken for another public use under the general laws conferring the right of eminent domain, where the second use will destroy or injure the use to which the property is already devoted. To authorize a second condemnation of such properties to a second use which is subversive of the first, there must be express legislative authority."

Then, after citing authorities and construing section 5213, *supra*, as above indicated, he continues:

"A corporation in instituting condemnation proceedings has the general right to select such property as it shall find necessary for its public use. This right is recognized by the courts. No one can defend against such an appropriation by showing that some other property would serve the use of the corporation equally well. Such property is 'necessary' when the corporation asserts that it has placed its line over it and needs it. Property already dedicated to a public use stands upon the same footing as other property, and is subject to condemnation as is other property, provided that the second use shall not interfere with the first. The defendant in error in this case has alleged that this property is necessary for its use, and that it is not necessary for the use of the plaintiff in error. The court has found that these allegations are true, and has found that the second use is more necessary than the first. As we construe the statutes of Idaho, we find no error in that conclusion."

The same result was arrived at in the Montana district, under a statute of similar provisions to the Idaho statute. *Postal Tel. Cable Co. v. Oregon Short Line R. Co.* (C. C.) 114 Fed. 787. The state courts announce a like doctrine. In *Postal Telegraph Cable Company of Indiana v. Chicago, I. & L. Railway Company*, 30 Ind. App. 654; 66 N. E. 919, 921, decided by the appellate court of Indiana, the court, after citing numerous authorities, among them the case decided by the federal Circuit Court of Appeals, *supra*, says:

"These authorities, together with the recent cases in our own state, we think squarely hold that under the general grant of authority to condemn given to telegraph companies, such as is given in this state, the telegraph company may show the nature of the two uses, together with any facts which show that the two uses may coexist—the latter use without materially interfering with or impairing the first use—and, if the court upon all the facts finds that the two uses can coexist, it is the duty of the court to hold that the condemnation may be had under the general grant for the purpose."

To the same purpose are the cases of *Postal Tel. Cable Co. v. Oregon S. L. R. Co.*, 23 Utah, 474, 65 Pac. 735, 90 Am. St. Rep. 705, and *Mobile & Ohio Railroad Co. v. Postal Telegraph Cable Co.*, 120 Ala. 21, 24 South. 408. These and other authorities lead me firmly to the

public use through quasi-public concerns may be taken for another public use for like concerns, where the taking will not materially impair or interfere with, or is not inconsistent with, the use already acquired, and is not detrimental to the public. The prime essential is that the two uses may stand together, and it is not of vital consequence that some inconvenience may result to the prior occupant, so that the later suitor does not interpose in such a manner as to materially interfere with the practical use of the antecedent franchise.

The allegations of the complaint bring the plaintiff fairly within this rule, and hence it results that the demurrer should be overruled; and it is so ordered.

In re E. I. FIDLER & SON.

(District Court, M. D. Pennsylvania. September 16, 1908.)

No. 996.

BANKRUPTCY—CONCEALMENT OF PROPERTY BY BANKRUPT—EVIDENCE CONSIDERED.

Bankrupts, who were partners conducting a clothing store, within the three months preceding their bankruptcy purchased goods of the value of \$8,100. The managing partner estimated the value of the stock previously in the store at \$5,000, and about the same amount, or a little less, was turned over to the trustee. In the meantime the sales, as nearly as could be estimated from the bank deposits and claimed expenditures, no books having been kept, aggregated but about \$4,700, including the profits. The bankrupts could give no explanation whatever of the shortage, of more than \$3,400, which arose during such short time; but there was testimony that goods had been removed from the store at night, and after the bankruptcy a store containing similar goods was started in another town in the name of the wife of one of the bankrupts, and conducted by them. *Held*, that such evidence warranted a finding that the goods unaccounted for were concealed by the bankrupts and an order requiring them to turn the same over to their trustee.

In Bankruptcy. On certificate of James Smitham, referee, sur rule on bankrupts to turn over property.

Frank N. Decker, for trustee.

Frank P. Sharkey and W. G. Thomas, for bankrupts.

ARCHBALD, District Judge. These are proceedings to compel the bankrupts to turn over certain property which it is claimed that they fraudulently conceal and keep back from their trustee. The referee has found that this is the fact, and the case now comes up on objections to his report. The legal points involved have been fully discussed recently by this court in the *Lesaius Case*, 163 Fed. 614, and it will not be necessary therefore to go over them. The only question is as to the facts.

E. I. Fidler & Son were adjudged bankrupts on their own petition in this court May 29, 1907. At the time of their failure they were engaged in the general clothing and men's furnishings business in Mauch Chunk, Pa.; Morris Fidler, the son, being the active manager.

was subsequently sold by the trustee at public sale for \$5,000; the referee finding that it was worth \$5,000.

It is claimed on behalf of the bankrupts that it should be rated in the present accounting at from \$10,000 to \$12,000, on the theory that at a forced sale only one-third of the value is supposed to be realized. But it is expressly testified by Morris Fidler that it was not worth over \$5,000, the amount fixed by the trustee, which puts the matter beyond controversy.¹ No books were kept by the bankrupts, and no inventory had been made for over two years; the only means taken to keep track of the business being the invoices or bills for goods purchased. According to these, as found by the referee, there was bought between March 1, 1907, and May 29th following, the date of bankruptcy, goods and merchandise to the amount of \$8,115.62, which added to the stock of goods on hand at the beginning of this period, which was also estimated by Morris Fidler to have been about \$5,000, makes \$13,115.62 to be accounted for.

Against this, in order to get at what has become of them, there is to be credited the sales made during the time covered, which as evidenced by the deposits in bank amounted to \$3,845.58. The running expenses for the same time, including the money drawn out by the bankrupts to live on, are figured by their counsel at \$1,794. This is a somewhat liberal estimate, and not altogether to be gathered from the evidence. But, accepting it as being about as near as we can come to it, it represents so much more to be credited to sales, except that during this time the bankrupts borrowed \$700 from Mrs. Esther Fidler, the wife of E. I. Fidler, the father, and \$250 from other sources, which, having gone into the business, is to be charged up against the bankrupts in this accounting, or, perhaps better, deducted from the amount allowed for expenses, which it may be assumed that it went to meet, reducing by so much that which is to be credited as realized from sales. The net result of this may be tabulated as follows:

The bankrupts are to be charged with:	
Goods on hand March 1st, as estimated.....	\$5,000 00
Merchandise received from March 1st to the date of bankruptcy, as shown by invoices.....	8,115 62
	<hr/>
	\$13,115 62
They are to be credited with:	
Sales made, as evidenced by bank deposits.....	\$3,845 58
Expenses paid out of the business, \$1,794, less \$950 bor- rowed money.....	844 00
	<hr/>
	4,689 58
	<hr/>
	\$8,426 04

¹ "By Mr. Sharkey, bankrupts' attorney: Q. In the speed and hurry of making up the value of your stock and contents of your store, you gave me the value at \$9,000. Since then you have made an examination of the store and contents? A. Yes, sir. Q. And what is your opinion of the value of it since the latter examination? A. I do not think it more than about \$5,000."

accounted for. This is \$750 less than was found by the referee, owing to the correction in the amount of money borrowed; but otherwise it follows his report.

The bankrupts have absolutely no explanation to offer for this large discrepancy. Their attention being called to it, that was the express answer which they gave. They admittedly experienced no loss by theft, nor by fire, and, doing a cash, and not a credit, business, as they claim, they had no bad debts, if any could have accumulated in the short time in question. Indeed, they even go so far as to say that they did not know that they were insolvent, and only went into bankruptcy because suits were being brought against them. But \$8,000 worth of goods, obtained inside of three short months, if their bills are to be relied on, are not to be disposed of upon any such convenient lack of knowledge. They certainly could not have disappeared through the ordinary and legitimate channels without leaving some trace behind them.

It is said that the dates on the bills cannot be taken as evidence of when the goods were received; it being the custom of the trade to date them ahead, in fixing the terms of credit, the goods being forwarded meanwhile. But this is not true universally, and, if it applied to any specific bills, the bankrupts should have shown it. Indeed, the matter having been called to the notice of Morris Fidler, he testified that with one exception, which he named, where the goods were returned, and so do not figure here, they were all received subsequently to the dates in the invoices. It is further said that some of the bills do not show when the purchases were made, that in others the dates are after bankruptcy, while in others there should be corrections. There is one bill for advertising, \$9, which, of course, does not represent goods; and another, for patterns, is \$8.78 more than it should be. The two amount to \$17.78, and this will be deducted. But with regard to the rest there seems to be no valid objection. The dates which are after bankruptcy, of which there may be one or two, may be examples of postdating such as is alluded to. But the bankrupts certainly do not deny that they got these goods before they failed, and, if so, they are chargeable with them, however they may have been billed. And as to those which are said to bear no date at all, the claims proved from which the amounts are taken were not sent up by the referee, and I have no means, therefore, of determining the truth about them.

It is said, again, that the stock on March 1st was made up of old goods, on which there was a large depreciation, which has not been allowed for. But the value taken is that which was put on them by Morris Fidler, which he expressly declared was rather more than less than that of those which were turned over to the trustee at the end, which he also fixes at \$5,000, and this effectually disposes of any such question. Besides that, in crediting the sales, the goods are taken as though disposed of at cost prices, without considering the profits upon them, which, according to the bankrupts, would run any-

this is an uncertain problem to enter on, and whatever corrections there should be on account of it may be set off against what should possibly be allowed because of old stock, thus doing justice to the rival contentions.

There is direct evidence, also, to sustain the charge of a disappearance or spiriting away of goods. William Conley, a borough policeman, whose duty it is to patrol the streets and try the store doors to see that they are fastened, at the same time inspecting the interiors through the windows, says that he noticed that the Fidler store was getting empty; and along the last of May, about a quarter to 5 one morning, he saw Sam Levin, an intimate friend of the Fidlers, a junk dealer, drive in the direction of the store with a wagon load of trunks, and half an hour afterwards come back again with them and drive off towards East Mauch Chunk, where he was doing business. And William Kistler, a watchman at the Mauch Chunk National Bank, confirms this. On another occasion, also, about 6 o'clock one morning in May, two weeks before the bankruptcy, C. A. Rex, who had a store next door to the Fidlers, saw Morris Fidler and Sam Levin loading up a wagon full of boxes, which looked like shoe boxes and were handled by them as though they were filled. It was daylight, but was an hour before the store was usually opened. Furthermore, on May 3d, the bankrupts bought a bill of umbrellas and parasols, from Siegel, Rothschild & Co. of Baltimore, Md., 254 articles, out of which only 81 were to be found in the stock turned over to the trustee, 173 being unaccounted for, an altogether improbable number to have been sold by one firm, in a place of the size of Mauch Chunk, in the short period before they went into bankruptcy. It is also a circumstance that the same kind of a store was started up not long afterwards at Lansford, a few miles from Mauch Chunk, in the name of Esther Fidler, in which E. I. Fidler signs the checks the same as before, and Morris Fidler is again the active manager.

The referee alludes to other matters which he considered significant, but it is not necessary to dwell upon them. Taking into consideration the things which have been referred to, in connection with the discrepancy in the stock which is disclosed by the figures, there is no escape from the conclusion that the bankrupts have made away with the goods which are unaccounted for, and, if so, they must now produce them. This applies to E. I. Fidler, the father, as well as Morris Fidler, the son, both being equally responsible; it being inconceivable that the one could have abstracted and concealed such a large quantity of goods without the other knowing and participating in it. The referee was therefore right in the order which he made, and it will be sustained, merely reducing the amount of it.

Let an order be drawn requiring the bankrupts to turn over to their trustee, within 10 days, goods and merchandise, late a part of their store stock, to the value of \$3,400.

TRINIDAD ASPHALT MFG. CO. v. STANDARD PAINT CO.

(Circuit Court of Appeals, Eighth Circuit. August 11, 1908.)

No. 2,621.

1. TRADE-MARKS AND TRADE-NAMES—NAMES SUBJECT TO APPROPRIATION — "RUBEROID."

The word "Ruberoid" cannot be appropriated as a trade-mark for a roofing made of felt saturated with a gum composed of the residuum of animal fats, and which is in the nature of soft, flexible rubber; such word not being a fanciful, arbitrary term, but merely a misspelling of "rubberoid," which is a common descriptive term signifying a resemblance to rubber in appearance or characteristics, and the use of which belongs to the public.

[Ed. Note.—Arbitrary descriptive or fictitious character of trade-marks and trade-names, see note to *Searle & Hereth Co. v. Warner*, 50 C. C. A. 323.]

2. SAME—UNFAIR COMPETITION—USE OF SIMILAR DESCRIPTIVE WORDS.

A manufacturer, which adopted the word "Ruberoid" as a trade-mark for a roofing material, which trade-mark was invalid as an attempt to appropriate the descriptive term "rubberoid," is not entitled to an injunction on the ground of unfair competition against another manufacturer because of its use of the name "RubberO" to designate a similar roofing, which was plainly marked with defendant's name as manufacturer, and where there was no imitation of the form, dress, or appearance of complainant's packages, beyond the fact that both complainant and defendant, in common with all manufacturers of similar roofing material, put up their product in rolls.

Sanborn, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

W. B. Homer, for appellant.

John F. Green (F. N. Judson, on the brief), for appellee.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

HOOK, Circuit Judge. About the year 1891 the Standard Paint Company, a West Virginia corporation, commenced to make and put upon the market a prepared roofing material of felt, saturated with a gum composed of the residuum of animal fats. Because of the close resemblance of the gum to rubber and the durability and flexibility of the roofing, it then adopted the word "Ruberoid" as a trade-name, and in 1901 caused it to be registered in the Patent Office as a trade-mark. In the application for registration it was said the trade-mark was appropriated to solid substances in the nature of soft, flexible rubber in the form of flexible roofing, etc. It extensively advertised, and built up a large business. In 1904 the Trinidad Asphalt Manufacturing Company, a Missouri corporation, put upon the market a roofing of similar appearance and of similar composition, except that vegetable oils were used in treating the felt, and it applied thereto the name "RubberO." There were about 40 other concerns engaged in that business, many of whose products resembled those of complainant and defendant, and because they possessed some of the characteristics of India rubber were called and known to the trade as "rubber roof-

accounting on two grounds: First, infringement of trade-mark; and, second, unfair competition, in that the use by defendant of the word "rubbero," its similarity to "ruberoid," and the form and dress of defendant's roofing as put upon the market were calculated to and did deceive the public, when buying it, into the belief they were buying the roofing of complainant. The trial court gave the complainant a decree, and the defendant appealed.

First, as to complainant's trade-mark. It is clear that by the adoption of the word "ruberoid" as a trade-mark it was sought to appropriate the exclusive use of the term "rubberoid," and complainant's rights are to be judged accordingly. If the latter cannot be appropriated as a trade-mark, because it is a common descriptive word, and its use, therefore, belongs to the public, complainant cannot maintain its claim to the one it selected. A public right in "rubberoid" and a private monopoly of "ruberoid" cannot co-exist. They are inconsistent and trespass upon each other, and under the law of trade-mark the latter must give way. To the contention that "ruberoid" is fanciful or arbitrary it must be said that no one can restrict or destroy the public right by the coinage and monopoly of a word that is a near imitation of one the use of which is open to all for the truthful description of articles of trade and commerce. The act of Congress (Act March 3, 1881, c. 138, § 1, 21 Stat. 502 [3 U. S. Comp. St. 1901, p. 3401]) prohibits the registration of a trade-mark so closely resembling that of another as to create mistake or confusion in the mind of the public, and certainly the public is entitled to like protection against encroachments upon a common descriptive term. To the visual perception there is a close resemblance between "rubberoid" and "ruberoid," and the pronunciation is so nearly identical the difference would not ordinarily be noticed by the attentive ear. They are substantially alike in suggestion. Nothing can be gained by the mere dropping of a "b" from the appropriate word expressive of the advertised qualities of complainant's product. For similar reasons it was held that the word "Matzoon" could not be appropriated as a trade-mark for a medicinal beverage because of its similarity to "Madzoon"; the latter being the transliteration of the ancient Armenian name of the preparation. *Dadirrian v. Yacubian*, 39 C. C. A. 321, 98 Fed. 872. In *Goodyear Co. v. Rubber Co.*, 128 U. S. 598, 604, 9 Sup. Ct. 166, 168, 32 L. Ed. 535, it was said:

"The designation 'Goodyear Rubber Company' not being subject to exclusive appropriation, any use of terms of similar import, or any abbreviation of them, must be alike free to all persons."

Because of its very structure and meaning the word "rubberoid" is not a fanciful one, and it owes nothing to complainant for its existence or its descriptive relevance to the roofing productions in question. It was a part of our common vocabulary long before complainant began operations, the Patent Office discloses applications of it to compositions resembling but not containing rubber, and it had found its way into the lexicons. The suffix "oid" signifies likeness or resem-

beroid" like rubber. The latter is the common English term signifying a resemblance to rubber in appearance or characteristics. Indeed, it would appear that many of the rubber roofings, so called, that are common in the markets, could more appropriately and truthfully be described as "rubberoid."

It is the settled rule that no one can appropriate as a trade-mark a generic name, or one descriptive of an article of trade, its qualities, ingredients, or characteristics, or any sign, word, or symbol which, from the nature of the fact it is used to signify, others may employ with equal truth. *Canal Co. v. Clark*, 13 Wall. 311, 323, 20 L. Ed. 581; *Goodyear Co. v. Rubber Co.*, 128 U. S. 598, 9 Sup. Ct. 166, 32 L. Ed. 535; *Brown Chemical Co. v. Meyer*, 139 U. S. 540, 11 Sup. Ct. 625, 35 L. Ed. 247. A reference to a few of the many cases in which it has been applied may more clearly signify its purport than the bare statement of the rule itself. The following have been held to be descriptive terms, and therefore not the subject of trade-mark: "Nourishing Stout" as applied to a malt liquor (*Raggett v. Findlater*, L. R. 17 Eq. 29); "Gall Cure" to a medicine (*Bickmore, etc., Co. v. Mfg. Co.*, 67 C. C. A. 439, 134 Fed. 833); "Whirling Spray" to a syringe (*Marvel Co. v. Pearl*, 66 C. C. A. 226, 133 Fed. 160); "Standard" and "Computing" to scales (*Computing Scale Co. v. Standard Computing Scale Co.*, 55 C. C. A. 459, 118 Fed. 965); "Steel Shod" to boots and shoes with soles studded with nails (*Brennan v. Dry Goods Co.*, 47 C. C. A. 532, 108 Fed. 624; *Id.* [C. C.] 99 Fed. 971); "Aluminum" to a manufactured article composed in part of that metal (*American Washboard Co. v. Mfg. Co.*, 43 C. C. A. 233, 103 Fed. 281, 50 L. R. A. 609); "Instantaneous" to a tapioca ready for use (*Bennett v. McKinley*, 13 C. C. A. 25, 65 Fed. 505); "Iron Bitters" (*Brown Chemical Co. v. Meyer* (C. C.) 31 Fed. 433, affirmed in 139 U. S. 540, 11 Sup. Ct. 625, 35 L. Ed. 247); "Acid Phosphate" (*Rumford Chemical Works v. Muth* [C. C.] 35 Fed. 524, 1 L. R. A. 44); "Indurated Fiber" to wares made of wood pulp (*Indurated Fiber Co. v. Amoskeag, etc., Co.* [C. C.] 37 Fed. 695); "Cramp Cure" (*Harris Drug Co. v. Stucky* [C. C.] 46 Fed. 624); "Hygienic" to underwear (*Jaros, etc., Co. v. Fleece Co.* [C. C.] 65 Fed. 424); "Valvoline" to lubricating or valve oil (*Leonard v. Wells*, 53 L. J. Ch. 233, 32 W. R. 532); "Croup Tincture" (*In re Roach*, 10 Off. Gaz. 333); "Crack-Proof" to rubber goods (*In re Goodyear Rubber Co.*, 11 Off. Gaz. 1062); "Crystalline" to artificial stones (*Ex parte Kipling*, 24 Pat. Off. Gaz. 899); "Fireproof Oil" (*Scott v. Standard Oil Co.*, 106 Ala. 475, 19 South. 71, 31 L. R. A. 374); "Aromatic Schiedam Schnapps" to gin (*Burke v. Cassin*, 45 Cal. 467, 13 Am. Rep. 204); "Snowflake" to crackers and biscuit (*Larrabee v. Lewis*, 67 Ga. 561, 44 Am. Rep. 735); "Cough Remedy" (*Gilman v. Hunnewell*, 122 Mass. 139); "Selected Shore Mackerel" (*Trask v. Wooster*, 28 Mo. App. 408); "Rye and Rock" to a mixture of rock candy and rye whisky (*Van Beil v. Prescott*, 82 N. Y. 630); "Dessicated Codfish" (*Town v. Stetson*, 3 Daly [N. Y.] 53); "Headache Wafers" (*Gessler v. Grieb*, 80 Wis.

21, 48 N. W. 1098, 27 Am. St. Rep. 20); "Microbe Killer" (Alff v. Radam, 77 Tex. 530, 14 S. W. 164, 9 L. R. A. 145, 19 Am. St. Rep. 792). "Rubberoid" easily falls in the above class, when applied to articles with no rubber in their composition, but appearing to have and possessing its qualities and characteristics. There are cases in which words and phrases have been upheld as trade-marks upon the ground that they were suggestive, rather than descriptive; but they have no application here.

Even a proper name may in time become by common acceptance the generic designation of an article, and after the expiration of the monopoly arising from letters patent become publici juris, like an ordinary descriptive term, and therefore not appropriable as a trade-mark. This was held to be so of "Rahtjen's Composition" and a preparation of paint (Holzapfel's Co. v. Rahtjen's Co., 183 U. S. 1, 22 Sup. Ct. 6, 46 L. Ed. 49); "Singer" and the sewing machine (Singer Mfg. Co. v. June Mfg. Co., 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118); "Goodyear Rubber" and a class of goods made by the process known as Goodyear's invention (Goodyear Co. v. Rubber Co., 128 U. S. 598, 602, 9 Sup. Ct. 166, 32 L. Ed. 535); "Webster" and the dictionary (Merriam v. Pub. Co. [C. C.] 43 Fed. 450; Merriam v. Clothing Co. [C. C.] 47 Fed. 411); "Fairbanks" and a make of scales (Fairbanks v. Jacobus, 14 Blatchf. 337, Fed. Cas. No. 4,608); "Harvey" and "Worcestershire" and the table sauces of those names (Lazenby v. White, 41 L. J. 354; Lea v. Deakin, 11 Biss. 23, 15 Fed. Cas. 95, Case No. 8,154). In the same way a fanciful word may become the very name of the thing to which in the beginning it was arbitrarily applied. Before this controversy arose complainant publicly declared it selected the word "ruberoid" for a trade-mark, because of the resemblance of its product to rubber. It advertised the fact to the world, and pointed to the common characteristics. The truth of its statement is so obvious, and the connection between the misspelled name and the thing so manifest, we need not search for some remote likeness to other words found in the lexicons that have no possible application to the artificial roofing in question. That the roofing of complainant possesses characteristics of rubber in composition is plain to the most ordinary inspection, and it is also plain that the average person would take the word adopted as signifying that fact. It seems altogether clear that complainant's trade-mark is invalid.

The rule as to unfair or fraudulent competition does not necessarily involve the right to the exclusive use of a word or symbol, for though one's trade-mark may be invalid the circumstances attending its use by another may be such as to constitute an invasion of his rights and a fraud upon the public. It proceeds upon ethical considerations and has its foundation in business honesty. The evil against which it is directed has a twofold aspect, the deception of the purchasing public, and the consequent piracy of the reputation and good will which a competitor has earned by fair conduct and the quality of his goods, and which constitute a valuable asset in his business. Briefly stated, the rule is that one should not be permitted to sell his goods as the

signs, or symbols, or by the dress, appearance, or form of package, so imitate his competitor's course or way as to deceive the ordinary purchaser, giving such attention as purchasers usually do. But all must submit to the competition which comes alone from the fair and truthful employment of generic names and terms descriptive of the qualities and characteristics of articles of trade and commerce, unaccompanied by other acts designed to induce confusion and error in the mind of the public.

We discover nothing in defendant's conduct justifying the charge of unfair competition. In the last analysis the charge rests solely on the use of the word "rubbero" and the similarity thereof to "ruberoid," or its equivalent, "rubberoid." Complainant has no monopoly of the resemblance to rubber of roofing that has none in its composition, and obviously it cannot secure a monopoly of the appropriate term descriptive of that resemblance by invoking the doctrine of unfair competition. The word "rubberoid" is part of the common heritage, and all who can truthfully apply it to their products are entitled to do so, taking due care that they do not otherwise trespass upon the rights of competitors. The defendant being entitled to the proper use of the word "rubberoid," the complainant cannot justly complain of the use of "rubbero." That complainant marketed its roofing in rolls and defendant did the same is not significant. That was the usual, ordinary course of those engaged in the business. The form was not peculiar or fanciful, but was one of convenience, due to the physical characteristics of the material. It is as natural that such roofing should be in rolls as carpet, matting, or paper, or as dress-fabrics in bolts, thread on spools, or matches in boxes. Similar considerations apply to the cutting of the roofing into strips of convenient width and the designation of the weight or thickness thereof. There was no imitation of the arrangement, color, design, or general appearance of the wrappers and markings on the packages. On the contrary, those of defendant were in such marked contrast to complainant's as to repel all suggestion of design on the part of the former to misrepresent the origin or ownership of its product. Moreover, its name and address were plainly printed on the labels. It would be a result unsustained by reason or authority if one, after vainly attempting through a trademark to secure a monopoly of a generic or descriptive word, should nevertheless be granted one by decree of a court, applying the doctrine of unfair competition to those who simply used the word in the appropriate naming or description of their goods, but in other respects plainly distinguished them from the goods of their competitor. Yet that is practically what complainant is attempting in the second branch of its case, for it has no other basis than the mere use by defendant of the word "rubbero." If at complainant's instance a court should enjoin the use of "rubbero," then logically none of the large number of other manufacturers who make roofings resembling rubber can lawfully call their products "rubber roofing" or "rubberoid roofing," because of similarity to the term selected by complainant, and thus com-

be decreed the exclusive right to call his sugar sweet or his vinegar sour.

In *Singer Mfg. Co. v. June Mfg. Co.*, supra, the Supreme Court held that the name "Singer" had become the generic designation of a certain class of sewing machines, and therefore the Singer Company could not appropriate it as a trade-mark, though it had exclusively used it many years. It also expressly recognized the right of any manufacturer of that type of machines to apply the name "Singer" thereto, provided it was clearly and unmistakably specified in connection therewith that they were the product of the maker, and not of the Singer Company. 163 U. S. 207, 16 Sup. Ct. 1016, 41 L. Ed. 131. The requirements of honest competition mentioned by the court in that case were fully met by the defendant here.

In *Centaur Co. v. Heinsfurter*, 28 C. C. A. 581, 84 Fed. 955, an injunction was sought restraining the defendant from using the word "Castoria." It was held that the word had become the descriptive name of the medicine to which it was applied, and therefore plaintiff could not appropriate it as a trade-mark, though it had long enjoyed the exclusive use of it. Mr. Justice Brewer, speaking for this court, said of the claim of unfair competition:

"But, as we have heretofore observed, in the present case, outside of the use of the word 'Castoria,' there is nothing to mislead the public into the belief that the Castoria manufactured and sold by the defendants was in fact manufactured and sold by the plaintiff. On the contrary, the information was full and specific that the defendants were the manufacturers and vendors."

This excerpt aptly fits the case at bar. True, in both these cases there were patents which had expired, and the names "Singer" and "Castoria" had become the generic names of the articles during the existence of the monopoly. When the patents expired, and the exclusive right to manufacture ceased, the right to use the names also became a public one through a species of dedication. But in respect of the question now being considered those cases are indistinguishable in principle from the one before us. It is immaterial that names like "Singer" and "Castoria" became public property by acquiescence of those who first employed them, instead of being naturally so by reason of structure and original meaning, as is the case with an ordinary appellative like "rubberoid." The important thing is the fact that they are public property, not how they became so. If they are, it follows from that quality alone that all may truthfully apply them to their products, and that no one can lawfully monopolize them. Though the cases cited also involve other questions, they recognize and enforce the established rule that unfair competition cannot arise from the mere use of words belonging to the public, accompanied by a fair and truthful statement of the ownership and source of manufacture.

In *Brown Chemical Co. v. Meyer*, 139 U. S. 540, 11 Sup. Ct. 625, 35 L. Ed. 247, the rule was expressly applied. The complainant had for a long time made "Brown's Iron Bitters," when defendant put upon the market a medicine which he called "Brown's Iron Tonic."

The court, after first observing that there could be no valid trade-mark in the words "Iron Bitters," addressed itself to the claim of unfair competition, and after considering the similarities of the form and dress of the packages found that they afforded no ground for complaint. So, as in the case at bar, the question finally resolved itself into one of the mere use of complainant's words, or words similar thereto. The court said:

"But if the words 'Iron Bitters' cannot be lawfully appropriated as a trade-mark, it is difficult to see upon what theory a person making use of these or similar words can be enjoined. We understand it to be conceded that these words do not in themselves constitute a trade-mark. It follows, then, that another person has the right to use them, unless he uses them in such connection with other words or devices as to operate as a deception upon the public."

And then the court disposed of the addition of the patronymic "Brown" by finding from the facts in the case defendant had the right to use it also. The same rule was applied on the circuit in *Brown Chemical Co. v. Myer* (C. C.) 31 Fed. 453, by Judge Thayer, and in *Gessler v. Grieb*, 80 Wis. 21, 48 N. W. 1098, 27 Am. St. Rep. 20, and *Alff v. Radam*, 77 Tex. 530, 14 S. W. 164, 9 L. R. A. 145, 19 Am. St. Rep. 792.

In *Reddaway v. Banham*, L. R. App. Cas. [1896] 199, the decree directed by the House of Lords to be entered by the lower court recognized the right of defendants to use the name "camel hair belting" under restrictions similar to those imposed by the Supreme Court in the *Singer Case*. By long use the name had come to signify plaintiff's goods. The decree which was directed (page 222) was "for an injunction restraining the defendants and each of them from using the words 'camel^hhair' as descriptive of or in connection with belting manufactured by them or either of them, or belting (not being of the plaintiffs' manufacture) sold or offered for sale by them or either of them, *without clearly distinguishing such belting from the belting of the plaintiffs.*" (The italics are ours.) In respect of distinguishing, Lord Morris said:

"That, to my mind, is obviously done when the respondents put prominently and in a conspicuous place on the article the statement that it was camel hair belting manufactured by themselves. Having done so, they would, as it appears to me, fully apprise purchasers that it was not Reddaway's make, by stating that it was their own." Pages 221, 222.

The decree is reversed, and the cause remanded, with directions to dismiss the bill.

SANBORN, Circuit Judge (dissenting). In 1891 the complainant commenced to manufacture a roofing to which it applied the trade-name "Ruberoid." Its officers and agents pronounce this word "ruber-oid." Neither this word nor the word "ruberoid" had ever been used to designate or describe this or any other roofing at that time. In 1901 the complainant registered this word "ruberoid" as its trade-mark. It advertised and promoted the sale of its ruberoid until its sales in the year 1904 amounted to \$950,000, its roofing was known, ordered, and sold throughout the United States and foreign countries by the name "ruberoid," and that word had come to mean in the trade

the complainant's product. That word indicated to the trade the origin and the ownership of the roofing. Thereupon the defendant in 1904 commenced to make and sell a similar roofing under the name of "Rubbero," and the complainant's sales decreased \$8,000 in the territory where the latter article was sold, and nowhere else. The Circuit Court was of the opinion that the word "ruberoid" was a valid trade-mark, that the defendant infringed upon it and was guilty of unfair competition, and it enjoined the use of the word "rubbero" in competition with the complainant's product. The findings and conclusion of the chancellor in cases of conflicting evidence prevail, unless it clearly appears that he has fallen into an error of law or a plain mistake of fact, and I find myself unable to concur in the view of the majority that the court below was guilty of either.

The striking similarity between the words "rubbero" and "ruberoid" the many dissimilar names open to the defendant, the long-established reputation and extensive sales of complainant's "ruberoid," the evident probability and the evidence of confusion of the trade by the use of the word "rubbero," and the decrease of complainant's sales after the defendant commenced to use it, leave no doubt in my mind that the court below was right in its conclusion that the purpose of the conception and use of the word "rubbero" by the defendant was to palm off its product as that of the complainant, and that it has been accomplishing its purpose. The arguments in support of the position that the defendant has the equitable right to palm off its roofing as the ruberoid roofing of the complainant by the use of the word "rubbero," as I understand them, are substantially these: (1) That the word "ruberoid" is substantially identical with the word "rubberoid"; that the word "rubberoid" is a public heritage, incapable of monopolization as a trade-mark; hence that the word "ruberoid" is so, and the defendant is entitled in equity to take the complainant's trade in its ruberoid roofing by the use of the word "rubbero." (2) That the word "ruberoid" is descriptive; that it cannot become a trade-mark; and hence the defendant may use the word "rubbero" to sell its goods as the ruberoid of the complainant. (3) That the word "ruberoid" is a generic term; and hence the defendant may use the word "rubbero" to sell its goods as the ruberoid of the complainant. (4) That the defendant does not palm off its goods as the goods of the complainant by the simulation of the dress of complainant's goods, or by any other means than the use of the word "rubbero"; and hence it should be permitted to use the word "rubbero." (5) That if the defendant is enjoined from using the word "rubbero," other manufacturers could not be logically permitted to call their products "rubber roofing" or "ruberoid roofing"; and hence the defendant should be permitted to use the word "rubbero" to take from the complainant its trade in ruberoid roofing. (6) That where a manufacturer of a patented product has made his trade-name the generic name of his manufacture during the term of his patent, as in *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 178, 186, 189, 201, 204, 16 Sup. Ct. 1002, 41 L. Ed. 118, and the "*Castoria*" case (*Centaur Company v. Heinsfurter*, 84 Fed. 956, 28 C. C. A. 581), other manufacturers of the same product may use this generic name

not the manufacture of the original patentee; hence the complainant may use the word "rubbero" to sell its goods as the ruberoid of the complainant, notwithstanding the fact that the complainant's manufacture was never patented, and the word "ruberoid" has always remained the designation of its particular product, and never became the generic name "rubber roofing." Some of the reasons why these contentions have not proved persuasive to me are these:

1. When the complainant adopted the word "ruberoid" as its trade-mark in the year 1891, and before it taught the public and the trade by its advertisements and sales that this word meant its particular make of rubber roofing, this word "ruberoid" was not, in my opinion, substantially identical with, but was distinctive from, the word "ruberoid." It was not pronounced and did not sound the same. "Ruberoid" sounds as different from "rubberoid" as "ruble" from "rubble." It was not spelled in the same way, and when written or printed it had a strikingly different appearance. There is no more striking method of differentiating words than by changing the spelling. Witness "uneeda" in contrast with "youneeda." The absence of a single letter destroys the identity and the similarity of appearance and signification of many words. "Tough" is not "trough"; "cow" is not "crow"; "rob" is not "robe"; "robin" is not "robbin"; "robing" is not "robbing"; "ruble" is not "rubble"; and "ruberoid" is not "rubberoid." The root of "ruberoid" is "rubere," to be red, and some of its derivatives are "rubify," "rubific," "rubescence," "rubicund," "rubicity." The root of "rubberoid" is "rub," to apply pressure with motion. Caoutchouc acquired the name "rubber" because it was first used to erase pencil marks by rubbing. "Ruberoid" did not have, and never has had, the same meaning as "rubberoid." The generic name of the product of the complainant, of that of the defendant, and of those of more than 30 other manufacturers, is "rubber roofing." Some of the trade-marks of the products of specific manufacturers of this rubber roofing are "Ruberoid," "Paroid," "Indruroid," "Lasticite," "Perfection," "Galvanized," "Original." The evidence in the record in hand is clear and uncontradicted that the word "ruberoid" signified nothing to those who first saw and heard it until the complainant taught the trade that it meant its specific manufacture of rubber roofing, and that this word has never become the generic name of such roofing, which has always continued to be rubber roofing; nor has it ever signified anything but the origin and ownership of the complainant's particular product. The evidence is also undisputed that the word "rubberoid" has never signified any kind of rubber roofing. Its definition in the Century Dictionary is "a trade-name for an imitation of hard rubber," and it has signified solid articles, like the handles of knives and forks, but never felt saturated with the residuum of animal fats, or any other soft or flexible roofing.

The facts of this case, therefore, neither prove nor indicate to my mind that the complainant sought to appropriate the exclusive or any use of the word "rubberoid" by its adoption of the word "ruberoid" as its trade-mark, and they equally fail to show, in my opinion, that a

public right in "rubberoid" and a private right in "ruberoid" may not lawfully coexist. On the other hand, they seem to me to show conclusively that, if the word "rubberoid" was a public heritage and incapable of monopolization, the word "ruberoid" was not of that character, but was a fanciful term, coined by the complainant, and its appropriation and use as a trade-mark in no way impinged upon the free use by the public of the word "rubberoid," and this because the former word never had the same sound, nor the same spelling, nor the same appearance, nor the same meaning, as the latter, but was a new and fanciful term, coined and used to mark a particular product, which has never yet fallen within the meaning of the word "rubberoid." Moreover, the defendant does not use the word "rubberoid," and the question here is, not whether it may avail itself of the common heritage in that word and its meaning, but whether or not it has a right to coin and use the fanciful word "rubbero" to palm off its goods as those of the complainant—a right which is superior in equity to the right of the complainant to enjoin and prevent the perpetration of such a wrong.

2. Is the defendant entitled to the use of the word "rubbero" to sell its goods as the ruberoid of the complainant because the word "ruberoid" is descriptive, and for that reason not subject to monopolization as a trade-mark? The question is not whether or not the word "ruberoid" described the complainant's roofing in 1904, when the defendant sought to appropriate its trade by the use of the word "rubbero," nor is it whether or not this word "ruberoid" describes the complainant's product now, but it is whether or not it so clearly described it, or its qualities, or its characteristics, at the time it was first adopted, that it would have been recognized at that time by men of ordinary experience in the trade upon seeing or hearing the word for the first time. *Wellcome v. Thompson & Capper*, 1 L. R. Chan. Div. [1904] 736, 742, 749, 750, 754; *Keasbey v. Chemical Works*, 142 N. Y. 467, 471, 474, 475, 476, 37 N. E. 476, 40 Am. St. Rep. 623.

Again, words are disqualified for trade-marks only when they are so accurately descriptive of the qualities, ingredients, and characteristics of the articles that the latter would be recognized by men of ordinary intelligence upon seeing or hearing the words when first applied. *Keasbey v. Chemical Works*, 142 N. Y. 467, 37 N. E. 476, 40 Am. St. Rep. 623. Of this nature are the words adjudicated in the cases cited by the majority—"Lackawanna" as a description of the valley of that name, whence Lackawanna coal was derived (*Canal Company v. Clark*, 13 Wall. 311, 323, 20 L. Ed. 581); "Goodyear Rubber," used after, as the Supreme Court said, these words had become "terms descriptive of well-known classes of goods produced by the process known as Goodyear's invention" (*Goodyear Co. v. Goodyear Rubber Company*, 128 U. S. 598, 602, 9 Sup. Ct. 166, 32 L. Ed. 535); "Iron Bitters," in a case in which the word "iron" was accurately descriptive of the distinctive ingredient of the bitters (*Brown Chemical Company v. Meyer*, 139 U. S. 540, 11 Sup. Ct. 625, 35 L. Ed. 247).

But words which are merely suggestive of the qualities, ingredients, or characteristics of the articles to which they are applied, but do not

so accurately describe them that men of ordinary intelligence would have recognized them upon seeing or hearing the words when first applied, constitute valid trade-marks. Thus "tabloid" is a good trade-mark, although it suggests a similarity to "tablet" and "table," and it was applied to a troche in the form of a tablet. *Wellcome v. Thompson & Capper*, 1 L. R. Chancery Division [1904] 736, 744. The argument was urged in that case that, when "tabloid" was first used, the words "tabella," "table," and "tablet" were in common use, that the suffix "oid" meant "like," or "allied to," or "in the form of"; and hence that "tabloid" described an article like a table or a tablet. But the test applied by the judges was, did the word "tabloid" really intelligibly describe the thing sold under that name when it was first applied to it in the year 1884? They held that it did not and sustained the trade-mark. *Byrne, J.*, at page 744 said:

"I come to the conclusion that in March, 1884, the word was not 'really intelligibly describing the thing sold,' which is the way in which *Lindley, L. J.*, in '*Bovril*' Case (1) [1896] 2 Ch. 607, puts the form of direction to the jury. I agree that there is a suggestion or atmosphere of description about the word as then used, but I do not think that it can be said to have been other than a 'fancy word' as applied to goods in the class to which it was registered."

"Bromo-Caffeine," applied to a medicinal preparation composed of caffeine, bromide of potassium, and other ingredients, is a good trade-mark, although "caffeine" was a well-known article and "bromo" certainly suggested a bromide much more clearly than "ruberoid" suggested rubber. *Keasbey v. Brooklyn Chemical Works*, 142 N. Y. 467, 471, 474, 475, 476, 37 N. E. 476, 40 Am. St. Rep. 623. The opinion in that case was written by Judge Peckham, now Mr. Justice Peckham of the Supreme Court, and he stated and applied the rule that a word, though suggestive of form, character, or quality, was not disqualified for a trade-mark unless it described the article when it was first applied to it, so that its character, qualities, or ingredients would be recognized by a man of ordinary intelligence at that time upon seeing or hearing the word. Caffeine was a well-known article, and the decision turned on the word "Bromo." Judge Peckham said:

"The word could only be said to inform one of the fact that bromine or some kind of bromide had entered into and formed part of the compound, but upon the question whether it was bromine, or one of the many different kinds of bromides, the word 'Bromo' would give no knowledge whatever. A name which furnishes no information on this point cannot be said to be so far descriptive in its nature as to prevent its adoption as a trade-mark, so far as this question is concerned."

"Cottolene," applied to a substance composed of cotton seed oil and the product of beef fat, may be monopolized as a trade-mark. Why may not "ruberoid," applied to a substance which is not composed of any form or extract of rubber? The court said:

"It seems clear that 'cottolene' is a proper and valid trade-mark. Although it may suggest cotton seed oil, it is not sufficiently descriptive to render it invalid as a trade-mark under the recent decisions." *N. K. Fairbank Co. v. Central Lard Co.* (C. O.) 64 Fed. 133, 134.

Under this rule trade-marks have been sustained in "Cocaine" (*Burnett v. Phalon*, 9 Bosw. [N. Y.] 192); "Maizena" (Manufacturing

45 Fed. 796); "Elastic" when applied to bookcases (Globe-Wernicke Co. v. Brown [C. C.] 121 Fed. 185, 186); "German Sweet Chocolate" (Walter Baker & Co. v. Baker [C. C.] 77 Fed. 181, 187, 188); "Anti-Washboard" (O'Rourke v. Central City Soap Co. [C. C.] 26 Fed. 576, 578); "No-To-Bac" (Sterling Remedy Co. v. Eureka Chemical & Mfg. Co., 80 Fed. 105, 25 C. C. A. 314); "Swan Down" applied to a complexion powder (Tetlow v. Tappan [C. C.] 85 Fed. 774); "Silicon" and "Electro-Silicon," applied to an article one of whose component parts was "silicon," (Electro-Silicon Co. v. Hazard, 29 Hun [N. Y.] 369); "Celery Compound" (Wells & Richardson Co. v. Siegel, Cooper & Co. [C. C.] 106 Fed. 77); "Cream" (Price Baking Powder Co. v. Fyfe [C. C.] 45 Fed. 799); "Lightning" applied to hay knives (Hiram Holt Co. v. Wadsworth [C. C.] 41 Fed. 34); "Maryland Club" applied to whisky (Cahn v. Gottschalk [Com. Pl.] 2 N. Y. Supp. 13); "Cough Cherries" (Stoughton v. Woodard [C. C.] 39 Fed. 902); "Sliced Animals," "Sliced Birds," "Sliced Objects," applied to dissected puzzle pictures (Selchow v. Baker, 93 N. Y. 59, 45 Am. Rep. 169); "Saponifier" (Pennsylvania Salt Mfg. Co. v. Myers [C. C.] 79 Fed. 87); "Insurance Oil" (Ins. Oil Tank Co. v. Scott, 33 La. Ann. 946, 39 Am. Rep. 286); "Congress Water" and "Congress Spring" (Congress & Empire Spring Co. v. High Rock Congress Spring Co., 45 N. Y. 291, 6 Am. Rep. 82); "Magnetic Balm," applied to a medicine (Smith v. Sixbury, 25 Hun [N. Y.] 232); and in numberless suggestive words and terms which failed to accurately describe the articles.

We may argue now, 17 years after the event, that "ruber" means rubber and "oid" means like, and hence "ruberoid" means like rubber; but there is no evidence in the record in this case that the word "ruberoid" or the word "rubberoid" had ever been applied to any kind of rubber roofing, or that either of them had ever meant felt saturated with the residuum of animal fats, before the complainant selected "ruberoid" as its trade-mark in 1891 and applied it to its product. There is uncontradicted evidence that neither of them had been so applied and that neither of them had any such meaning. "Ruberoid" was a word coined by the complainant. It had never existed until the complainant had made and applied it to its felt saturated with the residuum of animal fats, and it has never had any other meaning than the complainant's particular product. This evidence and these facts have forced my mind to the conclusion that no one who first heard or saw this word "ruberoid" in 1891, before the complainant taught its meaning by advertisements and application to its product, could have recognized thereby the product of the complainant, or the ingredients or characteristics of its roofing, and hence that the word "ruberoid" was not descriptive, but was a fanciful term, which constituted a perfect trade-mark. From this conclusion it necessarily follows that the use of the word "rubbero" to sell a similar product is a clear infringement of the complainant's trade-mark, and that the complainant is entitled to an injunction against that use.

Moreover, even if the word "ruberoid" had been so accurately descriptive that it could not have been a technical trade-mark, the result ought not to be different. In *Buzby v. Davis*, 80 C. C. A. 163, 165, 150 Fed. 275, 277, this court held that the complainant was entitled to an injunction against the use of the word "Keystone" and affirmed the following statement of the law, quoted from the opinion in *Shaver v. Heller & Merz Co.*, 48 C. C. A. 48, 59, 108 Fed. 821, 832, in which an injunction against the use by the defendant of the word "American" to sell their goods as the manufactures of the complainant was sustained:

"The use of a geographical or descriptive term confers no better right to perpetrate a fraud than the use of any other expression. The principle of law is general and without exception. It is that no one may so exercise his own rights as to inflict unnecessary injury upon his neighbor. It is that no one may lawfully palm off the goods of one manufacturer or dealer as those of another to the latter's injury. It prohibits the perpetration of such a fraud by the use of descriptive and geographical terms which are not susceptible of monopolization as trade-marks as effectually as it prohibits its commission by the use of any other expressions." 48 C. C. A. 55, 108 Fed. 827.

And it is the duty and practice of courts of equity to enjoin the use of descriptive and geographical terms by one competitor for the purpose of filching the trade of another. *Thompson v. Montgomery*, 41 Ch. Div. 35, 38, 47, 51; *Montgomery v. Thompson*, App. Cas. 217, 220; *Lee v. Haley*, 5 Ch. App. 155, 161; *Wotherspoon v. Currie*, L. R. 5 H. L. 508, 522, 523; *Brewery Co. v. Powell* [1897] App. Cas. 710, 716; *American Waltham Watch Co. v. U. S. Watch Co.*, 173 Mass. 85, 53 N. E. 141, 43 L. R. A. 826, 73 Am. St. Rep. 263; *Flour Mills Co. v. Eagle*, 86 Fed. 608, 628, 30 C. C. A. 386, 406, 41 L. R. A. 162; *American Brewing Co. v. St. Louis Brewing Co.*, 47 Mo. App. 14, 20; *Cady v. Schultz*, 19 R. I. 193, 32 Atl. 915, 29 L. R. A. 524, 61 Am. St. Rep. 763; *Newman v. Alvord*, 49 Barb. (N. Y.) 588; *McLean v. Fleming*, 96 U. S. 245, at pages 254, 255, 24 L. Ed. 828; *Elgin Nat. Watch Co. v. Illinois Watch Case Co.*, 179 U. S. 665, 674, 21 Sup. Ct. 270, 45 L. Ed. 365; *Reddaway v. Banham* [1896] App. Cas. 199, 204, 211, 215; *Buzby v. Davis*, 80 C. C. A. 163, 165, 166, 150 Fed. 275, 277, 278; *Shaver v. Heller & Merz Co.*, 48 C. C. A. 48, 59, 108 Fed. 821, 832, in which this court sustained an injunction issued by the Circuit Court which forbade the defendants from using the word "American" to sell their goods as the manufactures of the complainant.

The general rule is that one may not use his own name even to sell his goods as those of another, and defendants have been enjoined from using their names for that purpose in these cases: *Croft v. Day*, 7 Beav. 84, 89, 90; *Meyer v. Medicine Co.*, 58 Fed. 884, 887, 7 C. C. A. 558, 565, 18 U. S. App. 373, 378; *Garrett v. T. H. Garrett & Co.*, 78 Fed. 472, 477, 478, 24 C. C. A. 173, 178, 179; *Walter Baker & Co. v. Sanders*, 80 Fed. 889, 26 C. C. A. 220, 51 U. S. App. 421; *Tarrant & Co. v. Hoff*, 76 Fed. 959, 961, 22 C. C. A. 644, 646; *R. W. Rogers Co. v. Wm. Rogers Mfg. Co.*, 70 Fed. 1017, 1019, 17 C. C. A. 576, 578, 35 U. S. App. 843, 847, 848; *Thread Co. v. Armitage*, 45 U. S. App. 62, 73, 21 C. C. A. 178, 186, 74 Fed. 936, 944.

3. The argument that one who uses a generic or descriptive term

is not entitled to an injunction against the use of simulative names or terms, and hence that the defendant has a superior equitable right to use the word "rubbero" to sell its goods as the "ruberoid" of the complainant, is not persuasive to my mind, because the generic name of the product in this case is "rubber roofing," and the word "ruberoid" has never become the generic name of the product, but has always been a specific designation of complainant's particular manufacture of it, because, in my opinion, for the reasons which have already been stated, "ruberoid" was not descriptive of that product when first applied, and because the word "rubbero" is neither the generic name of the product nor any simulation of it, but is a coined, fanciful word, conceived and applied to simulate, not the generic name "rubber roofing," but the specific designation of complainant's manufacture, the term "ruberoid," and to palm off the goods of the defendant as those of the complainant.

4. It is said that the defendant should be permitted to use the word "rubbero" to sell its product as that of the complainant because it does not accomplish that end by the simulation of the name of the complainant or by simulation of the complainant's other peculiarities of the dress of its goods. But this product of the complainant is ordered and sold throughout the world by its name "ruberoid," and many of those who purchase it doubtless never see its dress until they have made their purchases. In my opinion the evidence is plenary that the defendant creates confusion in the trade and filches the complainant's business by the use of this word "rubbero." It is no defense for one who kills with a pistol that he did not kill with a sword, or for one who defrauds by mortgage that he did not defraud by a deed, and in my opinion it ought to be no defense for one who palms off his own goods as those of another by the use of a successful simulation of the name of the latter's manufacture that he does not accomplish that end by other means, or that he places his own name and address and the assertion of his manufacture and ownership upon the product. The chief effect of placing the defendant's unfamiliar name and marks upon an article so well known as appellee's "ruberoid" was to give the appellant the benefit of the established reputation of appellee's articles and thus to enable it to derive a greater benefit from its fraud. "That is an aggravation, and not a justification, for it is openly trading in the name of another upon the reputation acquired by the device of the perpetrator." *Menendez v. Holt*, 128 U. S. 514, 521, 9 Sup. Ct. 143, 32 L. Ed. 526; *Gillott v. Esterbrook*, 48 N. Y. 374, 378, 8 Am. Rep. 553.

5. Nor does it appear to me to be the logical result of an injunction against the use of the word "rubbero" by the defendant to filch the complainant's trade that none of the other manufacturers of rubber roofing could lawfully call their products "ruberoid roofing" or "rubber roofing." "Rubber roofing" is the generic name of the product of all these manufacturers, and they all have and exercise an undoubted right to use that name. "Ruberoid" is the fanciful term by which the complainant designates its particular manufacture of this product. "Rubbero" is the fanciful word devised and used by the defendant to simulate, not the generic name "rubber roofing," but the fanciful name of defendant's product for the purpose of palming off the defendant's

the continuance of this fraud logically, or otherwise, deprive manufacturers of the right, whose exercise works no fraud, to call their products "rubber roofing," as they have called them without objection or interruption during the 17 years that the complainant's manufacture has been made and sold as "ruberoid"?

The cases of *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 178, 186, 189, 201, 204, 16 Sup. Ct. 1002, 41 L. Ed. 118, and the "*Castoria*" case (*Centaur Co. v. Heinsfurter*, 84 Fed. 955, 956, 28 C. C. A. 581), upon which the majority seem to rely so confidently, illustrate an exception to the general rule of the law of unfair competition, under which the case at bar, in my opinion, does not fall. That exception is that where a patentee, during the life of his patent, confers an arbitrary or a generic name upon the patented article, by which alone it comes to be known during the term of the patent, such as "*Singer*" in the former case and "*Castoria*" in the latter, the right to the use of that name passes to the public upon the expiration of the patent. 163 U. S. 178, 183, 199, 16 Sup. Ct. 1002, 41 L. Ed. 118. But if there had been no patent, or if there had been no conference of such name, or if there had been no expiration of the patent, the right to the use of the name would not have passed to the public. Those cases are inapplicable to the case at bar, because the complainant's product was never protected by a patent, because "*ruberoid*," the trade-name of its manufacture, was not conferred upon the product while the complainant had a patented monopoly of its manufacture, and because that term never became the generic name of the product, which was and is "*rubber roofing*," but has always been, and still is, simply the distinguishing name of complainant's particular manufacture. This case falls under the general rule, and that is that no one may lawfully use any word or expression which has come to signify his competitor's product, for the purpose of filching his trade and perpetrating a fraud upon the public. In *Reddaway v. Banham* the plaintiff had manufactured and sold for 14 years belting, made chiefly of camel's hair, under the name "*camel hair belting*," until that term had come to signify *Reddaway's* belting to the trade. Then the defendant commenced to make belting of camel's hair and to sell it as "*camel hair belting*." The court below refused to sustain an injunction against him, but the House of Lords reversed that decision and restrained the defendant from using the words "*camel hair*," so as to palm off its goods as those of the complainant. Lord Herschell said:

"In my opinion the doctrine on which the judgment of the Court of Appeal is based, that where a manufacturer has used as his trade-mark a descriptive word he is never entitled to relief against a person who so uses it as to induce in purchasers the belief that they are getting the goods of the manufacturer who has theretofore employed it as his trade-mark, is not supported by authority and cannot be defended on principle. I am unable to see why a man should be allowed in this way, more than in any other, to deceive purchasers into the belief that they are getting what they are not, and thus to filch the business of his rival."

In *Elgin National Watch Co. v. Illinois Watch Case Co.*, 179 U. S. 665, 674, 21 Sup. Ct. 270, 45 L. Ed. 365, a case determined by the Su-

preme Court long after *Brown Chemical Co. v. Meyer*, 139 U. S. 540, 11 Sup. Ct. 625, 35 L. Ed. 247, the Supreme Court held that the word "Elgin" was a geographical term, not the subject of a trade-mark. But it also reviewed with approval *Wotherspoon v. Currie* and *Reddaway v. Banham*, and said:

"But it is contended that the name 'Elgin' had acquired a secondary signification in connection with its use by appellant, and should not for that reason be considered or treated as a mere geographical name. It is undoubtedly true that, where such a secondary signification has been acquired, its use in that sense will be protected by restraining the use of the word by others in such a way as to amount to a fraud on the public and on those to whose employment of it the special meaning has become attached."

The word "rubbero" is so similar to the word "ruberoid," so different from the generic name "rubber roofing," that I am unable to bring my mind to believe or suppose that it was conceived or used for any other purpose than to palm off the defendant's goods as those of the plaintiff. Under the decision of the Supreme Court in *Menendez v. Holt*, 128 U. S. 514, 521, 9 Sup. Ct. 143, 32 L. Ed. 526, and other authorities of like character, the fact that the complainant added its name and address and asserted its manufacture of the product it sold under this name "rubbero" not only failed, in my opinion, to excuse, but had the effect to aggravate, the offense, and the decree for an injunction against the continued perpetration of this fraud granted by the court below should, I think, be affirmed, both because complainant's "ruberoid" was not descriptive of its product, but was a fanciful word and a good technical trade-mark, which was infringed by the defendant's use of the word "rubbero," and because the evidence has convinced me, as it did the court below, that the defendant was guilty of unfair competition by the use of this word "rubbero" to palm off its product as the ruberoid of the complainant.

GILLESPIE v. POCAHONTAS COAL & COKE CO.

(Circuit Court of Appeals, Fourth Circuit. September 15, 1906.)

No. 789.

1. COURTS—FEDERAL COURTS—FOLLOWING STATE DECISIONS.

Where there is a state statute directing the manner and form of the examination of a married woman on making a deed jointly with her husband conveying her separate lands, the construction placed upon such statute by the highest court of the state, declaring what the necessary requirements are in order to make such examination effective, becomes a rule of property in that state, binding upon the federal courts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 957-959.

State laws as rules of decision in federal courts, see notes to *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553.]

2. JUDGMENT—MATTERS CONCLUDED—DECREE IN PARTITION.

At common law an action of partition does not determine title, but the parties after partition hold in severalty by the same title as before; and although by Code W. Va. 1899, c. 79, § 1 (Code 1906, § 3180), the court in a suit for partition is authorized to "take cognizance of all questions of law affecting the legal title that may arise in the proceedings," a de-

creed of partition in that state, awarding a part of the property to parties who appeared by the record to own a life estate therein, cannot be construed to give such parties title in fee simple as against infants, who were made parties and who owned the reversionary interest, where no question of title as between them was put in issue by the pleadings or litigated.

Appeal from the Circuit Court of the United States for the Southern District of West Virginia, at Bluefield.

For opinion below, see 162 Fed. 742.

J. W. Chapman and A. P. Gillespie, for appellant.

Albert W. Reynolds (Joseph S. Clark and Rucker, Anderson, Strother & Hughes, on the brief), for appellee.

Before PRITCHARD, Circuit Judge, and WADDILL and BOYD, District Judges.

BOYD, District Judge. This is a bill in equity, originally filed by Joseph S. Gillespie (appellant here) against the Pocahontas Coal & Coke Company (appellee here) in the circuit court for the county of McDowell, W. Va. The case was subsequently removed, upon the petition of defendant, for trial, to the Circuit Court of the United States for the Southern District of West Virginia, at Bluefield. The plaintiff in his bill alleges that he is the owner in fee simple and in possession of a tract of land containing 58.8 acres in the county of McDowell aforesaid, and by his suit he seeks to remove a cloud upon his title to said land, which he alleges exists by reason of the fact that the defendant has certain deeds and conveyances under which it claims to be the owner. Plaintiff prays in his bill that these deeds and conveyances so held by the defendant may be set aside and annulled, and the cloud upon his title thus removed.

The facts in the case, so far as we think necessary to present the points upon which it should be decided here, are as follows:

Some time previous to December, 1887, Thomas J. Meyers died intestate, seised at the time of his death of a tract of land situate in the county of McDowell aforesaid, containing 434 acres. At the death of said intestate the land descended to his eight children, who were his only heirs at law, and they then and there became entitled to the said land as tenants in common thereof; each owning an undivided eighth interest. Among intestate's children was a daughter named Louisa (or Mary L. B., as she was sometimes called), who, after the death of her father, married a man by the name of Thomas C. White. On the 9th of December, 1887, said Thomas C. White and his said wife made a deed to Harman Newberry, J. G. Watts, and William E. Peery, by which said deed they undertook to convey to the said three parties named the undivided interest of the wife in the lands of her deceased father, Thomas J. Meyers. This deed, with the certificate of acknowledgment thereon, is set out in the record as follows:

"This deed, made this 9th day of December, 1887, between Thomas C. White and Mary L. White, his wife, of the first, and Harman Newberry, J. G. Watts, and William E. Peery, of the second, witness that for and in consideration of one hundred and fifty dollars, the receipt of which is hereby acknowledged, the said Thomas C. White and Mary L. White, his wife, does bargain, sell,

ceased. The said parties of the first part warrant generally the title to the land hereby conveyed.

"Given under our hands and seals this day and year above written.

"Thomas C. ^{his}X White. [Seal.]
mark

"Mary L. ^{her}B. X White. [Seal.]
mark

"State of West Virginia, County of McDowell—to wit:

"I, James S. Brewster, a justice of the peace in Big Sandy district, do hereby certify that Thomas C. White and Mary L. B. White, wife of said White, personally appeared before me in my said county aforesaid and acknowledged the within deed, bearing date on the 9th day of December, 1887; and the said Mary L. B. White, wife of said Thomas C. White, being examined by me privily and apart from her said husband, and having the said writing fully explained to her, declared she had willingly executed the same and does not wish to retract it.

"Given under my hand this 9th day of December, 1887.

"Jas. Brewster, J. P."

After the making of this deed, some time in the year 1888, the said Mary L. B. White died intestate, leaving her surviving her said husband and four infant children, two of whom died, leaving two, named Mary White and Sterling White, still living. The plaintiff's title to the land in question is evidenced by several deeds, duly executed, conveying to him the interests of Mary White and Sterling White, the children of Mary L. B. White, in the 434-acre tract of land of which her father died seised and at her death descended to her children. The defendant's title, as shown by the record, is derived through a proceeding for partition of the said tract, commenced and consummated in the circuit court of McDowell county, W. Va., in which said proceeding lot No. 3, the subject of this controversy, was allotted to Harman Newberry, J. G. Watts, and William E. Peery. Watts and Peery conveyed their interests in the lot to their co-tenant, Newberry, who in turn conveyed the lot to the Pocahontas Coal Land Company, a corporation, and this corporation by deed conveyed it to the Pocahontas Coal & Coke Company, the present defendant. The suit or proceeding for partition referred to was brought in the circuit court of McDowell county, W. Va., on the first Monday in December, 1894; the style of the suit being as follows:

"The bill of complaint of Harvey Beavers and Jessa Beavers, his wife, plaintiffs, v. Thos. Lambert and Rosa Lambert, his wife, Clifton Meyers, Charles Meyers, W. F. Harman, James Hall, Margaret Hall, his wife, Thomas White, Mary White, Sterling White (the two last named are infants under twenty-one years of age and heirs at law of Louisa White, dec'd, late Louisa Meyers), John W. Moore and Minnie Moore, his wife, late Minnie Meyers, W. P. Payne, Kewee Creek Flat Top Coal Company, a corporation organized under the laws of the state of West Virginia, Harman Newberry, John G. Watts, and William E. Peery, Defendants. In Chancery."

The plaintiffs alleged in the bill that Thomas J. Meyers died seised in fee of 434 acres of land in the county of McDowell, W. Va., etc.; further, that the said Thomas J. Meyers died in 1886, leaving him surviving Poley Meyers, his wife, who had since died, Clifton Meyers,

Charles Meyers, Roxie J. Meyers, Minnie J. Meyers, since married to Thomas Lambert, Margaret Meyers, since married to James Hall, Louisa Meyers, since married to Thomas White, and who has since died, leaving Thomas White, her husband, and Mary White and Sterling White, infant children, surviving her. After alleging several conveyances of interest in the land sought by the bill to be divided and now held by one or more of the parties named as defendants, the bill further alleges that on the 9th of December, 1887, Thomas C. White and Mary L. B. White, his wife, conveyed to Harman Newberry, J. G. Watts, and William E. Peery one undivided eighth interest in the said tract of land. The complainants alleged that they, in the right of the feme complainant, were the owners of an undivided eighth of said tract of land, and their prayer was that commissioners be appointed to lay off and assign to each of the said parties their respective portions of said land, etc. The return, as set out in the record, shows that process was executed personally on Roxie J. Meyers, Clifton Meyers, Charley Meyers, and W. P. Payne. That it was served by publication on the other defendants named, and also including Thomas C. White. There is no return, so far as appears, of any service upon the two infant children, Mary White and Sterling White; but in the decree it is stated that service of process was accepted for them by John W. Waldron, guardian ad litem appointed by the court to defend them and their interests in the suit.

The answer of John W. Waldron, as guardian ad litem of Mary White and Sterling White, infant defendants, says that "they are infants under the age of 21 years, and by reason of their infancy are incapable of understanding and taking care of their interests. They therefore, by their guardian ad litem, commit themselves and their interests to the jurisdiction of the court, and pray that no decree may be pronounced which will tend to their prejudice," etc. The court thereupon at March term, 1895, appointed A. C. Brewster, Charter Pruett, and C. A. Bailey commissioners to make actual partition of the said tract of 434 acres of land among the several tenants in common thereof, as shown in the bill. The report of said commissioners, set out in the record, shows that on the 17th of August, 1895, they proceeded to execute their duties under the decree of the court, and as to lot No. 3, subject of the present controversy, we quote from the said report the following:

"Lot No. 3 we laid off and assigned to Harman Newberry et al., which is bounded and described as follows: Beginning at a white oak at the lower edge of Dry Fork road, about 150 feet east of Dry fork, N. 28 deg. 34' E. 890 feet to a stake in line of the Meyers tract, of which this is a part; S. 70 deg. 37' W. 2,955 (crossing Dry fork at 280 feet) to a large chestnut on top of a spur at lower edge of a flat; S. 48 deg. 40' E. 176.9 feet to a poplar on a hillside; S. 22 deg. 00' E. 99.0 feet to a double chestnut; S. 81 deg. 00' E. 157.0 feet to a stake on top of a spur in a flat; S. 37 deg. 30' E. 154.1 to two small red oaks on top of a spur, corner to lot No. 2; N. 82 deg. 00' E. 2,117.7, crossing Dry fork to a stake on a hillside; N. 33 deg. 19' W. 800 feet to the beginning—containing 58.8 acres or $\frac{1}{2}$ of the Meyers estate."

Following this report at March term, 1896, of the said court, a decree confirming the same was entered, and it was further decreed as follows:

8 of chapter 117 of the Code of the clerk of the county court of this county, to be by him recorded in the manner prescribed by law."

And then the costs are apportioned to be paid by the parties to the action according to their respective interests.

At the hearing the Circuit Court, upon the bill, the answer, the proofs, and exhibits, dismissed plaintiff's bill and entered a decree accordingly, from which the plaintiff appealed to this court.

In order to present the matter more fully, we think it well to give the chain of title of the two parties to this action, as set forth in the record.

The plaintiff relies upon the following deeds, conveyances, and evidences of title, to wit:

Deed made 22d day of June, 1903, by G. W. Altizer and Maggie Altizer, his wife, A. T. Lambert and Rosa Lambert, his wife, Henry I. Beavers and Jessa Beavers, his wife, Charles Meyers, and Mary White to J. S. Gillespie, conveying one-half interest in lot No. 3, containing 58.8 acres and also all of the right, title, and interest of the grantors in the tract of land on which the dwelling house of the late J. T. Meyers is situated.

Deed executed the 20th day of July, 1904, by Henry I. Beavers, commissioner of the circuit court of McDowell county, W. Va., in the cause of Henry I. Beavers, guardian, v. Sterling White, to A. Z. Altizer, in which said lot No. 3, containing 58.8 acres, is conveyed, and also including all the land and interest in land which descended to Sterling White from his mother, and which she acquired from the estate of her father, J. T. Meyers.

Deed of October 10, 1904, executed by A. Z. Altizer and his wife to J. S. Gillespie, conveying the said tract of 58.8 acres.

Deed of September 25, 1905, from Sterling White to J. S. Gillespie, releasing and confirming unto Gillespie all right, title, and interest of the said Sterling White to certain lands in McDowell county, state of West Virginia, on the Dry fork and waters thereof, which were inherited by the said White from his mother, being the same lands inherited by his mother from the estate of her father, J. T. Meyers; the interest conveyed being one-sixteenth part of the lands owned by J. T. Meyers, including the lands conveyed by Henry I. Beavers, commissioner, to A. Z. Altizer, by deed dated July 20, 1904.

Deed of August 15, 1905, by Mary F. White to J. N. and J. W. Harman, attorneys, in which Mary F. White conveys to the said attorneys her interest in real estate in the county of McDowell, W. Va., on the waters of Dry fork; the said interest being derived to her from her mother, Louisa White, deceased.

Deed of April 13, 1906, executed by Mary F. White, J. N. Harman and his wife, and James W. Harman, to J. S. Gillespie, conveying the lands contained in the boundaries of lot No. 3, containing 58.8 acres, being the lands inherited by Mary A. White from her mother, the late Louisa White, and which were inherited by the said Mary Louisa White from her father, the late J. T. Meyers.

The defendant's chain of title is as follows, to-wit:

Deed executed on the 9th of December, 1887, by Thomas C. White and L. B. White, his wife, to Harman Newberry, J. G. Watts and William E. Peery, conveying a one-eighth undivided interest of Mary L. B. White in the lands of her father, J. T. Meyers; said land being on Dry fork of Sandy river, in McDowell county, W. Va. (This deed is set forth before in full.)

Deed of June 14, 1890, executed by William E. Peery and his wife and J. G. Watts and his wife to Harman Newberry, conveying to the latter the interest of the parties first named in the lands bought from Thomas C. White and Mary L. B. White, evidenced by the deed of December 9, 1887.

her husband, against Roxie J. Meyers et al., heretofore referred to, had in the circuit court of McDowell county, W. Va., beginning in December, 1894, and concluding with decree of March 13, 1896.

Deed from Harman Newberry and wife to the Pocahontas Coal Land Company, of September 12, 1901, conveying lot No. 3, as shown in the division, in which the land is described as being the tract that represents the interest of Mary L. B. White in the estate of her father, J. T. Meyers, deceased, which interest the said Mary L. B. White and Thomas C. White, her husband, by deed dated December 9, 1887, conveyed to the said Newberry, J. G. Watts, and W. E. Peery; said Watts and Peery conveying by deed dated June 14, 1890, their interest to said Newberry, and on partition of said estate said tract as described was allotted to said Newberry.

Deed of October 19, 1901, executed by the Pocahontas Coal Land Company, conveying the said tract, lot No. 3, to the Pocahontas Coal & Coke Company, the present defendant.

The contentions of the defendant against the granting of the relief prayed for in Gillespie's bill were: (1) That the deed from Thomas C. White and Mary L. B. White to Newberry, Watts, and Peery was a good and valid deed, and availed to pass the title of Mrs. White to her interest in her father's estate. (2) That in any event the decree in partition of the circuit court of McDowell county, assigning this 58.8 acres to those under whom the defendant claims, created title, and that, the decree not having been appealed from or otherwise directly impeached within the time required by law, it cannot now be attacked collaterally.

The Circuit Court determined the first contention adversely to the defendant, on the ground that the privy examination of Mary L. B. White on the deed of December 9, 1887, was not taken in accordance with the requirements of the law of the state of West Virginia, and said deed was therefore insufficient to pass her title. In passing upon this question the court, in an opinion filed in the case, after a mild criticism of the soundness of the decisions of the Supreme Court of Appeals of West Virginia, construing the statute in regard to the examination of *femes covert* upon deeds conveying lands belonging to them in their own right, says:

"Nevertheless, the present state of the law, as determined by the supreme appellate court of this state, is in favor of the proposition that the deed here in question does not avail to pass the title of the female grantor, and I feel constrained to abide by the law as declared until that decision has been duly reversed."

See *McMullen v. Eagan et al.*, 21 W. Va. 233, *Watson v. Michael*, 21 W. Va. 568, and *Laidley v. Knight, Trustee, et al.*, 23 W. Va. 735.

Upon an examination of the West Virginia authorities we unhesitatingly concur in this conclusion of the Circuit Court, and although we may be inclined to agree with the learned judge below as to the soundness of the principles declared in these decisions, yet we believe the law to be that where there is a state statute directing the manner and form of the examination of a married woman upon a deed, made jointly with her husband, conveying her separate lands, the construction placed upon such statute by the highest court of the state, declaring what the necessary requirements are in order to make such examination effective, becomes a rule of property in that state, and

therefore, being eliminated, we come to the second contention of the defendant, in which it relies on the decree in partition entered by the circuit court of McDowell county, W. Va., in the proceeding of Harvey Beavers and Jessa Beavers, His Wife, v. Thomas Lambert et al.

The Circuit Court held that, notwithstanding the deed of December 9, 1887, executed by Thomas C. White and Mary L. B. White, his wife, to Newberry, Watts, and Peery, by reason of the defective examination of the feme covert, was ineffectual to pass her title to the land in question, yet that the subsequent proceeding in partition divested the title of her infant children, Mary White and Sterling White, and that by virtue of the decree in the said proceeding allotting parcel No. 3 to Newberry, Watts, and Peery, and the failure of the said Mary White and Sterling White thereafter, within the proper time, to have the said decree reviewed, modified, or reversed, constitutes an estoppel to them, or any person claiming under them, as to the title to said lot; in other words, that by virtue of said proceeding and decree the question of the title to lot No. 3, which was assigned to Newberry, Watts, and Peery, is *res judicata*. We readily admit that if in that proceeding the title to the lot in controversy could have been litigated as between the purchasers under the deed of December 9, 1887, and the surviving children of Mary L. B. White, and had been determined adversely to the latter, it would be final, and the Circuit Court of the United States would have no right in the present action to impeach the decree; but could such issue have been raised or tried in the proceeding for partition? It is a rule of the common law that neither the title nor the right to the possession of land can be determined in an action for partition; the effect of partition being only to designate the particular part of the land which each alleged coparcener is entitled to hold in severalty, but he holds it by the same tenure and in the same degree of estate as before the partition was made. However, we do not think this case rests upon that ground at all, but that it must be decided upon the decree itself, construing it in the light of the facts which existed at the time it was entered. The deed of December 9, 1887, was specifically referred to in the petition for partition, and it was also at the time upon the records of McDowell county, W. Va., in which the partition proceeding was brought and was pending. We have, therefore, the right to assume that the judge of the court took notice of the deed and of the manner of its execution, and that he saw that under the laws of West Virginia it was not sufficient to convey the interest of Mary L. B. White in her deceased father's land.

There is a further fact which is important in this connection, and that is that in the petition for partition it is alleged that Thomas C. White, the husband of Mary L. B. White, had survived her, and it is evident that the partition was proceeded with under the belief that said Thomas C. White was then still living. In the summons which was issued for the defendants on the 19th of November, 1894, Thomas White is named among them. Subsequently publication was made for him; and in the decree appointing commissioners to divide the land

entered on the 13th of March, 1895, it is ascertained as a fact that publication had been made for him. If, therefore, the court at that time treated Thomas C. White as still living, it would necessarily follow that Newberry, Watts, and Peery were entitled, by virtue of the deed of December 9, 1887, to hold the estate for life in the lands of Mary L. B. White existing as the curtesy consummate of her surviving husband. We think this view much more consistent with reason than that a chancellor, sitting in a court of equity, entered a decree divesting the title of two infant defendants to land inherited from their mother, and created a fee-simple title to the land in three purchasers who claimed under a deed such as that of December 9, 1887. If, as we have suggested, the court held Newberry, Watts, and Peery to be the owners of a life estate in an eighth interest in the Meyers land, they had a right to have partition, for it is a settled principle of law that a person having a limited estate in an undivided interest in land and entitled to the present possession thereof can maintain an action to enforce the assignment of such interest in severalty; but under these circumstances partition is temporary only, and does not affect a reversioner or remainderman who is entitled to partition when his estate falls into possession by reason of the termination of a particular estate. And no doubt, in view of this principle, the precaution was taken to make the infants, Mary White and Sterling White, parties to this proceeding, not that their title, as derived to them as heirs of their mother, was to be affected, but that they might be bound by the allotment, so that when they arrived of full age, and the life estate, which was supposed to be existing, had terminated, no further proceeding in partition would be necessary.

But it further appears that in the hearing of the present case by the Circuit Court the fact was disclosed that Thomas C. White was dead and that he died before the institution of the partition proceeding. Three witnesses, namely, Mrs. Maggie Altizer, who was a sister of Mary L. B. White, Charles W. Meyers, who was her brother, and Henry I. Beavers, a brother-in-law, all testified that Thomas C. White was dead, and Mrs. Altizer testified that he died in 1891. This testimony was uncontradicted. So, then, at the time of the partition proceeding Newberry, Watts, and Peery had no interest whatever in the Meyers land, and yet it is insisted by the defendant that because of the fact that they were made parties to the proceeding, and Mary White and Sterling White, the two infants, were also made parties, and in the course of the proceeding a lot was assigned to Newberry, Watts, and Peery without defining any estate whatever therein, and the assignment was confirmed by a decree of the court, there being no issue or question as to the title raised, such proceeding and the decree entered therein created in Newberry, Watts, and Peery a fee-simple title to one-eighth interest in the Meyers land, and thereby divested the two infants, Mary White and Sterling White, of whatever interest they had, and adjudicated finally the relative rights of these parties to the lands in controversy. We do not consent to this proposition. We regard as anomalous the position that a court of equity, in a proceeding for partition in which no question or issue of title is raised, where upon the face of the petition and the exhibits thereto it was

would, under such circumstances, undertake to increase such life estate to the dignity of a fee simple, and especially when it must have been clear to the court at the time that the owners of the fee simple were two infant children represented in the cause by a guardian ad litem. It is an especial province of a court of equity to protect the rights of infants in the subject-matter of a controversy pending therein, and we are unwilling to assume that a chancellor, in view of the facts which existed and were made known to the court at the time the partition proceeding before referred to was pending, would by decree have undertaken to divest infant parties of a fee-simple title to a particular lot of land, and invest parties who had only a life estate or no estate at all with such title. As we have before stated, the title to this lot of land was not in controversy. By the partition proceeding Newberry, Watts, and Peery did not and could not increase their estate in the lands divided. They did not, by virtue of the allotment, take as purchasers. They only became entitled to hold in severalty their shares in the land; the limit of estate being left as it was before. Partition does not create title. It only sets apart in severalty the interest of a tenant of a common possession with precisely the same degree of estate as was held by him in the land before division was made.

The deed of partition destroys the unity of possession, and henceforth each holds his share in severance. But such deed confers no new title or additional estate in the land. 2 Blackstone, 186. "Partition makes no degree. It only adjusts the different rights of the parties to the possession. Each does not take allotment by purchase, but is as much seised of it by descent from a common ancestor as of the undivided share by partition." Allnatt on Partition, 124. So that, if Newberry, Watts, and Peery had nothing in the land by virtue of the deed from White and wife, the mere fact of partition and assignment to them of a lot did not convey title.

In the foregoing we have laid down what we understand to be the common-law rule in partition; but the defendant insists that that rule is not in force in the state of West Virginia by reason of the fact that the Legislature of that state has enacted a statute which confers upon the courts of the state in partition proceedings the right to pass upon questions of title arising between the parties to such proceeding, and that thereby the common-law rule has been modified in that state. This statute is section 1, c. 79, Code W. Va. 1899 (Code 1906, § 3180), and reads as follows:

"Tenants in common, joint tenants, and coparceners, shall be compellable to make partition, and the circuit court of the county wherein the estate, or any part thereof, may be shall have jurisdiction in cases of partition, and in the exercise of such jurisdiction may take cognizance of all questions of law affecting the legal title that may arise in the proceedings."

The Supreme Court of Appeals of West Virginia has construed this statute, and we quote from the syllabus in *Davis v. Settle et al.*, 43 W. Va. 18, 26 S. E. 557, which is given in the opinion of the Circuit Court as a leading case on the subject:

"Section 1, c. 79, Code 1891, authorizes a court of equity in partition cases to pass on all question of law touching the legal title of any one claiming to share in the partition to the interest he claims, if his interest be such as, if valid, will make him a co-owner in the common subject with the plaintiff, as holding under the same right or title under which the partition is to be made; but it does not authorize the court to pass on the title of a stranger claiming under a different title, adverse to the title under which the partition is to be made, nor can such stranger and his hostile title be brought into such suit, and the conflict between the two hostile rights settled as incident to partition."

Under the statute, as will be seen, the court is authorized to take cognizance of all questions of law affecting the legal title that may arise in the proceedings, and the Supreme Court of Appeals has construed that authority to be confined to questions of title affecting the right to be parties to the action. This statute, as construed by the state court, is readily understood. The common-law rule is modified to the extent that the state court has jurisdiction to pass upon questions of law touching the legal title of any party to the action to the interest he claims in the land to be divided, in order to ascertain if such party is a co-owner in the common subject with a party plaintiff as holding under the same right and title that partition is sought to be made. But there is no jurisdiction conferred by which the court can increase or decrease the degree of an estate, change a life tenure into a fee simple, or invest a title where otherwise none existed. As to these matters the West Virginia statute seems to leave the rules of the common law in regard to partition still in force.

In our case there was no dispute as to the title to any portion of the land. There was no conflicting claim, nor did the court in the decree refer to or determine any such claim. The court decreed partition as sought by the complainants and confirmed the report of the commissioners, and nowhere in the bill filed, in the decree directing partition, in the report of the commissioners, or in the decree of confirmation is there any suggestion that contested rights or conflicting claims of title to or estate in the lands are either raised or passed upon. To our minds it is clear that the chancellor saw, from an inspection of the deed of December 9, 1887, and the certificate attached, the quantum of estate it conveyed and that the partition and confirmation were made in the light of this knowledge. It is our conclusion, therefore, that Mary White and Sterling White, the infant parties to the partition proceeding, are not estopped by the decree therein, nor are they divested of their interest in their mother's land by the adjudication in that suit. Consequently we are of the opinion that the dismissal of plaintiff's bill on that ground was error.

The proposition that Mary White and Sterling White should have availed themselves of the West Virginia statute, which gives a person six months after attaining majority to show cause to modify or set aside a decree rendered against him in his infancy, is without merit. As we construe the decree in the partition case, the decision was not adverse to them, and no existing right of theirs was affected.

There is still a further question raised by the defendant, and that is that Mary White and Sterling White have forfeited to the state whatever interest they had in the lands in controversy because of the fact that the said lands were not entered upon the land books and taxes

paid thereon as required by law. Under the facts as disclosed in the case we do not regard this position as tenable. It was evidently not considered as having bearing by the learned judge of the Circuit Court, because in his opinion dismissing plaintiff's bill he makes no reference to it whatever.

It was error to dismiss appellant's bill on the grounds stated, and the decree entered to that effect should be reversed.

Reversed.

In re APPEL

In re McPECK.

(Circuit Court of Appeals, First Circuit. August 18, 1908.)

No. 756 (Original).

1. NE EXEAT—WRIT FOR ARREST OF BANKRUPT—CONSTRUCTION OF BOND.

A bond given to secure the release of a bankrupt when arrested under a writ of ne exeat regno, and conditioned that he shall not depart from the district, is to be construed in accordance with its terms, and the departure of the bankrupt from the district without leave of the court is a breach thereof, although he is present to abide the judgment of the court when rendered.

2. BANKRUPTCY—POWERS OF COURT—CHANCEER OF BOND.

A court of bankruptcy, acting either upon the analogy of a court of equity or of the power possessed by courts of the United States in actions at law, has power to chancer a bond given for the release of a bankrupt when arrested under a writ of ne exeat.

Petition of Trustee to Revise in Matter of Law the Proceedings of the District Court of the United States for the District of Massachusetts, in Bankruptcy.

Lee M. Friedman (Morse & Friedman, on the brief), for petitioner.

Edmund A. Whitman (Elder & Whitman, on the brief), for respondent David Appel.

Before COLT, PUTNAM, and LOWELL, Circuit Judges.

LOWELL, Circuit Judge. Majer Appel was adjudged a bankrupt January 23, 1905, and thereafter McPeck was elected his trustee. On July 26, 1906, McPeck filed a petition in the District Court, setting out that the bankrupt had fraudulently concealed from the trustee a considerable sum of money belonging to the bankrupt estate; that the bankrupt was a resident of Adams, within the district of Massachusetts, at the commencement of the bankruptcy proceedings; "that thereafter, and while said proceedings were still pending, said Appel removed to the state of New York, and that he has not since been a resident of Adams, but has continued to keep within the said state of New York; * * * that said Majer Appel is now within the jurisdiction of this court, but * * * is about to remove from the jurisdiction of the court, and has no intention of remaining within said jurisdiction, and that his removal from the jurisdiction will endanger the amount due from said Majer Appel to your petitioner. Wherefore

of said Majer Appel. The writ issued on the same day, and the bankrupt was duly arrested thereupon. On July 27th, he obtained his liberty by executing before a commissioner the following instrument:

"Recognizance for Appearance.

[Filed July 30, 1906.]

"United States of America, District of Massachusetts, ss.—City of Pittsfield.

"Be it remembered that on this twenty-seventh day of July A. D. 1906, before me, a commissioner duly appointed by the District Court of the United States for the said District of Massachusetts, personally came Majer Appel of Brooklyn in the State of New York and David Appel of the city, county and State of New York, and jointly and severally acknowledged themselves to owe the United States of America the sum of two thousand five hundred dollars, to be levied on their goods and chattels, lands and tenements, if default be made in the condition following, to wit:—

"The condition of this recognizance is such, that if the said Majer Appel will not go or attempt to go into parts beyond the jurisdiction of the District Court of the United States for the District of Massachusetts without the leave of said court or until further order of said court, and then and there abide the judgment of the said court, and not depart from said district without leave, then this recognizance to be void, otherwise to remain in full force and virtue.

Majer Appel. [Seal.]

"David Appel. [Seal.]

"Taken and acknowledged before me on the day and year first above written.

"[Seal.]

Arthur H. Wood,

"Commissioner of the United States for the District of Massachusetts.

"United States of America, District of Massachusetts, ss.—

"David Appel, a surety on the annexed recognizance, being duly sworn, deposes and says that he resides at 248 East 7th Street, in the city of New York, that he is a freeholder in the city of Brooklyn, New York, that he is worth the sum of three thousand dollars, over and above all his just debts and liabilities, in property subject to execution and sale, and that his property consists of real estate in said Brooklyn. David Appel has deposited with me two thousand five hundred dollars in cash as bail money.

"[Affiant's Signature] David Appel.

"Sworn to and subscribed before me, this twenty-seventh day of July, A. D. 1906.

"[Seal.]

Arthur H. Woods,

"Commissioner of the United States for the District of ———."

The deposit of \$2,500 was later handed over by the commissioner to the clerk of the District Court.

On March 12, 1907, the judge of the District Court affirmed the order of the referee directing the bankrupt to turn over to the trustee \$6,000. On April 29, 1907, the trustee filed a petition in the District Court, alleging the arrest and release of the bankrupt, that the bankrupt had "committed various breaches of said bond," and "that demand had been made upon said surety for the penal sum of said bond, and the money deposited in the clerk's office." The trustee, therefore, prayed that the sum of \$2,500 might be ordered to be paid by the clerk of the District Court to the petitioner as trustee in bankruptcy. There was a hearing in the District Court, at which both the bankrupt and the surety were present. The decree recited "that no breach of the conditions of said bond had been committed, as more fully appears in the opinion of the court," and it denied the petition. On reference to

law that the absence of the bankrupt from the district from time to time after the bond was given did not amount to a breach of the bond. This was the ground upon which the trustee's petition was dismissed. The record, as presented to this court, is informal in several respects, but it appears generally, and both counsel are agreed, that this court must first answer the following question: Was the learned judge of the District Court right in ruling that the bond given for the bankrupt's release was in effect a bail bond, binding him only to abide the decrees and orders of the District Court when rendered, and in other respects leaving him free to absent himself from the court's jurisdiction? The trustee contended, in accordance with the wording of the bond, that it was conditioned upon his remaining constantly within the jurisdiction.

An examination of the practice of the English Court of Chancery, as set out in the decided cases and in accepted text-books, leads us to the conclusion that the bond should receive its grammatical construction, and that it binds the bankrupt not to go into parts beyond the jurisdiction without leave of the court of bankruptcy. *Musgrave v. Medex*, 1 Mer. 49; *Utten v. Utten*, 1 Mer. 51; 2 Dan. Ch. Pr. (6th Am. Ed.) p. 1712. This rule has peculiar application to the case of a bankrupt who is required by the general scheme of the bankruptcy act to be constantly on hand in order that he may assist the trustee in his administration of the estate.

We hold the decree of the District Court erroneous and reverse it, because it sets out that the bankrupt's absence from Massachusetts was not a breach of the bond. We hold that this absence was a breach of the bond, but we recognize that weighty courts have held that, while a bond given to procure the release of one arrested under a writ of *ne exeat regno* differs from an ordinary bail bond in requiring the constant presence of the principal within the jurisdiction, yet the chief object of the two obligations is the same, viz., to obtain security that the principal shall abide (not perform) any decree which the court may render against him. 14 Enc. Pl. & Prac. p. 320. The penal sum of the bond in the case at bar is already in the disposition of the District Court. In *Harris v. Hardy*, 3 Hill, 393, the Supreme Court of New York said:

"If the defendant leave the state without permission, an order will be granted directing his sureties to pay the money into court, or, in default thereof, that a suit be brought upon the bond. The writ will be discharged, on paying into court the sum for which it is marked, and upon giving security to abide by the decree. The fund is under the control of the Court of Chancery, and will be disposed of with due regard to the rights of all parties concerned."

The learned district judge seems to have found no evidence that the bankrupt had not always been ready to abide the decrees of the court of bankruptcy, although he had personally departed from the jurisdiction. Acting either upon the analogy of a court of equity or of the power possessed by courts of the United States in actions at law, a court of bankruptcy has power to chancery a bond. *Sun Printing & Publishing Association v. Moore*, 183 U. S. 642, 662, 22 Sup. Ct. 240,

46 L. Ed. 366; 8 and 9 Wm. III, c. 11; Rev. St. § 961 (U. S. Comp. St. 1901, p. 699). It may well be that the District Court will refuse to enforce the liability of the surety upon this bond, and will relieve him from that liability, basing its action, not upon the want of a technical breach of the bond, but on the broader ground that the result sought by the obligation has not yet failed. We are not required to pass upon these questions. The record is not full enough. Inasmuch as the decree contains a recital which we deem erroneous in law, we must reverse it; but we do so with leave to the District Court to proceed further in the matter in accordance with the rules of equity.

The decree of the District Court is reversed, and the case is remanded to that court, with directions to proceed in accordance with our opinion passed down the 13th day of August, 1908; and the petitioner recovers his costs in this court.

NOTE.—The following is the opinion of Dodge, District Judge, on petition to pay over money deposited as bail for bankrupt:

DODGE, District Judge. Upon a writ of ne exeat, issued by this court on July 27, 1906, the bankrupt, as appears by the return on the writ, was arrested and taken before an officer at Pittsfield, in this district, duly qualified to take bail in cases pending in any one of the United States courts. By order of that officer he was committed to the Pittsfield jail in default of bail. On the same day, however, a bond of recognizance was executed by the bankrupt as principal and one David Appel as surety in the sum of \$2,500. The surety deposited \$2,500 with the clerk of the court, agreeing that it should be held as bail or security for the performance of the bond. The bankrupt was then released from custody.

The present petition, filed by the trustee April 29, 1907, alleges that the bankrupt has committed various breaches of this bond, and that demand has been made upon the surety. It asks that the amount deposited may be ordered to be paid by the clerk to the trustee of the bankrupt's estate, to be disbursed by him as assets of the estate.

The bond referred to was filed in court on July 30, 1906. It is in the form of a recognizance taken before a United States commissioner, Mr. Wood, of Pittsfield, the officer referred to in the return upon the writ. The bankrupt and his surety acknowledge themselves to owe the United States of America \$2,500, to be levied on their goods and chattels, lands and tenements, if default be made in the condition expressed in the bond, which is that the bankrupt "will not go or attempt to go into parts beyond the jurisdiction of this court without the leave of the court, or until the further order of the court, and then and there abide the judgment of said court, and not depart from said district without leave."

When the writ was issued, a petition was pending before the referee for an order directing the bankrupt to turn over to his trustee certain property alleged to have been concealed by him. The trustee, in his petition for the issue of the writ, set forth the pendency of this proceeding, and represented that the bankrupt had removed his residence from this district since the bankruptcy proceedings were begun, was about to remove himself from the jurisdiction of the court, and that such removal would "endanger the amount due" from him to the trustee. The writ was issued in order to prevent any obstruction of the proceedings before the referee then pending, or of such further proceedings as the trustee might institute for the enforcement of the referee's orders therein, by the bankrupt's absence from the district. The bond was given in order to secure the bankrupt's presence in the district whenever required for the purposes of any proceedings such as are above indicated.

Thereafter, on January 12, 1907, the referee made an order, on the petition referred to, that the bankrupt pay over \$6,000 to the trustee. The bankrupt filed a petition for review of this order. This was argued by both sides before the court, and the referee's order was affirmed March 12, 1907. It ap-

He has been bound to comply with it ever since March 12, 1907, and if he failed to do so it was for the trustee to have him summoned to show cause why he should not be adjudged in contempt.

If such a summons had been issued, and service thereof prevented or obstructed by the bankrupt's absence from the district, or if he had left the district after service, instead of obeying the summons, there would have been a breach of the condition of the bond, which might then have been enforced against the surety or his property.

The trustee, however, has never instituted any proceedings whatever against the bankrupt, based upon his noncompliance with the order. The only breaches of the bond which he now asserts are that the bankrupt has as matter of fact been outside this district since the bond was given without the leave of the court, and that he has not paid any of the money which the referee ordered him to pay. The bankrupt, however, has at all times been represented by counsel within the district, he appeared in court at the hearing on this petition, and he claims (although this is denied) that the trustee assented to his leaving the district on certain occasions when he admits having gone to New York.

I do not think that any breach of the bond has been shown which justifies the court in adjudging the surety liable and ordering his deposit paid over to the trustee. I have indicated above what seems to me the only construction which can properly be given to the condition upon default in which this money was to become due. I do not think the bond can be regarded, in view of the circumstances under which it was given, as anything more than security for his appearance before the court, when required, to abide the judgment which upon such appearance the court might give. I cannot construe it as security for the payment of the amount which the referee might order the bankrupt to pay. See *Griswold v. Hazard*, 141 U. S. 260, 11 Sup. Ct. 972, 35 L. Ed. 678.

The petition must be denied.

LEGG v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. May 5, 1908.)

No. 224 (4,648).

1. CUSTOMS DUTIES — CLASSIFICATION — FEATHER BOAS—"FEATHERS * * * DRESSED."

Feather boas, made by stringing dressed feathers upon a cord, are subject to the classification of "feathers * * * dressed," etc., under Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 425, 30 Stat. 191 (U. S. Comp. St. 1901, p. 1675), by virtue of section 7, 30 Stat. 205 (U. S. Comp. St. 1901, p. 1693), prescribing that unenumerated articles "shall be assessed at the highest rate at which the same would be chargeable if composed wholly of the component material of chief value."

2. SAME—PROTEST AGAINST ASSESSMENT—BURDEN OF IMPORTER.

Where an importer challenges by legal proceedings the correctness of the assessment of duty by a collector of customs, the question to be decided is not whether the collector was wrong, but whether the importer is right; the burden being on him to establish the correctness of his contention.

Appeal from the Circuit Court of the United States for the Southern District of New York.

On appeal by the importer from a decision of the Circuit Court (154 Fed. 858), affirming a decision of the Board of General Appraisers (G. A. 6,467; T. D. 27,673), which sustained the action of the collector in assessing a duty of 50 per cent. ad valorem upon feather

boas, under the provisions of Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 425, 30 Stat. 191 (U. S. Comp. St. 1901, p. 1675), and section 7, 30 Stat. 205 (U. S. Comp. St. 1901, p. 1693).

Kammerlohr & Duffy (John G. Duffy, of counsel), for importer.
J. Osgood Nichols, Asst. U. S. Atty.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

COXE, Circuit Judge. The feather boas in question are non-enumerated articles, and are correctly described by the Board as follows:

"The boas in question are made up and ready for use as articles of wearing apparel, and therefore have passed beyond the stage of feathers 'dressed, colored or otherwise advanced or manufactured in any manner.' The evidence is that they are made by stringing feathers upon a cord, and that the value of the cord used is insignificant as compared with the value of the feathers."

The collector classified the boas under the provisions of Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 425, 30 Stat. 191 (U. S. Comp. St. 1901, p. 1675), and section 7 of the act 30 Stat. 205 (U. S. Comp. St. 1901, p. 1693). Paragraph 425 provides, so far as applicable to the present controversy, as follows:

"Feathers * * * dressed, colored, or otherwise advanced or manufactured in any manner, * * * fifty per centum ad valorem."

The applicable provisions of section 7 are:

"That each and every imported article, not enumerated in this act, which is similar, either in material, quality, texture or the use to which it may be applied, to any article enumerated in this act as chargeable with duty, shall pay the same rate of duty which it levied on the enumerated article which it most resembles in any of the particulars before mentioned; * * * and on articles not enumerated, manufactured of two or more materials, the duty shall be assessed at the highest rate at which the same would be chargeable if composed wholly of the component material thereof of chief value."

The importer insists that the boas are dutiable, under section 6 of the same act, which provides for a duty of 20 per centum ad valorem on all non-enumerated manufactured articles.

The question for us is not whether the collector was wrong, but whether the importer was right, for upon him lies the burden of establishing the proposition that the boas in question are neither enumerated nor provided for in the act except in the "catch all" clause. If they be provided for, either directly or by similitude, the importer must fail. *Arthur v. Fox*, 108 U. S. 128, 2 Sup. Ct. 371, 27 L. Ed. 675; *Hahn v. U. S.*, 100 Fed. 635, 40 C. C. A. 622.

There can be no doubt that the boas are non-enumerated, that they are manufactured of feathers and cord, feathers being chief value, and that the feathers have been dressed or manufactured and advanced from their crude state. The Board and the Circuit Court have united in holding that the provision of the similitude section, quoted above, is applicable for the reasons that the component material of chief value, and, in fact, of overwhelming value, is the feathers, the cord being used simply to hold the feathers together. It would seem from the testimony of the importer that though these boas have been coming

to this country for 10 or 12 years the classification has not before been contested. The counsel for the importer in an able and ingenious argument has pointed out many alleged inconsistencies which he thinks will follow if the construction relied on by the government is pushed to its logical conclusion.

It seems to us, however, that so far as the facts now before us are concerned the Board has properly applied the language of section 7. The appellant has, in fact, imported dressed feathers strung on a cord. It is true that in tariff nomenclature they are converted by this process into articles of wearing apparel but their value is substantially the same, and if the identical feathers were unstrung and imported in that condition they would concededly pay a duty of 50 per centum ad valorem. If the importer's interpretation of the law be correct, the addition of the cord and of the labor necessary in stringing the feathers thereon enables them to escape with a duty of but 20 per centum. In other words, if the appellant should import two boxes, one containing a quantity of dressed feathers and the other the same quantity strung on a cord, the former would pay 50 and the latter 20 per centum.

We think that the Board and the Circuit Court were correct in holding that the merchandise in question should be assessed at 50 per centum, that being the rate of duty upon the component material of chief value.

The decision of the Circuit Court is affirmed.

TOM WAH v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. June 3, 1908.)

No. 268.

ALIENS—CHINESE—PARTY TO DEPORTATION PROCEEDINGS—COMPULSION TO TESTIFY.

A Chinese person against whom deportation proceedings are pending may be called as a witness by the United States and compelled to answer questions relevant to the pending issue.

Appeal from the District Court of the United States for the Northern District of New York.

On appeal from an order (160 Fed. 207) directing that the plaintiff in error, Tom Wah, be confined in the jail of Franklin county, N. Y., until he expresses a willingness to answer various questions propounded to him in proceedings before a United States commissioner, looking to his deportation to the empire of China.

R. M. Moore, for appellant.

Alford W. Cooley, Asst. Atty. Gen., and A. Warner Parker, Sp. Asst. Atty. Gen. for the United States.

Before COXE, WARD, and NOYES, Circuit Judges.

PER CURIAM. The question involved may be stated briefly as follows: Can a Chinese person, against whom deportation proceed-

ings are pending, be called as a witness by the United States and compelled to answer questions relevant to the pending issue? That this question must be answered in the affirmative is sustained by a decided preponderance of authority.

The District Judge has stated the facts and has cited the principal authorities establishing the right and power of the District Court to punish for contempt a witness who refuses to answer in circumstances similar to those shown by this record. Since the decision of the Supreme Court, followed by the Circuit Court of Appeals of several of the circuits, that the proceeding to deport is civil, and not criminal, in its nature, the principal argument for sustaining the refusal to answer has been removed. We deem it unnecessary to add to the discussion found in the opinion below.

The order is affirmed.

CARRIERE & SON v. UNITED STATES.

(Circuit Court, W. D. Michigan, N. D. April, 1908.)

No. 460 (1,459).

1. CUSTOMS DUTIES—APPEAL FROM GENERAL APPRAISERS—TIMELINESS—JURISDICTION OF CIRCUIT COURT.

Customs Administrative Act June 10, 1890, c. 407, § 15, 26 Stat. 138 (U. S. Comp. St. 1901, p. 1933), providing that applications for review of decisions of the Board of General Appraisers should be filed "within 30 days next after such decision, and not afterwards," is mandatory; and a delay of 1 day beyond the period prescribed is as fatal as a longer period. An application filed after 30 days must be dismissed for want of jurisdiction.

2. COURTS—TRIAL—WAIVER OF JURISDICTIONAL DEFECT—TRIAL ON MERITS.

To go to trial upon the merits does not have the effect of waiving the jurisdiction of the court.

On Application for Review of a Decision by the Board of United States General Appraisers.

Hill & Smith (William S. Hill, of counsel), for importers.

George G. Covell, U. S. Atty.

KNAPPEN, District Judge. The decision of the Board of United States General Appraisers, a review of which is here asked, was made July 14, 1899. The application for its review was filed with the clerk of this court August 14, 1899. A motion to dismiss the application is made by the district attorney on behalf of the United States, upon the ground that it was not made within the period limited by statute therefor. If this application were one addressed to the discretion of the court I should be loth to exercise it in favor of such dismissal, coming, as it does, upon final hearing of the case, and raised, as it is, only by brief of counsel. If, however, the failure to apply for a review within the statutory period is jurisdictional, no case for the exercise of discretion is presented.

I have not had the benefit of the views of counsel for appellants, as no notice has been taken by them of the motion to dismiss contained in the brief of the district attorney, which motion cited the statute under which it was claimed the application for review came too late. The statute under which the review is asked provides:

"That if the owner, importer, consignee, or agent of any imported merchandise, or the collector, or the Secretary of the Treasury, shall be dissatisfied with the decision of the Board of General Appraisers, * * * they or either of them, may within thirty days next after such decision, and not afterwards, apply to the circuit court of the United States within the district in which the matter arises, for a review of the questions of law and fact involved in such decision. Such application shall be made by filing in the office of the clerk of said circuit court a concise statement of the errors of law and fact complained of." Act June 10, 1890, c. 407, § 15, 26 Stat. 138 (U. S. Comp. St. 1901, p. 1933).

July has 31 days. The 30-day period had thus elapsed when the application for review was made. An application on the 31st day after the decision was not in time. See, by analogy, as to computation of time, *United States v. Wyman & Co.*, 156 Fed. 97, 99, 84 C. C. A. 123, which involved the 10-day limitation for appeal to the Board of General Appraisers from the decision of the collector. The application for review was not made until the filing in this court of the statement of errors and fact complained of. The statutory provision is express that the application shall be made by filing the statement in the office of the clerk of the court. The statutes, both in respect to writs of error and appeals in equity, have been strictly construed. *Wauton v. De Wolf*, 142 U. S. 138, 12 Sup. Ct. 173, 35 L. Ed. 965; *Brooks v. Norris*, 11 How. 204, 13 L. Ed. 665; *Scarborough v. Pargoud*, 108 U. S. 567, 2 Sup. Ct. 877, 27 L. Ed. 824; *Credit Company v. Arkansas, etc., Railway Company*, 128 U. S. 258, 9 Sup. Ct. 107, 32 L. Ed. 448; *Kentucky Coal, etc., Company v. Howes*, 153 Fed. 163, 82 C. C. A. 337.

This statute is mandatory and its observance is essential to the conferring of jurisdiction upon this court. The dismissal of appeals and writs of error because not taken within the period limited by statute is expressly based upon a lack of jurisdiction in the appellate court. *Scarborough v. Pargoud*, *supra*; *Union Pacific Railroad Company v. Colorado Eastern Railway Company*, 54 Fed. 22, 4 C. C. A. 161; *Fayolle v. Texas & Pacific Railway Company*, 124 U. S. 519, 8 Sup. Ct. 588, 31 L. Ed. 533; *Old Nick Williams Company v. United States*, 152 Fed. 925, 82 C. C. A. 73; *United States v. Baxter*, 51 Fed. 624, 2 C. C. A. 410.

The 30-day limitation for appeals in bankruptcy, from the Circuit Court of Appeals to the United States Supreme Court, has been likewise held mandatory (*Conboy v. First National Bank*, 203 U. S. 141, 27 Sup. Ct. 50, 51 L. Ed. 128), as has also the 10-day provision before referred to for appeals from the decision of the collector to the Board of General Appraisers (*In re Guggenheim Smelting Company*, 112 Fed. 517, 521, 50 C. C. A. 374; *United States v. Wyman & Co.*, *supra*). A delay of 1 day beyond the statutory period is thus as fatal as a longer period. See, by way of illustration, *Lutcher v. United States*, 157 U. S. 427, 15 Sup. Ct. 718, 39 L. Ed. 759; *Cincinnati Safe & Lock*

Company v. Grand Rapids Deposit Company, 146 U. S. 54, 13 Sup. Ct. 13, 36 L. Ed. 885; United States v. Wyman & Co., supra. So strictly is the limitation of time enforced, as applied to statutory requirements, that an order allowing an appeal, or an order approving a bond or extending the time to settle a bill of exceptions, does not extend the statutory time for appeal or writ of error. *Lutcher v. United States*, supra; *Kentucky Coal, etc., Company v. Howes*, supra.

Going to trial upon the merits does not have the effect to waive the lack of jurisdiction. In *Stevens v. Clark*, 62 Fed. 321, 10 C. C. A. 379, it was held that by going to trial upon the merits an appellee could not waive lack of jurisdiction resulting from failure to take a proper appeal within the prescribed time. In *Brooks v. Norris*, supra, it was said:

"The bar arising from lapse of time is apparent on the record, and the defendant may take advantage of it by a motion to quash or dismiss the writ."

See, also, *Farrar v. Churchill*, 135 U. S. 609, 612, 10 Sup. Ct. 771, 34 L. Ed. 246.

In *Credit Company v. Arkansas Railway Company*, supra, and in *Edmonson v. Bloomshire*, 74 U. S. 306, 19 L. Ed. 91, the question of jurisdiction was raised by the court upon its own motion and upon hearing on the merits. In *Davies v. Miller*, 130 U. S. 281, 9 Sup. Ct. 560, 32 L. Ed. 932, which was an action against a collector to recover back duties, the question whether the protest was filed in time was permitted to be raised on the trial. In *Re Guggenheim Smelting Company*, supra, the appeal was from the action of the Board of Appraisers, sustaining the levying of the duties. The judgment below was affirmed on the ground that the 10-day limitation period provided by section 14 of the act in question could not be waived by the collector. In *United States v. Wyman & Co.*, supra, the collector had refused to receive the protest as too late. It was presented to the appraisers, who, "after hearing, * * * sustained the decision of the surveyor." The Circuit Court heard the evidence and sustained the appeal of the importer. The decision was reversed by reason of the failure of the importer to protest in time.

In my opinion the application for review must be dismissed for lack of jurisdiction to entertain it.

IN RE AUGUSTA POTTERY CO.

(District Court, N. D. West Virginia. September 15, 1903.)

BANKRUPTCY—RIGHT TO DIVIDEND—COLLATERAL CONTROVERSY BETWEEN CREDITORS.

The trustee in bankruptcy of a manufacturing corporation sold its plant to an agent, acting for a bank of which he was cashier and certain other banks, all of which were creditors. The sale was reported as for cash, and was so confirmed; but in fact the trustee accepted pass books from the banks containing credits for their respective shares of the purchase money. The cashier of one of such banks acted in the matter without authority, and it afterward removed him and repudiated the transaction. A dividend having been ordered, the trustee refused to pay such bank, because of its refusal to accept a certain check drawn on it.

to determine, but that the bank as a creditor was entitled to an order requiring the trustee to pay its dividend.

In Bankruptcy. On petition of the Exchange Bank of Mannington.

Showalter & White, for petitioner.

C. A. Snodgrass, for respondent Furbee.

C. A. Snodgrass, W. S. Meredith, and L. S. Schwenck, for respondent First Nat. Bank of Mannington.

DAYTON, District Judge. The administration of this bankrupt corporation's estate has been difficult and protracted. It has been twice before the Circuit Court of Appeals. See *Morgan v. First Nat. Bank*, 145 Fed. 466, 76 C. C. A. 236; *Morgan v. Benedum*, 157 Fed. 232, 84 C. C. A. 675. The questions now to be determined grow out of the following facts:

Morgan, the trustee, sold the pottery plant under order of the referee for \$38,000 to Furbee, acting as agent for the First National Bank of Mannington, the Bank of Mannington, the Home Gas Company, and, it is claimed, the Exchange Bank of Mannington; but the latter denies that it was party to, or in any way concurred in, the purchase. This sale was made on September 22, 1904. By the terms of the order it was to be sold for one-fourth cash and the residue upon 6, 12, and 18 months' credit. Morgan reported this sale as having been made to Furbee for cash, the purchaser electing so to pay, and it was duly confirmed, and Morgan, trustee, by deed conveyed the property to Furbee, the purchaser. My predecessor and the referee overlooked at the time the requirement of the bankrupt act, and did not direct the trustee to deposit the fund arising from the sale in an authorized bank. The three banks, the gas company, and Furbee were all holders of the bonds of the bankrupt, and a controversy arose as to the lien claimed for these bonds, which was very spirited and occasioned the first appeal to the Circuit Court of Appeals. Finally, on January 22, 1908, an order was entered by the referee directing payment of 43.73 per cent. of the debts in accordance with a dividend sheet then made. Among the creditors so directed to be paid this percentage were the Exchange Bank on its debt of \$5,274.17, the First National Bank on its debt of \$18,402.50, and Furbee on his debt of \$1,539.61. The trustee has complied with this order, and paid all other creditors the required percentage of their debts, except these three; and to enforce collection of such payment to it the Exchange Bank has filed this petition. The trustee, the First National Bank, and Furbee have all answered this petition, and the reasons why the trustee refuses to pay are substantially these:

Furbee was at the time of the purchase of the plant by him, and still is, cashier of the First National Bank. At that time one Jolliffe was cashier of the Exchange Bank, but is no longer so. The three banks at Mannington, the First National, the Exchange, and the Bank of Mannington, it seems, were anxious to secure the deposit with them

of the funds arising from this sale by Morgan, the trustee. Instead, therefore, of paying the purchase money in cash, Furbee secured to be issued to Morgan by the First National Bank a pass book showing a deposit there in his favor of \$4,750, by the Bank of Mannington a like pass book showing a deposit to his credit of \$3,562, and by Jolliffe, cashier of the Exchange Bank, a like pass book showing a deposit in that bank to his credit of \$1,187.50. These three sums aggregated the cash payment of \$9,500 required; and some days after in these pass books were entered additional credits to Morgan of \$14,321.25 in that of the First National, of \$10,740.93 in that of the Bank of Mannington, and of \$3,580.32 in that of the Exchange Bank, which last three sums aggregated the balance of the purchase money. The issuance of this deposit book, it is claimed by the Exchange Bank, was done by Jolliffe, its then cashier, without authority, and it is admitted that at the time no such deposits were in fact made. Some time after this Furbee sold the plant to the Homewood Pottery Company for \$38,142.50, and thereupon paid by his personal check to the First National Bank \$19,071.25 to cover the deposit credit given by that bank to Morgan, to the Bank of Mannington by check for a like purpose \$14,303.43, and sought to pay to the Exchange Bank by sending to it a check drawn by one Clayton on said Exchange Bank for \$3,775 and his personal check for \$992.82, the balance necessary to cover the \$4,767.82 deposit credit which Jolliffe, its cashier, had extended by the pass book to Morgan. The Exchange Bank refused to accept this settlement, and several times returned the checks. They were sent back and forth, until the teller of the First National Bank, by direction of Furbee, took them over and left them at the Exchange Bank.

The trouble all turns around the Clayton check for \$3,775. This check was executed under these circumstances: Schwenck, trustee for the Southern Tanning Company, bankrupt, sold the plant of that company to Clayton. Jolliffe, the Exchange Bank's then cashier, was personally interested with Clayton in this purchase, and had agreed to furnish at least a part of the purchase money. Clayton, without in fact having funds there, drew this check on the Exchange Bank and tendered it to Schwenck in payment or part payment of the purchase price of the tanning plant. Schwenck refused to accept the check unless the First National Bank, wherein he had been directed by this court to deposit the fund, would take it as cash and give him a deposit credit as trustee. Thereupon Furbee, the First National Bank's cashier, Schwenck, and Clayton went to the Exchange Bank, saw Jolliffe, who told Furbee to take the check and send it in to the Exchange Bank in the regular course of next day's business and it would be paid. It was so sent in, and, as I have said, returned several times and refused. Jolliffe some time after was removed as cashier of the Exchange Bank, and Showalter became his successor. In October, 1906, this court directed Morgan, trustee, to deposit all funds due to the cause in the First National Bank of Grafton, and all sums have been adjusted and paid to the trustee, except the \$3,775.

It is clear, it seems to me, that the real controversy here is between the First National Bank and the Exchange Bank, as to whether the latter, under the circumstances, is liable to the former for the \$3,775

Clayton check; and it seems very clear, also, that in the settlement of this question this court of bankruptcy, with its limited jurisdiction, can have nothing to do. It is beyond question that Furbee, in purchasing the pottery plant, was acting as agent for the First National Bank, the Bank of Mannington, and the Home Gas Company. The proof wholly fails to show that the Exchange Bank had any interest or concern in the purchase, or that Furbee was authorized by it to act as its agent in the matter. It is clear that Furbee did not comply with the terms of the sale and pay cash, and that Morgan, the trustee, had no right, as such, to receive anything else than cash from Furbee, the purchaser. When he did so it was upon his own personal responsibility. Jolliffe, cashier, had no more legal right and authority to give Morgan credit for a deposit in the Exchange Bank, which was in fact not made, than he would have had to walk off with a like amount of his bank's money; and Furbee, who secured him to do so, cannot for a moment set up, as against Morgan's claim upon him for a balance of unpaid purchase money, such illegal conduct on the part of Jolliffe in which he (Furbee) participated. Nor can this bank, for whom in its answer it admits Furbee was acting as agent in the purchase, by reason of this illegal conduct of Jolliffe, so participated in by its agent, make Morgan and this court the means of collecting its disputed debt against the Exchange Bank.

Morgan, it is true, by reason of his having accepted Furbee's pass books as money and reporting the sale as a cash one, is estopped from now denying payment to him so far as creditors are concerned, and this court can only go to the extent of enforcing the decree heretofore entered, requiring him to pay to the Exchange Bank 43.73 per cent. of its debt; but no reason is apparent why he should not so pay with funds in his hands due to either Furbee, the agent, or the First National Bank, the admitted principal, who have not in fact paid to him the purchase price by \$3,775. And this can in no way interfere with or impede the right of the First National Bank to sue, in a court having jurisdiction, which this one has not, the Exchange Bank upon its demand growing out of the Clayton check, if it desires to do so.

UNITED STATES v. MITCHELL.

(Circuit Court, D. Oregon. September 2, 1908.)

No. 2,902.

1. FINES—EFFECT OF DEATH OF DEFENDANT.

The purpose of a fine imposed in a criminal case is the punishment of the defendant personally for the offense of which he has been convicted, and, while the federal statutes provide for the collection of a fine by execution as in case of civil judgments, there is no provision making it a debt, and, where a defendant upon whom a fine has been imposed by a federal court dies before the fine has been paid or collected, the cause abates, and the fine cannot be collected from his estate.

person convicted of crime of imprisonment.
[Ed. Note.—For other definitions, see Words and Phrases, vol. 3, pp. 2811-2813.]

8. SAME—"IMPRISONMENT."

Imprisonment, in its general sense, is the restraint of one's liberty. As a punishment it is a restraint by judgment of a court or lawful tribunal, and is personal to the accused.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 4, pp. 3445-3447.]

John McCourt, U. S. Atty.

Bauer & Greene, for D. M. Dunne, administrator of the estate of John H. Mitchell, deceased.

WOLVERTON, District Judge. On July 25, 1905, the late Senator John H. Mitchell was sentenced by this court to a term of imprisonment and to pay a fine of \$1,000 for a violation of section 1782, Rev. St. U. S. (U. S. Comp. St. 1901, p. 1212). The cause was taken to the Supreme Court on writ of error, and while pending the defendant died. Thereupon, upon the suggestion of counsel for defendant, the court dismissed the writ without further hearing or proceedings had. Subsequently the government, through the district attorney, presented a claim to the administrator of the estate of deceased for the amount of the fine with accrued interest, and the administrator now appears by motion in this court to have the entire proceeding against the deceased abated, and the fine canceled.

The sole question for consideration is whether the cause abated by the decease of the defendant, so that the government is not now entitled to receive or recover the fine imposed from the deceased's estate. Undoubtedly an appeal or writ of error to a higher court is abated by the death of the defendant in a criminal cause; and this because no further proceedings can be had against a dead person. He cannot appear, either in person or by counsel; nor can he be required to obey the orders and judgments of the court touching his person. *State v. Martin*, 30 Or. 108, 47 Pac. 196; *O'Sullivan v. People*, 144 Ill. 604, 32 N. E. 192, 20 L. R. A. 143; *Overland C. M. Co. v. People*, 32 Colo. 263, 75 Pac. 924, 105 Am. St. Rep. 74; *Herrington v. State*, 53 Ga. 552. Upon the other hand, a cause taken to an appellate tribunal by writ of error leaves the judgment of the lower court for the time being undisturbed and still in force. This has been distinctly determined by the Supreme Court in *Railway Co. v. Twombly*, 100 U. S. 78, 25 L. Ed. 550. The court there says:

"A writ of error to this court does not vacate the judgment below. That continues in force until reversed, which is only done when errors are found in the record on which it rests, and which were committed previous to its rendition."

See, also, to the same purpose *Sharon v. Hill* (C. C.) 26 Fed. 337; *In re Kirby* (D. C.) 84 Fed. 606.

Ordinarily, therefore, the abatement or dismissal of the appeal or writ of error for any cause will leave the judgment below as it was

controversy. The question comes back to an inquiry as to the effect of the death of the defendant upon the judgment rendered in his life time imposing a fine as a punishment. The law affords certain remedies or process for enforcing a criminal judgment. These are to be sought for by a reading together of the federal and state statutes relating to the subject. By section 1041 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 724) it is provided that:

"In all criminal or penal causes in which judgment or sentence has been or shall be rendered, imposing the payment of a fine or penalty, whether alone or with any other kind of punishment, the said judgment, so far as the fine or penalty is concerned, may be enforced by execution against the property of the defendant in like manner as judgments in civil cases are enforced: Provided, That where the judgment directs that the defendant shall be imprisoned until the fine or penalty imposed is paid, the issue of execution on the judgment shall not operate to discharge the defendant from imprisonment until the amount of the judgment is collected or otherwise paid."

Under the state statutes the state is accorded a lien from the time of the commission or attempt to commit a felony upon all the property of the defendant, for the purpose of satisfying any judgment which may be given and rendered against him for any fine on account thereof, or for costs and disbursements of the proceeding. Section 2168, B. & C. Comp. Provision is then made, if the judgment be that the defendant pay money, either as a fine or costs and disbursements, or both, for its docketing and enforcement, in manner as provided by the Code of Civil Procedure. Sections 1445, 1459, B. & C. Comp. So that, reading the statutes of the two jurisdictions in *pari materia*, we find that a judgment imposing a fine in the federal court is to be enforced in like manner as a judgment in a civil action in the state court. These statutes do not define or determine the nature or effect of the judgment rendered. They afford merely a remedy, or definite process whereby it may be regularly enforced, so that in point of relevancy they do not aid us greatly in solving the direct issue before us.

If we could know the real nature of the judgment involved here, we would then be enlightened. "A fine is a pecuniary punishment imposed by a lawful tribunal upon a person convicted of crime or misdemeanor." This is the definition of the term "fine" as given by Bouvier, and adopted by 19 Cyc. p. 544. Imprisonment, in its general sense, is the restraint of one's liberty. As a punishment it is a restraint by judgment of a court or lawful tribunal, and is personal to the accused. It is a thing self-evident, therefore, that the death of a person upon whom such a judgment is imposed would put an end to an infliction or enforcement of the punishment. A fine being a pecuniary punishment imposed upon the person, it would seem that a like result would follow. If the accused should die before the punishment was in reality enforced or inflicted, he could not be pecuniarily mulcted or punished in person after he had ceased to exist. In passing judgment, whether of imprisonment or fine, it is the purpose of the court and the law that the accused be personally punished for the amendment of his life and of his deportment in the future, and to deter others from com-

Does it cease at the time of docketing, or at the time of the issuance and service of the execution, or of making the writ, or at any time? The answer is plainly that by no act in the enforcement of the judgment does it lose its original character as a personal infliction of punishment. If the fine is made out of his property, then as to that he is punished; but, if made out of the property that has descended to his heirs, or devised to his legatees, then it would seem he is not punished, for his day of temporal punishment has passed. It is, perhaps, within the power of Congress to constitute a fine a debt due from the accused, in the same relation as an ordinary debt, so that his estate, in case of his death, would be beholden for its payment. But this it has not done, nor attempted to do. It has provided merely a process for the enforcement of the fine as a fine, but not as a debt. I am of the view, therefore, that, by the death of Senator Mitchell, the cause abated entirely, so that no enforcement of the payment of the fine imposed can be made out of his estate. This conclusion is supported by *United States v. Pomeroy* (C. C.) 152 Fed. 279, the only case fairly in point to which my attention has been called. In speaking to the question in that case the court says:

"It [the fine] was imposed as a punishment of the defendant for his offense. If, while he lived, it had been collected, he would have been punished by the deprivation of that amount from his estate; but, upon his death, there is no justice in punishing his family for his offense."

As opposed to this view, *Whitley v. Murphy*, 5 Or. 328, 20 Am. Rep. 741, is cited and relied upon. There is involved in this case, however, the costs and disbursements of the cause only, not the fine; and I am not sure that the decision would have been the same if both had been the subject of the controversy. In the later case of *State v. Martin*, supra, it would seem that the court was of the opinion consonant with the view I have here adopted, for Mr. Justice Bean says in speaking for the court:

"But in a criminal action, the sole purpose of the proceeding being to punish the defendant in person, the action must necessarily abate upon his death."

It may be that the remark was unnecessary to a decision of the cause, but it indicates the trend of thought in relation to the subject, and, being the utterance of so eminent a jurist, is worthy of much weight.

The judgment of the court will be that the entire cause is abated, and that the fine imposed is not a subsisting claim or demand against the estate of the deceased.

ALLEN v. LUKE et al.

(Circuit Court, D. Massachusetts. July 27, 1908.)

No. 194 (Old No. 2,135).

1. BANKS AND BANKING—LIABILITY OF DIRECTORS OF NATIONAL BANK—SUIT ON BEHALF OF STOCKHOLDERS.

A loss resulting to a national bank from bad loans, which were not repaid, cannot be said to have been caused by a violation of law by the directors in failing to keep on hand the legal reserve required by Rev. St. § 5191 (U. S. Comp. St. 1901, p. 3486).

[Ed. Note.—Personal liability of directors of banks, see notes to Robinson v. Hall, 12 C. C. A. 680; Warner v. Penoyer, 33 C. C. A. 230.]

2. SAME—PLEADING—SUFFICIENCY OF BILL.

A bill on behalf of the stockholders of a national bank to charge the directors with liability for losses alleged to have been due to their negligence or misconduct *held* to set out the details of the several transactions relied on with sufficient fullness.

3. SAME.

In such a bill, charging the making of illegal loans by defendants as directors, it is not necessary to allege a formal vote of defendants authorizing or approving such loans.

4. SAME—COMMON-LAW LIABILITY OF DIRECTORS.

The provisions of the national banking act defining the duties of the directors of such banks do not relieve them from their common-law liability for a failure to diligently and honestly discharge their trust.

5. ABATEMENT AND REVIVAL—DEATH OF PARTY—SURVIVAL OF CAUSE OF ACTION—JOINDER OF DEFENDANTS.

A cause of action against a director of a national bank to recover for money lost to the bank through his negligence or misconduct survives against his executors, and they may be joined as defendants with the surviving directors in an action thereon.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Abatement and Revival, §§ 322-329.]

In Equity. On demurrer to amended bill.

Warner, Warner, & Stackpole, for plaintiff.

Chas. T. Gallagher and Horace G. Allen, for defendant Charles H. Allen.

Gaston, Snow & Saltonstall and Tower, Talbot, Hiler & Pillsbury, for defendants Weeks and others.

Herbert L. Harding, for defendant Richardson.

Hurlburt, Jones & Cabot, for defendant Loring.

Ropes, Gray & Gorham, for defendants Luke and others.

Richard D. Ware, for defendant Mason.

LOWELL, Circuit Judge. The receiver of a national bank brought a bill in equity against certain of its former directors to recover money lost to the bank through their alleged misconduct. The defendants demurred to the bill, and the demurrers were sustained. 141 Fed. 694. The complainant thereafter amended his bill. The creditors of the bank have been paid in full, and the stockholders' agent has been admitted to these proceedings as party complainant, instead of the receiver. The amended bill alleges that the defendants are liable:

A. For violations of the banking act: (1) In respect of unpaid

made in excess of the 10 per cent. limit (section 5200); and (3) in respect of unpaid loans made upon real estate (section 5137). The prayer for a return of dividends illegally paid, which was made by the receiver in the original bill, is now dropped by the new complainant, the stockholders' agent.

The bill further alleges that the defendants are liable:

B. For breach of their duties as directors at common law and in equity: (1) In respect of unpaid loans made negligently; (2) in respect of unpaid loans made by dishonest or incompetent agents put in office by the defendants; and (3) in respect of unpaid loans made after the liquidation of the bank had been improperly prevented by the defendants' misconduct in continuing a losing business.

The defendants have severally demurred to the amended bill. Their demurrers are alike in some respects, and in some respects are different. Including necessary repetitions, the grounds of demurrer alleged are inevitably numerous. They may be classified as follows:

First. That the bill is multifarious, by reason of the improper joinder of parties and of causes of action. This contention was decided against the defendants in the opinion already rendered.

Second. That the causal connection between the defendants' alleged violation of the banking act and the losses sustained by the bank is not made to appear sufficiently. In this respect, the allegations appear to be sufficient, except as to A (1) the unpaid loans charged to have been made while the reserve was too low. The object of Rev. St. § 5191 is to insure the constant presence of a cash reserve. If this were depleted below the statutory limit, the bank might suffer loss for want of cash on hand, and for such a loss, if one occurred, the defendants might be liable, although the loans made while the reserve was below the limit were paid at maturity. This provision of the statute was not intended to protect the bank against bad loans, and a loss arising from their nonpayment cannot fairly be said to be caused by the directors' violation of law. Moreover, the bill here goes on to allege that the statutory reserve was replenished after the bad loans were made, and before the bank went into the receiver's hands. In this respect the demurrers are sustained.

Third. That the bill and the accompanying schedules fail to distinguish between new loans and renewals. Except in section 5191, the statute makes no distinction between new loans and renewals, and the defendants have already been exonerated from liability under section 5191.

Fourth. That the words used in the bill to describe the alleged action of the defendants, viz., "participate," "approve," "permit," and the like, are not sufficiently explicit; that they do not sufficiently describe the physical acts alleged to have been committed by the defendants and upon which the complainant relies. In this respect the court held the earlier bill demurrable, but upon careful examination of the bill as amended its language appears to be as concrete, explicit, and descriptive as is reasonably possible. There are superfluities in the bill. Thus, on page 41, the bill alleges that the Mason & Ham-

that an examination of the affairs of the said company at any time after the said May 1, 1900, would have disclosed such insolvent condition." What is the purpose of the latter allegation is not obvious. If the defendants had knowledge of the company's insolvency, it is superfluous to allege their opportunity of obtaining knowledge; but the latter allegation is not in the alternative, nor does it qualify the former, as the defendants suggest, and so it may be disregarded. Again, the defendants are in error when they say that the bill must allege their vote to make the loans in question. The act of voting may be conclusive evidence of a violation of the statute, but it is not the only possible evidence. If defendants, sitting about the directors' table, informally agree that the bank's money shall be loaned illegally, they are none the less liable for the consequences of the loan because they do not respond viva voce when the presiding officer puts the question to vote. To hold otherwise would make the law prohibit a formality while permitting the illegal employment of the bank's money. It is to be borne in mind that the bill is not called upon to state evidence at length, but only the conclusions of fact which the evidence tends to establish. In the case of *Price v. Coleman* (C. C.) 21 Fed. 357, I find nothing in conflict with the decision thus reached.

Fifth. As to B, that the statutory liability is exclusive, and that neither at common law nor in equity does any liability rest upon the directors for the results of their negligence. For this proposition, the defendants rely chiefly upon *Yates v. Jones Nat. Bank*, 206 U. S. 158, 27 Sup. Ct. 638, 51 L. Ed. 1002; but that case is decisive against the defendants. "Mark the contrast between the general common-law duty to 'diligently and honestly administer the affairs of the association' and the distinct emphasis embodied in the promise not to 'knowingly violate, or willingly permit to be violated, any of the provisions of this title.' In other words, as the statute does not relieve the directors from the common-law duty to be honest and diligent, the oath exacted responds to such requirements. But as, on the other hand, the statute imposes certain express duties and makes a knowing violation of such commands the test of civil liability, the oath in this regard also conforms to the requirements of the statute by the promise not to 'knowingly violate, or willingly permit to be violated, any of the provisions of this title.'" 206 U. S. 178, 27 Sup. Ct. 645 (51 L. Ed. 1002).

Sixth. As to A, that the allegations of the defendants' knowledge of and participation in the offenses against the banking act are not as definite as required by the act and by the *Yates* Case. This contention is answered by the opinion expressed under the third heading.

Seventh. That, even if the directors of a national bank may be liable for a breach of the ordinary duties of a director, yet the allegations of the bill charging this breach are not sufficiently specific. This objection also is dealt with under the third heading.

Eighth. As to one defendant who died before the bill was filed; that the action did not survive. The weight of authority is otherwise. *Boyd v. Schneider*, 131 Fed. 223, 65 C. C. A. 209; *Stephens*

Ninth. That his executors are improperly joined with the other defendants; that an execution cannot issue de bonis testatoris as against one defendant and de bonis propriis as against another. On this point I follow Von Arnim v. Am. Tube Works, 188 Mass. 515, 74 N. E. 680.

Demurrers sustained as to prayer for reimbursement for loss on loans made while the reserve was depleted; otherwise overruled; answers to be filed on or before August 27, 1908.

MEMORANDUM DECISIONS.

CHOW CHOK v. UNITED STATES. (Circuit Court of Appeals, Second Circuit. June 8, 1908.) No. 272. Appeal from the Circuit Court of the United States for the Northern District of New York. R. M. Moore, for petitioner. Alford W. Cooley, Asst. Atty. Gen., for the United States. Before COXE, WARD, and NOYES, Circuit Judges.

PER CURIAM. Order affirmed, upon the opinion of the District Judge. 161 Fed. 627.

In re DUNLOP. (Circuit Court of Appeals, Eighth Circuit. October 31, 1907.) No. 2,711. Petition for Review. George S. Grimes, Victor J. Welch and Frank R. Hubacheck, for petitioner. M. H. Boutelle and N. H. Chase, for respondents.

PER CURIAM. Petition for review dismissed October 31, 1907, because questions are considered and decided in the case of Andrew G. Dunlop, Trustee, etc., v. H. V. Mercer et al., Trustees, etc., 156 Fed. 545, 86 C. C. A. 435.

DUPREE et al. v. LEGGETTE et al. (Circuit Court of Appeals, Fourth Circuit. February 19, 1908.) No. 669. Appeal from the Circuit Court of the United States for the Eastern District of North Carolina, at Wilmington. Rountree & Carr and Wells & Wells, for appellants. D. L. Russell, for appellees.

PER CURIAM. Appeal dismissed, under rule 20 (150 Fed. xxxi, 79 C. C. A. xxxi). See 140 Fed. 776.

In re HENDRICKS. (Circuit Court of Appeals, Eighth Circuit. February 17, 1908.) No. 2,657. Petition for Review. W. L. Converse, D. L. Grannis, and B. N. Hendricks, for petitioner. Joseph Griffin, John McCook, and Carl W. Reed, for respondents.

PER CURIAM. Petition for review dismissed, at costs of petitioner, because questions involved are considered and disposed of on appeal in case of James Hendricks v. C. F. Webster, Guardian (D. C.) 159 Fed. 927. See 143 Fed. 647.

MERCHANTS' COAL CO. v. FAIRMONT COAL CO. et al. (Circuit Court of Appeals, Fourth Circuit. January 17, 1908.) No. 779. Appeal from the

PER CURIAM. Decree of Circuit Court reversed, and cause remanded, with directions to dismiss the bill. Petition of appellees for appeal to the Supreme Court and order allowing appeal filed February 6, 1908. Transcript of record transmitted to the clerk of the Supreme Court February 18, 1908. See 160 Fed. 769.

MILLER v. ZEIGLER et al. (Circuit Court of Appeals, Third Circuit. March 9, 1908.) No. 10. Petition for Revision of Decree of the District Court of the United States for the Middle District of Pennsylvania. Wm. Hersh and Edward A. Weaver, for petitioner. W. C. Sheely and John D. Keith, for respondents.

PER CURIAM. This case has been brought here by petition for revision, and the counsel for the petitioner have been fully heard thereon; but it is not confined to "matter of law." It really presents complicated questions of fact, and for this reason cannot be entertained. Nothing is now decided with respect to any appeal which has been or may be taken; but it is clear that the present petition cannot be sustained, and therefore it is dismissed without prejudice.

MORRIS v. DUNBAR. (Circuit Court of Appeals, Third Circuit. March 26, 1908.) No. 41. In Error to the Circuit Court of the United States for the Western District of Pennsylvania. L. C. Barton, for plaintiff in error. A. S. Moorehead, for defendant in error.

PER CURIAM. Writ of error withdrawn, on motion of plaintiff in error. See 149 Fed. 406, 79 C. C. A. 226.

ROMINE v. JOHN G. MILLER & CO. (Circuit Court of Appeals, Eighth Circuit. January 10, 1908.) No. 2,534. Appeal from the District Court of the United States for the District of Nebraska. Allen G. Fisher, for appellant. Howard H. Baldrige, William A. De Bord, and Joseph B. Fradenburg, for appellee.

PER CURIAM. Affirmed, with costs, on authority of Kuntz v. Young, Trustee, 131 Fed. 719, 65 C. C. A. 477.

SCHAUBEL v. BACHE et al. (Circuit Court of Appeals, Third Circuit. March 16, 1908.) No. 31. Appeal from the Circuit Court of the United States for the District of New Jersey. Frank H. Bradner, for appellant. Conovers English, for appellees.

PER CURIAM. Stipulation of counsel to dismiss appeal, without costs. See 154 Fed. 859.

UNITED STATES v. O'BRIEN et al. (Circuit Court of Appeals, Second Circuit. May 20, 1908.) No. 269. In Error to the Circuit Court of the United States for the Southern District of New York. Submitted without argument. Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. The facts are the same as when these cases were here before. Our former opinion was filed January 7, 1908. 159 Fed. 671. Upon the second trial the government amended the complaints by reducing the amount of its claims. This enabled defendants to include among the grounds upon which they moved for direction of verdict in their favor the following: "The government having retained the penalty, which it was authorized to retain, has

cord with the opinion of a majority of this court as indicated in the former opinion. Judgment affirmed.

DAZZLE MFG. CO. v. OLLARD. (Circuit Court, E. D. Pennsylvania. September 11, 1908.) No. 3. In Equity. Motion for preliminary injunction. Wm. A. MacEldowney, Francis C. Adler, and John F. Lewis, for complainant. Edgar J. Pershing, for defendant.

J. B. McPHERSON, District Judge. The defendant does not assert that he has the right to use the trade-mark of the complainant, except in the sale of metal polish that may have been manufactured, or may be hereafter manufactured, out of the materials that were sold by the complainant to the defendant in August, 1907; and to this extent it is my opinion that the affidavits filed upon the motion for a preliminary injunction sustain the defendant's position. It is therefore ordered that, upon the entry of a bond by complainant in the sum of \$300, conditioned according to law, a preliminary injunction do issue restraining the defendant, his agents and employes, from using the complainant's formula or trade-mark in the manufacture and sale of Dazzle Metal Polish, or from representing in any manner that the metal polish sold by him is Dazzle Metal Polish. This order is to apply to all metal polish manufactured by the defendant, except to such polish as he may have manufactured, or may hereafter manufacture, in good faith, out of the materials bought by him from the complainant in August, 1907, which polish may be marked with, and sold under, the labels that were then bought with the other materials. The question of the costs accruing upon this motion, and also the question of the defendant's liability to account to the complainant for any portion of the price received by him from the sales of Dazzle Metal Polish, are expressly left open for future determination.

END OF CASES IN VOL. 163.

